IN THE INDIANA COURT OF APPEALS
Appellate Case No. 43A03-1610-MI-02332

EPWORTH FOREST ADMINISTRATION COMMITTEE, INC. Appellant/Defendant below,	) Appeal from the Kosciusko Circuit Court
v.	) Trial Court Case No.: 43C01-1602-MI-47
GERRY LEE POWELL and PATRICIA ANN POWELL and Appellee/Plaintiffs below,	
And	) The Honorable Michael W. Reed, Judge
ROBERT MILLER and DEBORAH MILLER Appellee/Defendants below	

BRIEF OF APPELLEES ROBERT MILLER and DEBORAH MILLER

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I. STATEMENT OF THE ISSUES

Appellees Robert Miller and Deborah Miller ("Millers") agree with the Appellant Epworth Forest Administration Committee's ("EFAC") Statement of the Issues.

II. STATEMENT OF THE CASE

Millers agree with the EFAC's Statement of the Case.

III. STATEMENT OF THE FACTS

Millers agree with EFAC's Statement of the Facts.

IV. SUMMARY OF THE ARGUMENT

Millers agree, adopt, support and ratify the arguments set forth in EFAC's Brief. Millers agree that the trial court's Order of September 9, 2016 is clearly erroneous. Further, the Millers agree that EFAC's decision "was a reasonable interpretation of the trial court's previous Orders and as such was not arbitrary or capricious" and therefore was not unreasonable.

V. ARGUMENT

A. Standard of Review

In *Barnes v. Northern Indiana Annual Conference of United Methodist Church, et al.*, Kosciusko Circuit Court Case No. 43C01-9109-CP-732 ("*Barnes*"), the Court's Order of August 2, 1994 established the framework for the management of pier placement in the Epworth Forest Addition located on and adjacent to Lake Webster in Kosciusko County, Indiana. Judge Sand's subsequent Order of November 7, 1997 established the Standard of Review for decisions made by EFAC and stated that an "action or decision of the conference will further not be reversed unless such action or decision is arbitrary, unreasonable or capricious." (Exhibit 4, Page 2). More recently in *Barnes,* the January 21, 2014 Order again restated that an "action or decision of

the conference will further not be reversed unless such action or decision is arbitrary, unreasonable or capricious." (Exhibit 5, Paragraph 10)

Therefore, by Court Order, judicial review of an EFAC decision is very similar or identical to the judicial review of an administrative agency decision. In conducting judicial review of an agency decision, the court is not to "try the facts de novo or substitute its own judgment for that of the agency." *Equicor Development, Inc. v. Westfield-Washington Township Plan Commission* (2001), Ind., 758 N.E.2d 34, 37. In determining whether a decision is arbitrary and capricious, the test is "whether there is no reasonable basis for the action." *Equicor,* at 38, (emphasis supplied). "Only where a decision is willful and unreasonable, without consideration and in disregard of the facts and the circumstances in the case, are without some basis which would lead a reasonable and honest person to the same conclusion" does it become arbitrary and capricious. *Equicor,* at 37. The party challenging the agency decision has the burden of establishing that such decision was arbitrary, capricious and unreasonable. *Lukis v. Ray, et al.* (2008), Ind. App., 888 N.E.2d 325. Further, in conducting judicial review, the court is "to presume that the [agency's] decision was correct." *Van Vactor Farms, Inc. v. Marshall County Plan Commission* (2003), Ind. App., 793 N.E.2d 1136.

B. Prior Court Orders Designated an Entity to Manage the Placement of Piers and Decide Disputes Relating to the Placement of Piers

The *Barnes* Order dated August 2, 1994 charged the Conference with the duty to manage the placement of piers and decide disputes arising out of pier placement and further set forth guidance to the Conference in carrying out these duties. That guidance included the following: (a) "Off-shore owners and conference piers may not be placed in such proximity to on-shore owner piers as to create an unreasonable inconvenience to the on-shore owners in the use of their

own piers"; (b) "the off-shore's owner right to pier placement must be managed through the Conference"; (c) "the Conference, will, therefore, have managerial rights,... to assign pier spaces to accommodate the off-shore owners without at the same time unduly burdening the on-shore owners"; and (d) "to allow the placement of piers and the docking of boats by off-shore owners and by the conference in a manner which imposes the least possible burden upon anyone or group of on-shore owners...." (Exhibit 5)

Nearly twenty (20) years later in *Barnes*, the Kosciusko Circuit Court issued an Agreed Order which stated, in part, as follows in Paragraph 14: "The conference shall set up the EFAC with By-Laws, rules and regulations which state or establish the following principles and rules which can only be altered with court approval": One of those rules was that "The '94 Judgment as altered, amended or modified by subsequent court orders will continue to define the existing rights of the owners in Epworth Forest. Further, "An off-shore pier assignment/location, in accordance with the 1994 judgment, may be changed only for substantial change of circumstances making the prior assignment unreasonable under current facts and circumstances." (Exhibit 6) (emphasis supplied)

The EFAC By-Laws state that an "off-shore pier assignment/location, in accordance with the 1994 judgment, may only be changed, in the sole discretion of the Board of Directors, for a substantial change in circumstances making the prior assignment unreasonable under the facts and circumstances." (Exhibit 8) (emphasis supplied)

C. The Court's Findings Are Not Supported by the Evidence

Several of the Trial Court's Findings of Fact are not supported by the evidence. Specifically, Finding No. 3 that the Powells and their predecessors maintained a pier on the

waterfront of lot 48 since 1941 ignores the testimony of Kevin Smith that there were a couple of years in the mid-nineties where no pier was maintained. (Transcript 110) Further, the finding ignores photographic evidence contained in Exhibits I and J.

In addition, Finding No. 13 is not supported by the evidence in that the Court's Order dated January 21, 2014 makes no reference to "actual prior usage." In similar fashion, Finding No. 20 refers to "historic usage" of the shoreline and the January 21, 2014 Order is devoid of any information relating to specific historic usage of the space.

This lack of supporting evidence for these findings undermines the basis for the Trial Court's Judgment of September 9, 2016.

D. The Trial Court Substituted its Judgment for the Judgment of EFAC

EFAC's decision was sound and reasonable for a number of reasons. First, pursuant to its By-Laws, EFAC has the sole discretion to determine whether there was "a substantial change in circumstance that made the prior assignment unreasonable under the facts and circumstances." Here, the substantial change in circumstances were new on-shore owners who were attempting to fully utilize the 24 feet allotted to them in order to use both sides of their pier in similar fashion to the vast majority of all other on-shore lot owners. The *Barnes* Orders do not define substantial change in circumstances. It was not unreasonable for EFAC to determine that this was a substantial change in circumstances.

Secondly, EFAC had a concern about appropriate and safe spacing which motivated in part, its decision. The January 21, 2014 *Barnes* Order directed the Conference to "strive to: a) Allow/provide for a five (5) foot clearance on both sides [for a total of ten (10) feet] of the dividing line between pier sites so that a ten (10) foot buffer zone may exist between all facilities

and equipment utilized on the pier sites." (Exhibit 5, Paragraph 8.a)). In addition, EFAC Board member Richard Presser identified a memo that addressed spacing, safety, access and liability concerns. (Exhibit "F") which were some of the reasons underlying EFAC's decision. (Tr. 77-78)

In short, like the Department of Natural Resources pier decision in *Lukis v. Ray,* supra, there was "nothing in [EFAC's] decision that warrants second guessing from the judicial system." *Lukis v. Ray, et al.* at 332.

E. The Trial Court Created New Concepts and Stated New Intentions to Reverse EFAC's Decision

For the first time, the Trial Court introduces several new concepts to justify reversing the EFAC decision in this case. No where in the *Barnes* Court Orders is there mention of a "certain location zone for pier and other equipment usage," or "a zone of use for these assignments (an actual area assignment)" or a "zone assignment." Further, these newly created concepts are not defined. The Trial Court's use of these newly created and undefined concepts to find EFAC's decision arbitrary, capricious, unreasonable and contrary to law is clearly erroneous. The Court's reliance on Exhibit "E" to its previous Court Order in creating these concepts is misplaced and inappropriate. EFAC and its committee members, to carry out its pier management duties, utilized Exhibit "E" merely as a starting point as Exhibit "E" contained numerous mistakes and inaccuracies.

The Court further substitutes its judgment for the judgment of EFAC by stating new "intentions" with respect to pier assignment when those intentions were not set forth in its prior Court Orders. In short, the Trial Court has attempted to re-write its prior Court Orders to justify its reversal of the EFAC decision. That is not the prerogative of the Trial Court under the

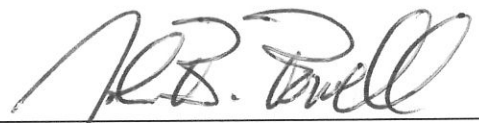
arbitrary, capricious and unreasonable standard it established for reversal of an EFAC decision.

VI. CONCLUSION

For the reasons set forth in EFAC's Brief as well as this Brief, the Trial Court's decision reversing EFAC in this case is clearly erroneous. In determining that there was not a substantial change in circumstances making the pier assignment unreasonable under current facts and circumstances, the Trial Court has substituted its own judgment. Further, the Trial Court's reliance on newly created concepts and "intentions" of the court was a clearly erroneous basis for overturning EFAC's decision. For all of these reasons, this Court should reverse the Trial Court's Order of September 9, 2016 and direct the Trial Court to reinstate the EFAC decision issued on January 6, 2017.

Respectfully submitted,

SHAMBAUGH, KAST, BECK & WILLIAMS, LLP

By 

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WORD COUNT CERTIFICATION

I verify that this Brief contains no more than 14,000 words and I verify that this Brief contains 1,984 words.

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CERTIFICATE OF SERVICE

I certify that on the 14TH day of April, 2017, I electronically filed the foregoing document using the Indiana E-Filing System. I also certify that on the 14TH day of April, 2017, the foregoing document was served upon the following person(s) via IEFS:

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