IN THE INDIANA COURT OF APPEALS
CAUSE NO. 43A03-1610-MI-2332

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

BRIEF OF APPELLEES GERRY LEE AND PATRICIA ANN POWELL

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STATEMENT OF THE ISSUE

Whether the trial court clearly erred in determining that Appellant's decision, requiring the Powell Appellees to remove their pier from its longstanding assigned location on Webster Lake, was arbitrary, capricious and not in conformity with the trial court's prior Judgment and Orders.

STATEMENT OF THE CASE

In accordance with App. R. 46(B)(1), Appellees, Gerry Lee and Patricia Ann Powell (the "Powells"), agree with the Statement of the Case of Appellant, Epworth Forest Administration Committee, Inc. ("EFAC").

STATEMENT OF THE FACTS

EFAC's Statement of the Facts fails to set forth the facts in a light most favorable to the judgment in accordance with the applicable standard of review and Ind. Appellate Rule 46(A)(6)(b). *See also Lowry v. Lowry*, 590 N.E.2d 612, 614 n. 1 (Ind. Ct. App. 1992). Accordingly, the Powells are providing a separate statement of facts for this Court's consideration. To place the facts relevant to EFAC's decision in context, the Powells will initially provide the Court limited background information concerning the Epworth Forest subdivision and related litigation that ultimately led to the formation of EFAC for purposes that included administration of Epworth Forest pier assignments.

Epworth Forest Subdivision

The Epworth Forest subdivision in Kosciusko County, Indiana adjoins Webster Lake and is comprised of over 400 platted offshore and onshore lots. (Pl. Ex. 2, pp. 3-4). As originally platted in 1923 by the North Indiana Annual Conference of the United Methodist Church ("Conference"), the Epworth Forest plat depicted a strip of land located along the shoreline between the platted lots and the water's edge of Webster Lake with language describing the same as an easement ("Easement"). (Pl. Ex. 2, p. 3). Following the original platting, both onshore and offshore owners in Epworth Forest used the strip of land subject to the foregoing Easement for a

walkway and to install piers, dock boats and otherwise access Webster Lake and exercise littoral rights. (Pl. Ex. 1, p. 5).

The Easement Litigation

Beginning in the 1950s, controversies among the Epworth Forest residents began and thereafter intensified largely due to the increasing number and size of boats being docked at the shoreline. (Pl. Ex. 1, p. 5). The continuing pier disputes and ownership claims over the littoral ultimately led to the filing of a complaint with the Kosciusko Circuit Court in 1991 by a group of onshore owners under Cause Number 43C01-9109-CP-732 ("Easement Litigation"). (Pl. Ex. 1). In the resulting August 2, 1994 judgment ("1994 Judgment"), the trial court construed the plat, determined the relative rights and obligations of the onshore owners, offshore owners and Conference with respect to the Easement, and imposed on the Conference an obligation to administer pier assignments for the Epworth Forest residents. (Pl. Ex. 1, pp. 13-14).

In the years since the 1994 Judgment, the trial court has issued additional Orders in the Easement Litigation bearing on the respective rights and obligations of the onshore owners, offshore owners and Conference. (*See* App. 29; Finding 7). On January 21, 2014, the trial court entered an Order as part of the Easement Litigation that provided in pertinent part:

> 9. The Conference has enacted reasonable regulations and procedures to carry out the responsibilities assigned to the Conference in the Judgment. The Court has further reviewed and approves the regulations known as The Epworth Forest Pier Administration Policy revised April 15, 2011, the Epworth Forest Pier Administration Policy Pier Violation Enforcement Policy approved February, 2010, and the map or list showing pier placements for 2014 developed pursuant to these policies, copies of which are attached hereto and made a part hereof as Exhibits "C", "D" and "E" as well as the current fee schedule testified to in open court, except as expressly modified herein.
>
> 10. As a means of enforcing the Court's prior orders in this case, any party alleging that the Conference has acted or failed to act in violation of the Judgment and/or as provided herein, shall file a separate law suit in this Court alleging same. Except as provided herein in paragraph 7(b), a separate law suit alleging

> that the Conference has acted or failed to act in violation of the Judgment and/or as provided herein, may be heard only if the party alleging the violation has complied with the issue submission procedures included in the Pier Administration Policy previously approved by the Court. The action or decision of the Conference will further not be reversed unless such action or decision is arbitrary, unreasonable or capricious.

(Pl. Ex. 5, pp. 7-8).

The Epworth Forest Pier Administration Policy, approved by the trial court in its January 21, 2014 Order, stated in pertinent part: "Non-lakefront property owners' shoreline pier locations are assigned by the Committee on a first-come, first-served basis. Once the shoreline locations are assigned and approved in writing by the Committee, the locations are intended to be permanent." (*See* Ex. 5 at its Ex. C, p. 2).

Transfer of Pier Administration Functions from the Conference to EFAC

On April 15, 2014, the trial court entered an Agreed Order in the Easement Litigation directing the Conference to establish EFAC as an independent not-for-profit corporation to serve as the successor to the Conference's Easement management obligations, including pier administration functions, pursuant to the 1994 Judgment. (Pl. Ex. 6; App. 29; Finding 8). The trial court directed the Conference to organize EFAC with bylaws, rules and regulations that state or establish various "principles and rules which can only be altered with Court approval," including in part the following:

***

> b. 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;

***

> j. Onshore owners' pier assignments will continue from year to year and be presumed permanent. An offshore pier assignment/location, in accordance with the 1994 [J]udgment, may be changed only for substantial change of circumstances making the prior assignment unreasonable under the current facts

> and circumstances. An onshore pier assignment may be changed, in accordance with the 1994 Judgment, only upon the request in writing of the onshore owner, however, the request may be denied and then reasonableness decided based upon the current facts and circumstances;
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> ***

(Pl. Ex. 6, pp. 4-5; App. 29; Finding 10).

In accordance with the trial court's April 15, 2014 Agreed Order, EFAC was formed on June 20, 2014 and thereafter adopted its Bylaws. (App. 29; Finding 8; Pl. Exs. 7-8). Under its Articles of Incorporation, EFAC was authorized in part to "prescribe reasonable rules limiting use of the Easement, provided such rules do not unreasonably interfere with the lawful, intended and continued use of a pier and are in compliance with the terms of the 1994 Judgment, 2014 Order or Bylaws" and to do all things necessary or convenient as permitted by Indiana statutes governing non-for-profit corporations and "not inconsistent with the terms of the 1994 Judgment, 2014 Order or the law." (Pl. Ex. 7, p. 3). The Articles of Incorporation further defined "1994 Judgment" to include "any subsequent orders of the Kosciusko Circuit Court interpreting, applying, or construing the 1994 Judgment." (Pl. Ex. 7, p. 7).

EFAC's Bylaws similarly defined "1994 Judgment" to include "all subsequent decisions under [the Easement Litigation] cause number" and separately acknowledged that "[t]he 1994 Judgment as altered, amended or modified by subsequent Court Orders shall continue to define the existing rights of the owners in Epworth Forest." (Pl. Ex. 8, p. 1). In the event of any conflict between the terms of EFAC's Bylaws and either the 1994 Judgment or 2014 Order, the 1994 Judgment and 2014 Order would control. (Pl. Ex. 8, p. 10). EFAC now administers the lakefront in Epworth Forest in place of the Conference, including with respect to pier assignment locations for onshore and offshore owners. (App. 29; Finding 9).

EFAC's Order Directing the Powells to Remove the Pier Serving the Powell Lot

The Powells own an offshore lot legally described as Lot 12 in Block C in the plat of Epworth Forest ("Powell Lot"). (App. 28; Finding 1). Mrs. Powell's family had historically owned the Powell Lot and originally built a home on it in the 1940s. (Tr. 7). The Powell Lot has been utilized by the Powells together since marriage for a period of over forty-five years. (Tr. 7-8).

In May 2015, Appellees, Robert and Deborah Miller (the "Millers"), purchased an onshore lot legally described as Lot 48 in Block C in the plat of Epworth Forest ("Miller Lakefront Lot"). (App. 29; Finding 3; Tr. 8). The Millers purchased the Miller Lakefront Lot from Suetta Johnson ("Johnson"), an original onshore plaintiff in the Easement Litigation that led to the 1994 Judgment. (Tr. 8; App. 30; Finding 11). Since at least 1969, a pier has been maintained for the Powell family use at the same location along the shoreline of the Miller Lakefront Lot. (Tr. 9-10). The Powells' pier structure is located east of the pier structure historically placed by the Millers and their predecessor-in-title, Johnson. (App. 31; Finding 17; Pl. Exs. 11-12).

The Miller Lakefront Lot contains a total of 50 feet of lake frontage on Webster Lake. (App. 30; Finding 11). Through its January 21, 2014 Order in the Easement Litigation, the trial court expressly approved the pier assignments as set forth on its Exhibit E attached thereto. (App. 30; Finding 11; Pl. Ex. 5, p. 7). The Pier Administration Policy defined "Pier Assignment" as "[a]n allotted space along the Lake Webster shoreline that is assigned to an owner." (Ex. 5 at its Ex. C, p. 1). With respect to the Miller Lakefront Lot footage, Exhibit E to the trial court's January 21, 2014 Order reflected "16 feet assigned to [the Powells] for Pier 35A, 24 feet

assigned to [the Millers' predecessor-in-title] Suetta Johnson for Pier 34 and 10 feet of open shoreline, a total of 50 feet." (App. 30; Finding 11).

Following their purchase of the Miller Lakefront Lot in 2015, the Millers desired "to place a boat lift on each side of their pier without relocating their pier within the 24-foot space assigned to them by [the trial court's January 21, 2014 Order]." (App. 30; Finding 12). "Doing so without relocation of the Miller pier would leave insufficient space for the Powell boat and pier as assigned by [the trial court's January 21, 2014 Order]." (App. 30; Finding 12). Moreover, "there is ample space lakeward from the Miller lot to allow Miller to place a 4 foot wide pier with a 10 foot wide boat lift on each side of the pier and still maintain in excess of 4 feet of open space if the Miller pier were moved slightly west within the 24 feet of lake frontage assigned to Miller." (App. 31; Finding 17).

On November 18, 2015, the Millers submitted an inquiry form to EFAC seeking its approval to place the additional boatlift on the east side of their existing pier towards the Powells' pier assignment. (Def. EFAC Ex. A). On January 6, 2016, EFAC, through its board of directors, voted 3-2 "to give Millers the 8 feet to the east, with the understanding that this would displace an offshore pier assignment." (Def. EFAC Ex. C).

The Powells appealed EFAC's initial decision eliminating their offshore pier assignment and such appeal was heard by EFAC on January 26, 2016 and thereafter denied. (App. 29; Finding 6; Pl. Exs. 1; 17). EFAC's record denying the Powells' appeal noted: "The vote on requiring the Powells to remove their pier because Pier 34 is allotted 24 ft. and the Millers are entitled to the same w/o moving their assignment." (Pl. Ex. 1). EFAC's dissenting board members acknowledged as follows with respect to the Powells' historical pier assignment: "The location of the 16 ft offshore assignment was defined as in compliance and has documented

evidence of being assigned many years ago. Therefore is intended to be permanent." (Pl. Ex. 1). On February 18, 2016, the Powells filed their Complaint for Judicial Review, seeking review of EFAC's decision requiring the removal of the Powells' pier. Following evidentiary hearings on May 4 and August 10, 2016, the trial court entered its Findings of Fact, Conclusions of Law and Judgment on September 9, 2016 reversing EFAC's decision as arbitrary, capricious and not in conformity with "the prior Judgment and Orders of this Court, the Articles of Incorporation of EFAC and the Bylaws of EFAC." (App. 28-32).

SUMMARY OF THE ARGUMENT

The trial court did not clearly err in determining that EFAC's decision, requiring the Powells to remove their pier from its longstanding assigned location on Webster Lake, was arbitrary, capricious and not in conformity with the trial court's own prior Judgment and Orders. EFAC had ordered the Powells to remove their pier based upon an erroneous interpretation of the trial court's Judgment and Orders issued in related litigation that ultimately led to the 2014 formation of EFAC for pier administration purposes.

In accordance with the trial court's prior Orders, the Powells' offshore pier assignment could be changed by EFAC only for a substantial change in circumstances making the prior assignment unreasonable under the current facts and circumstances. Based upon the evidence presented during separate evidentiary hearings, and the interpretation of its own prior Orders, the trial court properly determined that a proposed change of actual use of the area within a pier assignment by an assignee cannot be a substantial change of circumstances that would make the prior assignment unreasonable.

For these reasons, and as more fully addressed below, the Court should affirm the trial court's September 9, 2016 Findings of Fact, Conclusions of Law and Judgment.

ARGUMENT

I. THE TRIAL COURT DID NOT CLEARLY ERR IN DETERMINING THAT EFAC'S DECISION, REQUIRING THE POWELLS TO REMOVE THEIR PIER FROM ITS LONGSTANDING ASSIGNED LOCATION, WAS ARBITRARY, CAPRICIOUS AND NOT IN CONFORMITY WITH THE TRIAL COURT'S OWN PRIOR JUDGMENT AND ORDERS.

A. Standard of Review.

Following evidentiary hearings that took place on May 4 and August 10, 2016, the trial court ultimately entered its Findings of Fact, Conclusions of Law and Judgment on September 9, 2016. In its brief, EFAC acknowledges in part as follows with respect to the applicable standard of review:

> If a court makes special findings of fact, the appellate court reviews the findings evidence using a two-step process. "First, it must determine whether those findings of fact support the trial court's conclusions of law." *Estate of Reasor v. Putnam County*, 635 N.E.2d 153, 158 (Ind. 1994). The findings of the trial court will only be set aside if they are clearly erroneous. *Id*. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Id*. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts." *State v. Van Cleave*, 674 N.E.2d 1293, 1296 (Ind. 1996).

EFAC Br., p. 23. *See also Commonwealth Land Title Ins. Co. v. Robertson*, 5 N.E.3d 394, 404 (Ind. Ct. App. 2014) (In the context of an administrative judicial review proceeding, "[i]f the trial court holds an evidentiary hearing, this Court defers to the trial court to the extent its factual findings derive from the hearing.").

This case further involves the trial court's interpretation of its own prior Judgment and Orders. Judgments are to be construed in the same manner as contracts. *Tri-Professional Realty, Inc. v. Hillenburg*, 669 N.E.2d 1064, 1068 (Ind. Ct. App. 1996); *Flynn v. Barker*, 450 N.E.2d 1008, 1009 (Ind. Ct. App. 1983). If a judgment is considered ambiguous, the Court determines its meaning by examining the entire judgment. *Gilbert v. Gilbert*, 777 N.E.2d 785, 791 (Ind. Ct.

App. 2002). "Particular words cannot be isolated from the judgment but must be considered as part of the whole," with the judgment read "so as to render all provisions effective and not merely surplusage." *Id.* "Judgments should be liberally construed as to make them serviceable and not useless." *Id.*

Finally, the trial court established a framework for judicial review of the Conference's pier administration decisions in Epworth Forest which applies with equal force to EFAC as the trial court-approved successor to the Conference. In this regard, the trial court's January 21, 2014 Order in the Easement Litigation stated in pertinent part:

> 10. As a means of enforcing the Court's prior orders in this case, any party alleging that the Conference has acted or failed to act in violation of the Judgment and/or as provided herein, shall file a separate law suit in this Court alleging same. Except as provided herein in paragraph 7(b), a separate law suit alleging that the Conference has acted or failed to act in violation of the Judgment and/or as provided herein, may be heard only if the party alleging the violation has complied with the issue submission procedures included in the Pier Administration Policy previously approved by the Court. The action or decision of the Conference will further not be reversed unless such action or decision is arbitrary, unreasonable or capricious.

(Pl. Ex. 5, pp. 7-8).

EFAC's authority has at all times been subject to the 1994 Judgment and the subsequent Orders issued by the trial court in the Easement Litigation and those limitations were expressly included as part of the trial court's April 15, 2014 Agreed Order directing the formation of EFAC and thereafter in EFAC's Articles of Incorporation and Bylaws. (Pl. Exs. 6-8). In their Complaint for Judicial Review, the Powells specifically alleged that EFAC's actions at issue were contrary to the prior Orders of the trial court, in violation of EFAC's Bylaws and arbitrary and capricious. (App. 9).

"A decision is arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by

the administrative agency." *Commonwealth Land Title*, 5 N.E.3d at 403. Moreover, analogizing EFAC to an administrative agency as suggested by EFAC and the Millers in their respective briefs with respect to the standard of review, if an agency in rendering a decision misconstrues a statute, regulation or other applicable law, "there is no reasonable basis for the agency's ultimate action and the trial court is required to reverse the agency's action as being arbitrary and capricious." *See id*. at 405 [citation omitted]. This Court is also "free to determine any legal question that arises out of the administrative agency's decision and [is] not bound by its interpretation of the law." *Kiel Bros. Oil Co., Inc. v. Ind. Dept. of Envtl. Mgmt.*, 819 N.E.2d 892, 900 (Ind. Ct. App. 2005). "[T]he law is the province of the judiciary." *Id*.

B. The trial court properly construed its own prior Orders with respect to pier assignments applicable to the Miller Lakefront Lot and the appropriate grounds for changing historical pier assignments.

EFAC argues that the trial court's January 9, 2016 judgment "was clearly erroneous in that it found the actions of EFAC were arbitrary and capricious without making any interpretation of whether or not EFAC's interpretation of the previous Orders were [sic] reasonable." EFAC Br., p. 23. Upon consideration of the evidence presented during separate evidentiary hearings and in interpreting its own 2014 Orders, the trial court properly rejected EFAC's determination that "there was a substantial change in circumstances which justified having the Powells move their pier." *See* EFAC Br., p. 23. Indeed, EFAC based that very determination on an erroneous interpretation of the trial court's 2014 Orders as bearing on "pier assignments" and unsupported "assumptions" that the Millers located their actual "pier structure" at the centerline of the Millers' 24-foot wide "pier assignment."[1]

[1] For example, in response to a question as to whether EFAC had a way to know whether a pier had been installed east, west or in the center of an allocated space or if they had made an assumption, EFAC board member Richard Presser testified as follows: "I guess in that case we

The trial court's January 21, 2014 Order in the Easement Litigation expressly approved the Epworth Forest Pier Administration Policy and pier assignments as attached as Exhibits C and E thereto, respectively. (Pl. Ex. 5). Under the heading of "PIER ASSIGNMENT ELIGIBILITY," the Pier Administration Policy states: "Lot owners located in Epworth Forest with a residence located on them, or that own a lot that is buildable as a residence by Kosciusko County building standards, are eligible for a **pier assignment**." (Pl. Ex. 5 and its Ex. C at p. 2) (emphasis added).

"Pier Assignment" is separately defined in the Pier Administration Policy as "[a]n **allotted space** along the Lake Webster shoreline that is **assigned to an owner**." (*Id*. at p. 1) (emphasis added). The "pier assignment" width as addressed in the Pier Administration Policy further contemplates the Epworth Forest onshore and offshore owners utilizing their assigned space for any number of items, including "pier sections, watercraft, or any other personal property that takes up space in the water or along the shoreline." (*Id*. at p. 2). With respect to offshore "pier assignments" such as the Powells, the Pier Administration Policy states in pertinent part that, "[o]nce the shoreline locations are assigned and approved in writing by the Committee, the locations are intended to be permanent." (*Id*.).

In its September 9, 2016 judgment, the trial court made in part the following findings as bearing on the "pier assignments" applicable to the Miller Lakefront Lot:

> 11. Exhibit E to Exhibit 5 is a listing of assigned pier spaces approved by the Court as part of its Order dated January 21, 2014, and specifically assigned Pier Space 35A to [the Powells] and Pier Space 34 to the predecessor of Defendants Robert J. Miller and Debra S. Miller, Suetta Johnson. The same exhibit indicates

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made an assumption." (Tr. 85). Mr. Presser separately testified in pertinent part that, "we assumed that the pier is in the center." Separately, EFAC board member Suzann Montovani testified as follows when asked whether she had seen anything in the trial court's prior rulings or otherwise indicating that a pier establishes the centerline: "No, it was just assumed I think." (Tr. 163).

> that the lake frontage of the Miller property is 50 feet and at the time of the January 21, 2014 Order, consisted of 16 feet assigned to [the Powells] for Pier 35A, 24 feet assigned to Suetta Johnson for Pier 34 and 10 feet of open shoreline, a total of 50 feet.
>
> 12. Defendants Miller desire to place a boat lift on each side of their pier without relocating their pier within the 24-foot space assigned to them by Exhibit 5. Doing so without relocation of the Miller pier, would leave insufficient space for the Powell boat and pier as assigned by Exhibit 5.
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> 17. Exhibits 11 and 12 clearly indicate there is ample space lakeward from the Miller lot to allow Miller to place a 4-foot-wide pier with a 10-foot-wide boat lift on each side of the pier and still maintain in excess of 4 feet of open space if the Miller pier were moved slightly west within the 24 feet of lake frontage assigned to Miller.
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> 21. Persons to whom a portion of the shoreline has been assigned are free to locate any structures within the assigned shoreline and may relocate those structures as long as they are located within the assigned area.
>
> 22. Assigned shoreline areas are based on historical usage as determined by this Court in prior Orders in Cause No. 43C01-9109-CP-732 and are not controlled by the location of platted lot lines extended to the water's edge.

(App. 30-31).

On appeal, EFAC and the Millers failed to challenge these findings made by the trial court following the separate evidentiary hearings. "Where the appellant does not attack the validity of the trial court's findings, we accept them as true." *Ind. Dept. of Envtl. Mgmt. v. AMAX, Inc.*, 529 N.E.2d 1209, 1211 (Ind. Ct. App. 1988).

The trial court's subsequent April 15, 2014 Agreed Order required EFAC's "By-Laws, rules and regulations" to state or establish certain "principles and rules which can only be altered with Court approval." (Pl. Ex. 6). Those "principles and rules" that can only be altered with the trial court's approval included the following at Section 14(j):

> Onshore owners' **pier assignments** will continue from year to year and be presumed permanent. An offshore **pier assignment/location**, in accordance with the 1994 [J]udgment, may be changed only for substantial change of circumstances making the prior assignment unreasonable under current facts and circumstances.

(Pl. Ex. 6, p. 5) (emphasis added).[2]

In this case, rather than simply confirm the location of the Millers' 24-foot wide "pier assignment" as specified in Exhibit E to the January 21, 2014 Order and the actual "pier structure" within such allotted area, EFAC erroneously assumed the Millers' pier structure had been installed at the centerline of the 24-foot wide pier assignment. Compounding the problem, EFAC further erroneously construed the 2014 Orders to effectively treat the Millers' pier structure, rather than the 24-foot wide "pier assignment," as permanent. EFAC also erroneously failed to recognize its own authority to require the Millers to relocate their pier structure, along with any additional desired boatlift, wholly within the Millers' 24-foot wide "pier assignment." (*See, e.g.*, Tr. 157). In allowing the Millers to "shift" their 24-foot wide "pier assignment" to the east at the expense of the Powells' longstanding pier assignment, EFAC disregarded the trial court's 2014 Orders, including the definition of "pier assignment" contained in the approved Pier

[2] The corresponding provision in EFAC's Bylaws inserted the phrase "in the sole discretion of the Board of Directors" with respect to changes to offshore pier assignments/locations. (Pl. Ex. 8, p. 5). On appeal, the Millers in part rely on the "sole discretion" language to suggest that it was not unreasonable for EFAC to determine there was a substantial change in circumstances that made the prior assignment unreasonable under the facts and circumstances." Miller Br., p. 7. The Millers contend such a substantial change in circumstances consists of their efforts as new onshore owners to "fully utilize the 24 feet allotted to them" to use both sides of their pier. *Id*. The Powells initially contend that the Millers were attempting to utilize additional space beyond the 24-foot wide pier assignment previously approved by the trial court in the January 21, 2014 Order and not part of the 24 feet "allotted to them." Moreover, to the extent the inserted "sole discretion" language in the Bylaws purports to expand the scope of EFAC's authority from that provided in the 2014 Orders, it is invalid given the lack of prior trial court approval as required under the April 15, 2014 Order. (Pl. Ex. 6, p. 4). Moreover, in the event of any conflict between provisions in EFAC's Bylaws and the 2014 Orders, the Bylaws expressly provide that the 2014 Orders control. (Pl. Ex. 8, p. 10). Finally, any ambiguity in EFAC's Bylaws "shall be interpreted consistently with the written meaning and intent" of the 2014 Orders. (*See* Pl. Ex. 8, p. 10).

Administration Policy, and the straightforward measurements and fixed locations of the onshore/offshore "pier assignments" specific to the Miller Lakefront Lot (which account for the entire 50-foot frontage of such lot, including the "open areas").

In considering the issues and record before it, the trial court properly concluded in part that the 1994 Judgment and various Orders issued in the Easement Litigation, including the 2014 Orders, "clearly indicate that it was the intention of this Court that assignments of pier assignments for onshore owners were intended to be permanent." (App. 31; Conclusion 23). Consequently, the Powells' "offshore pier assignment/location, in accordance with the 1994 [J]udgment, may be changed only for substantial change of circumstances making the prior assignment unreasonable under the current facts and circumstances." (Pl. Ex. 6, pp. 4-5; App. 29; Finding 10).

In this case, the evidence presented to the trial court during the separate evidentiary hearings confirmed that no "substantial change in circumstances" occurred as bearing on the Miller Lakefront Lot that would make the prior offshore pier assignment to the Powells unreasonable under the current facts and circumstances. Since the time of their marriage over forty-five years ago, the Powells have maintained their pier in the same location on Webster Lake, including as of the trial court's January 21, 2014 Order approving the Powells' 16-foot wide pier assignment reflected on Exhibit E attached thereto. (Pl. Ex. 5 and its Ex. E, p. 2). At the time of EFAC's decision in this case, the Powells' pier was further in compliance with any EFAC requirements. (*See* Pl. Ex. 1).

Indeed, the only purported change in circumstances suggested by EFAC and the Millers is the **unilateral** desire on the part of the Millers, as new onshore owners, "to place a boat lift on each side of their pier without relocating their pier within the 24-foot space assigned to them by

Exhibit 5 [January 21, 2014 Order]." (App. 30; Finding 12). However, "[d]oing so without relocation of the Miller pier would leave insufficient space for the Powell boat and pier as assigned by Exhibit 5 [January 21, 2014 Order]." (*Id*.).

Based on the evidentiary record before it, the trial court properly confirmed that "the proposed change of actual use of an area by an assignee cannot be a substantial change of circumstances making the prior assignment unreasonable under current facts and circumstances." (App. 30; Finding 16). As such, the trial court did not clearly err in rejecting the notion that the unilateral desire of the Millers to place two boatlifts, one on each side of their pier, without relocating the pier wholly within the area of their 24-foot wide pier assignment, could serve as a substantial change in circumstances. (*See* App. 31; Conclusion 24).

C. The trial court did not create any new rule or concept for EFAC to follow by referencing "location zone," "zone" or similar language within its September 9, 2016 judgment.

On appeal, EFAC and the Millers separately seek to characterize the trial court's references in the September 9, 2016 judgment to a "location zone," "zone" or similar language as purporting to create "new rules" to be followed by EFAC. *See* EFAC Br., p. 24; Miller Br., p. 8. Indeed, in Finding 20 the trial court clearly equates the term "zone" with the "Pier Assignments" as defined in the Pier Administration Policy and previously approved by the trial court in its January 21, 2014 Order in the Easement Litigation. (App. 31) ("The Court's Order of January 21, 2014 in [the Easement Litigation] established the area (zone) along the shoreline assigned to particular onshore and offshore owners.").

As previously addressed, under the Pier Administration Policy, "Pier Assignment" is defined as an "allotted space along the Lake Webster shoreline that is assigned to an owner." (Pl. Ex. 5 and its Ex. C, p. 1). A separate provision in the Pier Administration Policy contemplates

that an "assigned owner" may use the maximum width of their pier assignment "for pier sections, watercraft, or any other personal property that takes up space in the water or along the shoreline." (*Id*. at p. 2).

Equating the term "zone" with "pier assignment" is likewise consistent with other findings referencing a "zone" made by the trial court. For example, Finding 15 states in pertinent part that "[i]t was further the Court's intention, and order, that **each assignee** of a pier assignment be free to fully and freely utilize **their zone assignment**, but not so that this usage would affect others. . . ." (App. 30) (emphasis added). Finding 19 states in pertinent part that, "[i]f the Powell pier is left within the 16 feet assigned to Powell, Defendants **Miller will retain the same 24 foot zone assigned to their predecessor, Suetta Johnson**, and Millers are free to locate whatever structures they desired within the **same 24 foot zone**, so long as this does not affect the usage of the adjacent pier assignments." (App. 31) (emphasis added). There can be no reasonable question that the "24 foot zone" described in this finding refers to the 24-foot wide "pier assignment" made to the Millers' predecessor-in-title, Johnson, as further set forth in Exhibit E to the January 21, 2014 Order approving the same. (Pl. Ex. 5 at its Ex. E, p. 2). The trial court committed no reversible error in referencing and effectively equating at times variations of the term "zone" with a "pier assignment" within its judgment.

D. The trial court is entitled to deference in interpreting its own prior Orders.

Analogizing itself to an administrative agency, EFAC finally argues that its interpretation of the trial court's Orders in the Easement Litigation "should be given great weight." EFAC Br., p. 27. In support of its position, EFAC solely cites to *Hoosier Outdoor Advertising Corp. v. RBL Mgmt., Inc*., 844 N.E.2d 157 (Ind. Ct. App. 2006). EFAC's arguments in this regard are misplaced.

Unlike in *Hoosier Outdoor* involving a zoning board's interpretation of a zoning ordinance, this case involves a private corporation's interpretation of Orders before the very trial court issuing such Orders. The trial court is in "the best position to resolve questions of interpretation" of its **own** Orders. *See Capellari v. Capellari*, 47 N.E.3d 1255, 1258 (Ind. Ct. App. 2015) (citing *Schwartz v. Heeter*, 994 N.E.2d 1102, 1108 (Ind. 2013)). Moreover, the concept of providing an administrative agency's interpretation of a statute or ordinance (in the face of differing reasonable interpretations between parties) derives from the position that such agency possesses an "expertise in the given area." *See, e.g., Bush v. Robinson Engineering & Oil Co., Inc.*, 54 N.E.3d 1073, 1079 (Ind. Ct. App. 2016). Here, EFAC possesses no demonstrated expertise that would place it in a better position than the trial court to interpret the trial court's own Orders.

Furthermore, even in an administrative agency context, the court in *Hoosier Outdoor* acknowledged that such agency's interpretation is entitled to **no** weight if the interpretation is inconsistent with the ordinance itself. 844 N.E.2d at 163. Also, if an agency misconstrues the applicable statute, ordinance or other law, "there is no reasonable basis for the agency's ultimate action and the trial court is required to reverse the agency's action as being arbitrary and capricious." *See Commonwealth Land Title*, 5 N.E.3d at 403. As previously addressed in Section B of this brief, EFAC misconstrued the 2014 Orders in multiple respects at the expense of the Powells.

Finally, unlike the court in *Hoosier Outdoor* considering only the paper record as generated before the zoning board, the trial court in this case entered its September 9, 2016 judgment following separate evidentiary hearings. The Court should thus defer to the trial court to the extent its factual findings derive from the evidentiary hearings, including as to those

findings bearing on the trial court's interpretation of its 2014 Orders. *See Commonwealth Land Title,* 5 N.E.3d at 404.

CONCLUSION

For all the foregoing reasons, Appellees, Gerry Lee and Patricia Ann Powell, by counsel, respectfully request that this Court fully affirm the trial court's September 9, 2016 Findings of Fact, Conclusions of Law and Judgment, together with all other appropriate relief.

Respectfully submitted,

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WORD COUNT CERTIFICATE

In accordance with Ind. Appellate Rule 44(E), and excluding those applicable items described in App. R. 44(C), I verify that this brief contains no more than 15,000 words.

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CERTIFICATE OF SERVICE

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