STATE OF INDIANA)
) SS:
COUNTY OF PULASKI)

IN THE PULASKI SUPERIOR COURT

ANNUAL TERM

CAUSE NO. 66D01-2009-PL-000010

CONNIE EHRLICH, DANIEL KNEBEL, JENNIFER KNEBEL, JOHN MASTERSON, TONI MASTERSON, LARRY E. LAMBERT, GAIL T. LAMBERT, KEITHER W. DAVIS, GALE J. DAVIS, and DEAN A. CERVENKA,

Petitioners,

VS.

MAMMOTH SOLAR a/k/a STARKE SOLAR LLC, GLOBAL ENERGY GENERATION, LLC, And the PULASKI COUNTY BOARD OF ZONING APPEALS,

Respondents.

ORDER

STATEMENT OF THE CASE

Mammoth Solar seeks to build and operate one of the largest commercial solar plants in the United States, and one of the largest in the world, projected to generate up to 1,000 megawatts, (1 gigawatt). The project will require land, and lots of it, to-wit: 12,000+ acres. Mammoth Solar has selected Indiana for this industrial plant, specifically, farmland in Pulaski and Starke Counties, located in the northern part of the state. The overall project has been divided into three (3) phases. The case at

hand involves phase I, and 4,500+ acres located in Pulaski County. Use of this land in Pulaski County for a commercial solar plant is not legally permitted without first obtaining a zoning exception. Therefore, Mammoth Solar needed to obtain a Special Exception from the Pulaski County Board of Zoning Appeals, (BZA).

To get a Special Exception in Pulaski County, all Commercial Solar Energy Systems (CSES), have to submit an application to the BZA, complying with all of the legal requirements for such applications. Those requirements and the legal procedures to be followed are set out in a law that was adopted by the Pulaski County Board of Commissioners on December 19, 2019, called the Unified Development Ordinance (UDO). This law became effective on January 1, 2020, and applies to Commercial Solar Energy Systems with a minimum of five (5) acres.

The Unified Development Ordinance declares that **the purpose of the application requirements** is to, "... **assure** that any development and production of ... solar-generated electricity in Pulaski County **is safe and effective**." (emphasis added). To that end, the UDO requires any application to satisfy a comprehensive summary of the project, including, but not limited to, the project description, engineering certification, a detailed site layout plan, a fire-protection plan, etc., as will be more fully set out below. **All** applicants **are required** to provide details of the project in order to permit a thorough examination and review of the details by

the BZA, and the public, to assure that the proposed use of the land will be safe and effective.

About six (6) months after the UDO became the law in Pulaski County, Mammoth Solar filed an application. Mammoth's application, filed on June 24, 2020, was a request that the BZA grant a Special Exception for four thousand, five hundred, and eleven (4,511) acres of farmland in Pulaski County to develop a CSES.

Mammoth's application, like all applications for a Special Exception to develop a CSES, must comply with the minimum requirements of the UDO before the application is deemed to be "complete." A completed application is a **prerequisite** to the BZA taking any action on the application, such as holding public meetings, receiving evidence, determining facts, voting, etc. Obviously, everyone would want full disclosure of all of the solar project details required by the UDO to promote an open and informed debate as to the impact of a solar project over 4,511 acres, and whether the project would be safe for the community.

The application filed by Mammoth Solar on June 24, 2020, failed to comply with the minimum legal requirements of the UDO. This fact is undisputed. Mammoth Solar has admitted that the application fails to satisfy the legal requirements of the law adopted by the Pulaski County Commissioners. Mammoth explained that they will employ a different procedure than the UDO requires, and it will be on their timetable, perhaps during the "design phase." Mammoth will

determine when the additional information will be provided to the people of Pulaski County, and only then **after the application is approved**.

Mammoth's explanation regarding the manner in which they will proceed, and their failure to comply with the clear and unambiguous requirements of the UDO, was nevertheless, apparently sufficient for the BZA, which proceeded to hold two public hearings and then unanimously approved the legally deficient application. Indiana law prohibits such action by a government agency. The BZA was required to act in accordance with law and was not at liberty to ignore clearly defined legal procedures. In fact, the Indiana Court of Appeals has specifically held that when an Indiana Judge is reviewing a zoning decision on an issue of law, *"...no deference is afforded the BZA, and* ***reversal*** *is appropriate if an error of law is demonstrated."* Lucas Outdoor Advertising, LLC vs. City of Crawfordsville, 840 N.E.2d 449, 453 (Ind. Ct. App. 2006). In the case at hand, not only has an error of law been demonstrated, but also Mammoth Solar has admitted it.

Everyone seems to agree that the law (UDO) was not followed. However, while some property owners object, others say never mind let us get on with it. Moreover, while the BZA was willing to overlook the legal errors, hold public hearings and approve an incomplete application, now we find the entire matter being reviewed by the judicial branch in Indiana.

Clearly, when a government agency decision is being reviewed by the judiciary, great deference is granted to that agency's weighing of evidence, findings of fact, and exercising discretion. However, the same degree of deference is not granted to an agency's legal conclusions. Law is the province of the judiciary. Indiana has long recognized that the reviewing court may set aside agency action not in accordance with law. Public Service Commission v. City of Indianapolis (1956), 235 Ind. 70, 131 N.E.2d 308, Public Emp. Retirement Fund v. Miller, (1988), Ind., 519 N.E.2d 732, Bryant v. Indiana Dep't. of Health, 695 N.E.2d 975, (1998), Cowper v. Collier, 720 N.E.2d 1250, (1999).

Recently, the Indiana Court of Appeals specifically declared that, "Construction of a zoning ordinance is a question of law." Essroc Cement Corp. v. Clark Cty. Bd. Of Zoning App., 122 N.E.3d 881, 891 (Ind. Ct. App. 2019). In the case at hand, the Pulaski Superior Court has before it a **question of law**. And if an agency misconstrues (or ignores) a law, then there is no reasonable basis for the agency's ultimate action, and the reviewing court is **required to reverse the** agency's action as being arbitrary and capricious. Pierce v. State Dep't of Corr., 885 N.E.2d 77, 89 (Ind Ct. App. 2008).

Here, the Pulaski County Commissioners created a law (UDO) which set the minimum requirements needed for an application for a Special Exception to develop a Commercial Solar Energy System. The Pulaski County Board of Zoning Appeals

ignored the legal requirements of that law and unanimously approved the application, thereby permitting Mammoth Solar to develop a massive solar farm over 4,500+ acres, without even satisfying a simple requirement such as including a fire protection plan for the safety of the people of Pulaski County.

If the elected officials don't like the law they passed, then they can change it. But they cannot pass a law and ignore it, and subsequently expect an Indiana Judge exercising judicial review to look the other way. This I will not do.

Therefore, by law, this Court is required to reverse the action of the Pulaski County BZA. But, there is a simple remedy. Require Mammoth to provide a completed application as required by the Pulaski County UDO. After Mammoth Solar has presented a "completed" application, then review the detailed information provided, allow the public to be heard on the completed application, and make an informed decision that is in the best interests of the people of Pulaski County.

A trial court has the authority to remand the case for further agency proceedings. Therefore, upon the statutory authority of IC 36-7-4-1615 and IC 36-7-4-1615, this court now remands this case to the Pulaski County Board of Zoning Appeals for further proceedings.

Findings of Fact, Conclusions of Law, and the Final Order are found herein.

FINDINGS OF FACT

UNIFIED DEVELOPMENT ORDINANCE

1. This Court finds that on December 19, 2019, the Pulaski County Board of Commissioners approved and adopted Unified Development Ordinance ("UDO") #2019-09 that provides "a regulatory scheme for the construction and operation of Wind Energy Convergence Systems and Solar Energy Systems in the county..." Id. At 731-754. The UDO contains specific and comprehensive requirements establishing the minimum information, documents, and certifications to be included in **all** applications.
2. Mammoth submitted a Petition for Special Exception under the UDO, Docket No. 07272020-01 (the "Solar Application") seeking approval for a solar energy farm to be constructed on 4,511 acres of farmland in Pulaski County (the "Solar Farm") on June 24, 2020. Id. At 141-167.

THE MAMMOTH APPLICATION / ONE SIGNATURE

3. The submitted Application included a single page form signed only by Nick Cohen (a representative of Mammoth Solar), which form provided Mammoth Solar's contact information, and identified the current use and zoning of the subject properties as agriculture. (Record 141). The submitted Application also included a two paragraph Statement of Intent, and a single paragraph statement in support of the four elements for a special exception. (Record 142-143). The only other materials provided as part of the Application were a list of contracted parcel owners (with addresses), and undated signature pages from solar leases with the contracted parcel owners. (Record 144-155).
4. While Mammoth Solar provided undated signature pages (only) of the underlying solar leases, those property owners did not sign the Application, (**as required by the UDO**), or any other document consenting to the Application. In fact, the lease signature pages make no reference to the Application or the Proposed Solar Farm whatsoever. (Record 146-155).

MAMMOTH APPLICATION DEFICIENCIES

UDO MINIMUM APPLICATION REQUIREMENTS INCLUDE:

5. Legal description. The legal description, address, and general location of the project.
6. Project description. A CSES Project Description including:
    a. Number of panels;
    b. Type;
    c. Name Plate generating capacity;
    d. Maximum spatial extent (height and fence lines);
    e. The means of interconnecting with the electrical grid;
    f. The potential equipment manufacturer(s) and model(s); and
    g. All related accessory structures.
7. Engineering Certification. For all SES, the manufacturer's engineer or another qualified registered professional engineer ***shall certify***, as part of the building permit application, that all equipment is within accepted professional standards, given local soil and climate conditions. An engineering analysis of the equipment showing compliance with the applicable regulations and ***certified*** by a licensed professional engineer ***shall*** also be submitted. The

analysis ***shall*** be accompanied by standard drawings of the solar panel, including the base.

8. The Application submitted by Mammoth Solar ***did not*** include the required engineering certification.
9. A site layout plan. A Development Plan, drawn to scale, including distances and ***certified by a registered land surveyor***. All drawings shall be at a scale not smaller than one inch equals 200 feet (1" = 200') and not larger than one inch equals 50 feet (1" = 50'). Any other scale must be approved by the Administrator. No individual sheet or drawing shall exceed twenty-four inches by thirty-six inches (24" x 36"). The site plan ***shall*** include the following:
    i. Address, general location, acreage, and parcel number(s) of subject property
    ii. Name of subdivision in which property exists (if applicable)
    iii. Location/key with north arrow
    iv. Property dimensions
    v. Location and distance to any substations or other means of connection to the electrical grid, including above-ground and underground electrical lines, as well as a copy of the written

notification provided to the utility company requesting interconnection

vi. Existing and proposed buildings and solar panels, with appropriate setbacks, parking areas, natural features, including vegetation (type and location) and wetlands, and other manmade features, including locations of any utilities, wells, drainage tiles, and/or waterways

vii. Electrical cabling

viii. Ancillary equipment

ix. Adjacent or on-site public or private street/roads and alleys

x. Existing and proposed ingress/egress

xi. Existing building setbacks and separation

xii. Delineation of all requested variant development standards (if applicable)

xiii. Existing easements

xiv. Approximate locations of neighboring uses and structures

xv. Brief description of neighboring uses and structures

xvi. Existing and proposed landscaping, lighting, and signage

xvii. A fire-protection plan for the construction and operation of the facility, including emergency access to the site

xviii. Proof of correspondence and cooperation with wildlife agencies regarding endangered species

xix. Map scale

xx. Dimensional representation of the structural components of the construction, including the base and footings

xxi. Any other item reasonably requested by the Board of Zoning Appeals

xxii. Dated signature of applicant and owner

10. Topographic Map. A USGS topographical map, or map with similar data, of the property and the surrounding area, including any other CSES, flood plains or wetlands within 1 mile, with contours of not more than five (5) foot intervals.

11. Copy of Communications Study.

12. The CSES applicant ***shall certify*** that the applicant will comply with the utility notification requirements contained in Indiana law and accompanying regulations through the Indiana Public Utility Commission.

13. Evidence of compliance with storm drainage, erosion, and sediment control regulations (Rule 5).

14. The Application submitted by Mammoth Solar ***did not*** include a site layout plan containing the items noted above, ***did not*** include a topographic map, ***did***

not include a communications study, ***did not*** include the utility certification, and ***did not*** include evidence of compliance with storm drainage, erosion, and sediment control regulations.

15. As reflected in the Findings of Fact, above, Mammoth Solar even admitted several of the omissions during the public hearing, ***stating it would provide those items later in the design phase***. The UDO, however, does not allow those items to be provided later. They are required as part of the Application. Compliance with the UDO is required, and Mammoth Solar failed to comply.

16. Failure to provide the required materials was significant and prevented a proper review of the Proposed Solar Farm, its impact, and prevented the required inquiry to determine if the requested special exception could be deemed appropriate and compatible. Indeed, at the time of the public hearings, Mammoth Solar admitted that it had no fire-protection plan, had no concrete plan of what it was trying to do regarding layout and exact proximity of equipment, and could not say where the proposed solar panels would be manufactured. Specifically, for clarification of Mammoth's position, one need look no further that the BZA record 74, wherein a discussion was held at the August 24, 2020, public hearing regarding the specifics of Mammoth Solar's fire protection plan. Nick Cohen, CEO, stated, ***"...regarding safety***

and health and emergency management plans ... there will be a plan as the project is developed." (Page 52)

17. Upon receiving an application for special exception, the Administrator is required by the UDO to determine whether the application is complete, and until an application is determined to be complete, the UDO prohibits the application from being processed for further review. *See* UDO, Section 2.3(B)(6)(a) and (b).

18. The application should not have been processed for further review, should not have been scheduled for public hearing, and should not have been approved.

19. Scheduling the improperly submitted (and incomplete) application for public hearing, and approving the improperly submitted (and incomplete) Application was arbitrary and capricious, not in accordance with the law, and without observance of procedure required by law.

20. Under the terms of the UDO, the application should not have been processed or scheduled for public hearing, let alone approved.

BZA MEMBERS QUALIFICATIONS

RESIDENCY / CONFLICTS OF INTEREST

21. The Petitioners claim that BZA member, Phil Woolery did not reside in Pulaski County and thereby failed to meet the minimal legal requirements to serve as a BZA member and vote on the application.

22. The Petitioners claim that BZA members Derrick Stalbaum and Abby Shidler-Dickey had conflicts of interest that should have precluded them from participating in the public hearings and from voting on the Application. They claim that Derrick Stalbaum had a direct and indirect financial interest in the outcome of the zoning decision to be made, and that he was biased in favor of the project, and therefore unable to be impartial. It was alleged that he had improper communication with one of the Petitioners which reflected that his mind was already made up before the evidence was even presented, and that he was attempting to influence those who opposed the application. They further claim that Abby Shidler-Dickey had an indirect financial interest which reflected a pro-solar bias and inability to be impartial.

CONCLUSIONS OF LAW

JUDICIAL REVIEW / STANDING / PREJUDICE

Indiana Code sections 36-7-4-1600 through-1616 ("the 1600 Series of the Zoning Enabling Act of 2011") establish the exclusive means for judicial review of zoning decisions. Ind. Code § 36-7-4-1601(a). The 1600 Series set forth the procedure that a petitioner must follow. Section 1602 entitles a petitioner to judicial review upon a showing that the petitioner qualifies under: (1) Section 1603 concerning standing; (2) Section 1604 concerning exhaustion of administrative remedies; (3) Section 1605 concerning the time for filing a petition for review; and (4) Section 1613 concerning the time for filing the board record for review. See Town of Pittsboro Advisory Plan Comm'n v. Ark Park, LLC, 26 N.E.3d 110, 117 (Ind. Ct. App. 2015).

This Court has determined that the Petitioners have sufficient footing to establish standing. Section 1603 states that to "have standing to obtain judicial review of a zoning decision: ... [a] person aggrieved by the zoning decision who participated in the board hearing that led to the decision, either: by appearing at the hearing in person, by agent, or by attorney and presenting relevant evidence; or by filing with the board a written statement setting forth any facts or opinions relating to the decision." This minimal burden was met by one or more of Petitioners

participating in the board hearing through various means and being aggrieved, as evidenced by the showing of the negative impacts on the Petitioners' property values and quality of life.

The exhaustion of administrative remedies, timeliness for filing a petition for review, and timing of the filing of board record for review are not at issue. The actual question before this Court is the application of Section 1614.

Section 1614 allows a trial court to grant relief from the zoning decision only if the court determines that the petitioner has been prejudiced by a zoning decision that is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

"When the General Assembly amended the Zoning Enabling Act in 2011, it brought the judicial review concepts from the Administrative Orders and Procedures Act [AOPA] into the zoning arena." Dunmoyer v. Wells Cnty., Ind. Area Plan Comm'n, 32 N.E.3d 785, 786 n.9 (Ind. Ct. App. 2015).

A comparison of the judicial review section 1614 dealing with Zoning Board judicial review and the judicial review section of the AOPA show they are identical:

IC 4-21.5-5-14(d) AOPA JUDICIAL REVIEW

*"The court **shall grant relief** under section 15 [IC 4-21.5-5-15] of this chapter only if it determines **that a person seeking judicial relief has been prejudiced by an agency action that is**:*

(1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) Contrary to constitutional right, power, privilege, or immunity;

(3) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) Without observance of procedure required by law; or

(5) Unsupported by substantial evidence."

IC 36-7-4-1614(d) ZONING JUDICIAL REVIEW:

*"The court **shall grant relief** under section 1615 [IC 36-7-4-1615] of this chapter only if the court **determines that a person seeking judicial relief has been prejudiced by a zoning decision that is:***

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law; or

(5) unsupported by substantial evidence."

Likewise, the AOPA and 1600 Series of the Zoning law have identical remedies available if the above requirements are met in a petition for judicial review:

IC 4-21.5-5-15. Remedies where there is prejudice found. (AOPA)

"If the court finds that a person has been prejudiced under section 14 [IC 4-21.5-5-14] of this chapter, the court may set aside an agency action and:

(1) Remand the case to the agency for further proceedings; or

(2) Compel agency action that has been unreasonably delayed or unlawfully withheld."

IC 36-7-4-1615. Remedies. (ZONING)

"If the court finds that a person has been prejudiced under section 1614 [IC 36-7-4-1614] of this chapter, the court may set aside a zoning decision and:

(1) remand the case to the board for further proceedings; or

(2) compel a decision that has been unreasonably delayed or unlawfully withheld."

The Petitioners, in this case, argue that they do not have to make a separate showing of prejudice under Section 1614(d) and cite First Am. Title Ins. Co. v. Robertson ex rel. Indiana Dep't of Ins., 990 N.E.2d 9, 17 (Ind. Ct. App. 2013), aff'd in relevant part, 19 N.E3d 757, 760 n.3 (Ind. 2014) to support that argument. The relevant portions of that series of partially vacated opinions, partially affirmed opinions, and confusing footnotes that seem to indicate that under the AOPA judicial review statute, no showing of prejudice is required. Other lines of cases under the AOPA also seem to hold to that concept. However, to counteract that point, the Respondents would point this Court to Dunmoyer v. Wells Cty., Indiana Area Plan Comm'n, 32 N.E.3d 785, 796–97 (Ind. Ct. App. 2015). In Dunmoyer, that Court specifically held that landowners' proximity to a planned windfarm, and any resultant noise or decrease in property values, was not sufficient to establish the necessary prejudice under Section 36-7-4-1614(d). Dunmoyer was decided after the First Am. Title Ins. Co. case and seems to suggest a showing of prejudice is required, as do many other cases dealing with Section 1614(d). Yet, Dunmoyer also states, in a footnote, that the judicial review provisions applicable to zoning decisions "are interpreted in the same manner as the relevant provisions of the AOPA and rely on case law established under the AOPA." (citing Howard v. Allen Cnty. Bd. of Zoning Appeals, 991 N.E.2d 128, 130 (Ind. Ct. App. 2013)).

It would seem to this Court that two identical laws should mean, be understood, and interpreted in the same ways. This Court finds First Am. Title Ins. Co. to be controlling in this situation and that if the Petitioners' can show that a zoning decision is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence; then the Petitioners' have been by definition prejudiced by that zoning decision. Regardless of that fact, the Court also finds that one or more of the Petitioners have demonstrated prejudice from the proximity of their residences to the proposed solar project, evidence presented that their property values will be diminished, and the BZA's failure to require Mammoth's application to comply with the UDO, thereby preventing the Petitioners from access to the information that was required so they could meaningfully participate in the public hearings.

FAILURE TO COMPLY WITH THE UDO REQUIREMENTS

Pulaski County has adopted the UDO as the regulatory framework controlling zoning issues for the BZA. UDO § 1.4(A) states: "This Ordinance applies to all lands within Pulaski County except for the areas under the zoning jurisdiction of the

Towns of Winamac and Francesville, unless otherwise specified." Further, UDO § 1.5(A) states: "no land shall be developed without compliance with this Ordinance..." Per UDO § 1.6(A), "In the application of this Ordinance, all provisions shall be considered as minimum requirements..." Three key terms applicable to this matter are specifically defined by the UDO:

> ***COMMERCIAL SOLAR ENERGY SYSTEM (CSES)***: *"an area of land or other area used by a property owner, multiple property owners, and/or corporate entity and its contained industrial-scale group or series of ... solar panels placed to convert solar radiation into usable direct current electricity... CSES are a minimum of 5 acres in total area."*
>
> ***SOLAR ENERGY SYSTEM (SES)***: *"a system capable of collecting and converting solar radiation into ... electrical energy... This definition shall include ... both* ***large-scale commercial*** *and small-scale accessory use solar energy systems."*
>
> ***SPECIAL EXCEPTION***: *"the authorization of a use that is designated as such by this ordinance as being permitted in the district concerned if it meets special conditions, and upon application, and is specifically authorized by the Board of Zoning Appeals by this Ordinance."*

Pursuant to the UDO § 2.3(B)(2), "**the applicant bears the burden** of ensuring that an application contains sufficient information to demonstrate **compliance** with applicable standards." Aside from the general requirements of an application, the UDO also contains an exhaustive list of items that are to be included for all SES and CSES applications in section 2.3(R), *Applications for All Solar Energy Systems (SES).* See the UDO and the Findings of Fact.

The UDO § 7.1(B) further states that "the intent of this Ordinance is to provide a regulatory scheme for the construction and operation ... Solar Energy Systems (SES) in the county; subject to reasonable restrictions, ***these regulations are intended to preserve the health and safety of the public.***" Further, that "***no applicant shall construct, operate, or locate a SES within Pulaski County without having fully complied with the provisions of this Ordinance."*** UDO § 7.1(D).

This Court must then turn to the issues of how to rationalize the BZA's actions in relation to the mandatory provisions of the UDO. "The construction of a zoning ordinance is a question of law." Essroc Cement Corp. v. Clark Cty. Bd. Of Zoning App., 122 N.E.3d 881, 891 (Ind. Ct. App. 2019) (citation omitted), trans. denied. "The express language of the ordinance controls [this Court's] interpretation..." Id. The plain language of the ordinance is the best evidence of the drafters' intent. Schwab v. Morrissey, 83 N.E.3d 88, 92 (Ind. Ct. App. 2017). It is clear to the Court that when reading the plain language of the UDO, Pulaski County has imposed a

detailed list of requirements on those wishing to locate SES / CSES within Pulaski County to preserve the health and safety of the public. These self-imposed regulations were intended to be fully complied with ***by all applicants*** locating any Solar Energy Systems in Pulaski County. However, it appears to this Court that was not done by the BZA in this situation. "When an ordinance is subject to different interpretations, the interpretation chosen by the administrative agency charged with the duty of enforcing the ordinance is entitled to great weight, ***unless that interpretation is inconsistent with the ordinance itself.***" Essroc Cement, 122 N.E.3d at 891 (quoting Hoosier Outdoor, 844 N.E.2d at 163). However, an agency's incorrect interpretation of an ordinance is entitled to ***no weight***. See Pierce v. State Dep't of Corr., 885 N.E.2d 77, 89 (Ind. Ct. App. 2008) (regarding statutes). **If an agency misconstrues an ordinance, there is no reasonable basis for the agency's ultimate action, and *the reviewing court is required to reverse the agency's action as being arbitrary and capricious***. Id.

BZA MEMBERS QUALIFICATIONS

RESIDENCY / CONFLICTS OF INTEREST

Both Indiana statute and the UDO require the BZA to have five appointed members. *See* I.C. 36-7-4-902 and -906.Moreover, I.C. 36-7-4-905 requires that members must be residents of the jurisdictional area of the board, or they must be a

resident of the county, and also an owner of real property located in whole or in part in the jurisdictional area of the board.

In addition to the foregoing, I.C. 36-7-4-909(a) provides that a BZA member is disqualified and may not participate in a hearing or decision of the board concerning a zoning matter if the member: (1) is biased or prejudiced or otherwise unable to be impartial: or (2) has a direct or indirect financial interest in the outcome of the hearing or decision.

Finally, an action of the BZA is not official unless authorized by a majority of the board which, in this case, would require three votes. I.C. 36-7-4-911.

A serious challenge has been raised to the constitution of the membership of the BZA, thereby casting doubt upon certain members' legal qualifications to have listened to the evidence, served as fact-finders, and voted on the application.

The UDO 2.2 (D)(1)(e) and Indiana Code 36-7-4-909, specifically provide that any member of the BZA who has a conflict of interest due to direct or indirect financial interest, **shall** recuse from voting on the matter. Challenges to the BZA members include residency, indirect financial interest, and bias and partiality.

In other words, the five (5) voting members of the Pulaski County BZA need to be legally qualified, have no financial interest, (even indirect), in the project, and exercise their fact-finding discretion impartially and with an open mind. However, upon judicial review, this Court is persuaded that these objections have legally been

waived. If not, then the *de facto* office holder doctrine applies. Burton, et.al. v. Board of Zoning Appeals of Madison Cty., 2021 Ind. App. LEXIS 202, 2021 WL 2521624.

Nevertheless, although the record indicates that this objection may have been waived, and Indiana recognizes *de facto* office holders, that does little to satisfy the need to for each of the five (5) members of the BZA to be fair and impartial on such a matter of the highest importance to the people of Pulaski County.

Indiana law anticipates that appointed members of a Board of Zoning Appeals may have conflicts of interest on matters that come before them. A review of Indiana zoning cases reveals that conflicts of interests among members of zoning boards, especially in rural counties, is not a rare event. Consequently, the legislature created a statutory procedure to provide for the recusal of the conflicted member.

Indiana law requires Courts exercising judicial review of a zoning agency's actions to defer to the decisions made by members who are presumed to have expertise in matters of zoning. However, that also presumes that those members are carrying out their fact-finding duties fairly and impartially. By remanding this case to the BZA for "further proceedings," the BZA may find that this issue should be revisited in those proceedings.

FILED
IN OPEN COURT
AUG 24 2021
Lynn Bahney
CLERK PULASKI SUPERIOR COURT

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. The individuals seeking judicial relief have been prejudiced by the Pulaski County Board of Zoning Appeals' action to disregard the clear and unambiguous language of the Pulaski County Uniform Development Ordinance regarding the minimum requirements for all applications for Special Exceptions submitted by Commercial Solar Energy Systems prior to determining Mammoth Solar's application to be complete, acting upon it, and approving it. The BZA was not at liberty to disregard the law.
2. By disregarding the legal requirements of the UDO, the actions of the BZA were arbitrary and capricious, not in accordance with the law, and without observance of procedure required by law.
3. Finding that the application was incomplete, should not have been acted upon by the BZA until it was in compliance with the UDO, and in utilizing the remedy provided in IC 36-7-4-1615, this Court now sets aside the BZA actions and remands the case to the BZA for further proceedings.

4. Inasmuch as this Court finds that the application was not complete and should not have been acted upon, there is no need for the Court to review the merits of the application or the BZA findings of fact. Accordingly, this ruling is limited to the finding that the application was legally deficient and was not properly before the BZA to hold public hearings, listen to evidence, find facts, and vote. Consequently, this Court declines to exercise judicial review of any BZA actions taken on the incomplete application, finding simply that all actions taken on the incomplete application are vacated, and the matter is remanded to the Pulaski County Board of Zoning Appeals for further proceedings.

8-24-21
Date

Special Judge Kim Hall
Pulaski Superior Court