

STATE OF INDIANA)
) SS:
COUNTY OF PULASKI)

IN THE PULASKI SUPERIOR COURT
CAUE NO. 66D01-2205-PL_____

CONNIE L. EHRLICH, GAIL T.)
LAMBERT, LARRY E. LAMBERT,)
RANDY DAVIS, ROSS DAVIS, DEAN A.)
CERVENKA, DANIEL KNEBEL,)
JENNIFER KNEBEL, JOHN)
MASTERSON, ANTOINETTE)
MASTERSON, KEITH W. DAVIS, GALE)
J. DAVIS, AND JAYBIRD FARM TRUST)
DATED JANUARY 2, 2020,)
)
Plaintiffs,)
)
vs.)
)
PULASKI COUNTY BOARD OF)
COUNTY COMMISSIONERS,)
)
Defendants.)
_____)

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs, Connie L. Ehrlich, Gail T. Lambert, Larry E. Lambert, Randy Davis, Ross Davis, Dean A. Cervenka, Daniel Knebel, Jennifer Knebel, John Masterson, Antoinette Masterson, Keith W. Davis, Gale J. Davis, and the Jaybird Farm Dated January 2, 2020 (collectively, “Plaintiffs”), by counsel, for their Complaint for Declaratory Judgment, state as follows:

1. This suit challenges the enactment of certain revisions (the “UDO Revisions”) to the Pulaski County Unified Development Ordinance (the “UDO”) relating to commercial solar developments in Pulaski County. The UDO was enacted as Ordinance #2021-03, adopted by the Commissioners on April 5, 2021, effective April 6, 2021.

2. The changes at issue in the UDO Revisions are many, and are significant, having two primary effects. First, the changes seek to eliminate, obfuscate, and/or blur the development standards associated with commercial solar projects. Second, the changes seek to eliminate the existing requirement that commercial solar projects be approved by the BZA as a special exception in agricultural zoning districts, instead allowing them as a permitted use. This change would eliminate notice to the public (and neighboring properties), eliminate any public hearing, eliminate the ability to remonstrate, and remove the ability of the BZA to impose reasonable conditions on any approval, among other things. Petitioners contend that this, coupled with the elimination of many development standards, creates many concerns and damages to the county, and its residents, and the owners of property near proposed commercial solar developments (including the Plaintiffs). Moreover, by changing commercial solar to a permitted use, there is no limitation on the amount of farm ground that could be taken out of production in order to accommodate such developments. Among other things, such a result violates the provisions of Pulaski County's Comprehensive Plan

3. Connie L. Ehrlich ("Ehrlich") is an individual with a principal place of residence and mailing address of 6830 Ripple Creek Drive, Lafayette, IN 47905.

4. Larry E. Lambert and Gail T. Lambert are individuals with a principal place of residence and mailing address of 3343 N. 700 W., Winamac, IN 46996.

5. Randy Davis is an individual with a principal place of residence and mailing address of 7249 W. 600 S., Winamac, IN 46996.

6. Ross Davis is an individual with a principal place of residence and mailing address of 7252 W. 600 S., Winamac, IN 46996.

7. Dean A. Cervenka is an individual with a principal place of residence and mailing address of 106 Erik Drive, Bozeman, MT 59715.

8. Daniel Knebel and Jennifer Knebel are individuals with a principal place of residence and mailing address of 5802 W. 200 N., Winamac, IN 46996.

9. John Masterson and Antoinette Masterson are individuals with a principal place of residence and mailing address of 3915 W. 200 N., Winamac, IN 46996.

10. Keith W. Davis and Gale J. Davis are individuals with a principal place of residence and mailing address of 2776 N. 800 W., Winamac, IN 46996.

11. Jaybird Farm Trust Dated January 2, 2020 (the “Jaybird Trust”) is a trust created under Indiana law and which owns the property located at 3343 N. 700 W., Winamac, IN 46996. Larry E. Lambert and Gail T. Lambert are the owners and trustees of the Jaybird Trust.

12. The Plaintiffs all own and/or reside in or on real property located in Pulaski County, Indiana.

13. The Pulaski County Board of County Commissioners (the “Commissioners”) is a legislative body, with a mailing address of:

Pulaski County Commissioners
c/o Pulaski County Auditor
112 E. Main St., Room 200
Winamac, IN 46996

14. A public hearing was previously scheduled for April 18, 2022, on an application for special exception filed by an entity named Mammoth Solar to construct a commercial solar development spanning 9,037 acres of farmland in Pulaski County.

15. All of the Plaintiffs either: (i) own real property within 660 feet of Mammoth Solar’s intended solar development; (ii) reside within 1 mile of Mammoth Solar’s intended solar

development; or (iii) own homes that will be bordered by the panels of Mammoth Solar's intended solar development.

16. The enactment of the UDO Revisions, and Mammoth Solar's intended solar development, each will negatively impact the Plaintiffs' property values and quality of life, among other things.

17. On February 22, 2022, Commissioner Mellon read a statement at the Commissioners' meeting claiming that commercial solar development in the County was being hindered by the current version of the UDO, and that he asked the County Attorney, with the consult of Barnes & Thornburg, and the Building Department, to look at making changes to the UDO relating to commercial solar, and that the Commissioners now had a copy of the proposed changes to the UDO that Commissioner Mellon wanted to send to the APC for its input and approval.

18. On March 16, 2022, the APC held a public meeting (as a Special Session) to address the proposed changes to the UDO. A true copy of the Public Notice scheduling the public meeting is attached as Exhibit "A."

19. The referenced Public Notice indicated that the purpose of the public meeting was to address proposed changes to Sections 2, 4, 7, and 8 of the UDO. The Public Notice did not provide a summary of the proposed changes, as required by law, and it made no effort to do so.

20. The referenced Public Notice indicated that the proposed changes to the UDO were available for review on the County website. The documents on the website, however, did not identify or summarize the proposed changes. The documents on the website at the time did not include a redline version by which one could see the proposed changes. Instead, the documents on the website simply included the referenced chapters, in their entirety, as they would read as if

all changes were accepted, without noting in any fashion what the changes were, and what portions of the prior UDO were being changed or eliminated. Moreover, the referenced chapters constituted hundreds of pages – again, with no indication of what changes were being proposed. True copies of the “proposed changes” as reflected on the County’s website at the time of the public meeting, are attached as Exhibits “B1 – B4”.

21. The referenced Public Notice failed to include the required information mandated by I.C. §36-7-4-604(b).

22. The APC did not vote on the proposed changes to the UDO at the March 16, 2022, public meeting.

23. In response to Commissioner Mellon’s statement noted above, on March 18, 2022, Ehrlich made a public records request seeking certain specified documents relating to the UDO Revisions. A copy of the public records request is attached as Exhibit “C”.

24. In response, the County Attorney claimed that Barnes & Thornburg was never hired to draft the UDO Revisions and there was no cost from them to the County. The County Attorney further stated that the UDO Revisions were drafted by him and the Building Inspector. *See* Tankersley correspondence dated March 24, 2022, a copy of which is attached as Exhibit “D”.

25. None of the documents requested in the public records request were produced. Moreover, when asked, the Building Inspector denied being involved in the drafting of the UDO Revisions.

26. In subsequent correspondence, the County of Attorney stated reiterated that Barnes & Thornburg was never hired to draft the UDO Revisions, and did not participate in any way. He also reiterated that he drafted the UDO Revisions which were reviewed by the Building Inspector

“to get her input.” *See* Tankersley correspondence dated April 13, 2022, a copy of which is attached as Exhibit “E”.

27. Subsequently, and despite representations to the contrary, Petitioners learned that Barnes & Thornburg issued an invoice to the County dated March 21, 2022, which invoice specifically referenced the “UDO” and “Mammoth”.

28. On April 1, 2022, at the APC resumed discussion of the proposed UDO Revisions at its regularly scheduled meeting.

29. No Public Notice was issued in connection with this meeting, let alone a notice containing any of the information required by I.C. §36-7-4-604(b), and mandated by I.C. §36-7-4-602. No public comment was permitted by the APC (in violation of Indiana law and the APC rules) prior to voting on the proposed UDO changes.

30. At the April 1, 2022, meeting, the APC voted to accept the majority of the changes to the development standards recommended by the Commissioners, as drafted, and recommended minor changes to a couple development standards requirements. The APC also unanimously voted (with 1 abstention) to reject the Commissioners’ request to change commercial solar to a permitted use, instead voting to keep commercial as a special exception. A copy of the APC’s spreadsheet identifying the minor changes approved by the APC is attached as Exhibit “F”.

31. At the next regularly scheduled public hearing of the Commissioners on April 4, 2022, Ehrlich timely requested that she and Plaintiffs’ counsel be placed on the agenda to address the potential UDO Revisions. The Commissioners denied Ehrlich’s request, and counsel was only permitted to speak during public comments at the conclusion of the meeting.

32. The next day, on April 5, 2022, a Public Notice was issued scheduling a Special Session of the Commissioners on April 8, 2022, to address the proposed changes to the UDO. A

true copy of the notice is attached as Exhibit “G”. The notice indicated that a list of the changes being considered were available on the County website. As noted above, that was not the case.

33. At the April 8, 2022, Special Session of the Commissioners, Plaintiffs’ counsel attempted to speak on the topic of the proposed UDO changes and was denied. No public comment on the topic was permitted. Ehrlich had previously, and timely, submitted a request to be placed on the agenda, along with counsel, to address the UDO Revisions, which request was also denied.

34. Despite the APC’s unanimous vote to the contrary, and after refusing public comment, the Commissioners voted at the April 8 meeting (2-0 vote with 1 abstention) to reject the APC recommendation to keep commercial solar as a special exception, and to accept the APC’s minor revisions on the development standard changes. A copy of the Minutes reflecting the Commissioners’ approval is attached as Exhibit “H”.

35. After the Commissioners’ vote, the April 18, 2022, public hearing before the BZA on Mammoth Solar’s application was cancelled. In that regard, the County Attorney confirmed his position that if the UDO was changed to allow commercial solar as a permitted use, the requested special exception would become moot. *See* email from K. Tankersley attached as Exhibit “I”.

36. On April 18, 2022, the Commissioners held a regularly scheduled public meeting during which the proposed UDO Revisions were a topic. A copy of the agenda is attached as Exhibit “J”. At Ehrlich’s request, she and Plaintiffs’ attorney were added to the agenda to speak on the proposed UDO Revisions. The request pursuant to which Ehrlich and Plaintiffs’ counsel were added to the agenda sought 20 minutes to speak. Ehrlich and Plaintiffs’ counsel were added to the agenda and were never told of any time limitation. When Plaintiffs’ counsel approached the microphone at the public meeting, he was informed that he would only be allowed 5 minutes to

speak, because it was a late addition to the agenda. Notably, the request to be placed on the agenda was made 17 days before the public meeting, on April 1, 2022. The Commissioners utilized a timer (something never done before) and refused counsel's request to continue speaking past 5 minutes.

37. On May 16, 2022, the APC held a Special Meeting for the sole purpose of addressing the UDO Revisions, i.e., the Commissioners' request to change commercial solar from a special exception to a permitted use.

38. A copy of the Public Notice associated with the APC meeting is attached as Exhibit "K". The Public Notice did not summarize the proposed changes to the UDO or otherwise comply with the notice requirements of Ind. Code §36-7-4-604(b).

39. Prior to the Special Meeting, Plaintiffs' counsel sent an email to the APC confirming his legal right to speak at the Special Meeting, and his intention to do so. A true copy of the referenced email is attached as Exhibit "L".

40. At the beginning of the Special Meeting a prepared statement was read indicating that no member of the public was permitted to speak at the meeting regarding the proposed UDO Revisions. The APC then proceeded to discuss and vote on the matter without public input. By a vote of 4-1 (with 1 abstention), the APC voted to keep commercial solar as a special exception, and to reject the Commissioners' effort to change to a permitted use.

41. The denial of the public's right to speak at the APC Special Meeting was a violation of Indiana law and the APC rules.

42. After the vote, it was noted that a majority vote of the entire APC membership was required in order to constitute official action, and that 4 votes was insufficient in that regard. The APC then adjourned the meeting.

43. The Commissioners took no further action on the proposed UDO Revisions.

44. Pursuant to I.C. §37-7-4-607(e)(4), the APC had 45 days (after the April 8, 2022, Commissioners' meeting) to consider and report back to the Commissioners. If the APC failed to act within that 45-day period, the referenced statute provides that the UDO Revisions stand as passed by the Commissioners at the end of the 45-day period.

45. The referenced 45-day period expired on May 23, 2022.

46. Pursuant to I.C. §36-7-4-607(e)(4), the UDO Revisions now stand as passed by the Commissioners on April 8, 2022.

47. I.C. §34-14-1-2 provides that any person whose rights, or other legal relations, are affected by a municipal ordinance, may have determined any question of validity arising under the ordinance and obtain a declaration of rights, status, or other legal relations thereunder.

48. The Plaintiffs' rights are affected by the adoption of the UDO Revisions, and the subsequent filing and/or approval of a commercial-solar application by Mammoth Solar, or any other solar entity seeking to develop a commercial solar project in the County.

49. The adopted UDO Revisions are invalid, among other reasons, as a result of the improper public notices, the procedural irregularities associated with their adoption, the failure to provide copies of the proposed changes, the withholding of information from the public, the refusal to allow public participation in the adoption process, the lack of transparency and otherwise impeding and denying the rights of the public, the denial of the Plaintiffs' due process rights, and multiple violations of Indiana law and statute, as well as the APC rules.

50. The Plaintiffs' rights, status, or other legal relations have been, and will be, directly affected by the enactment and the enforcement of the UDO Revisions, as well as the manner in which the UDO Revisions were enacted.

51. The Plaintiffs request that the Court declare the adoption of the UDO Revisions invalid, and that the Court set aside or vacate the UDO Revisions.

WHEREFORE, the Plaintiffs, by counsel, respectfully request that the Court enter judgment in their favor, and against the Commissioners, declaring the enactment of the UDO Revisions to be invalid, setting aside or vacating the UDO Revisions, and providing all other just and proper relief.

Respectfully submitted,

SNYDER MORGAN FEDEROFF
& KUCHMAY LLP

/s/ Jason M. Kuchmay
Jason M. Kuchmay, #20974-02
4211 Clubview Dr.
Fort Wayne, IN 46804
Telephone: (574) 457-3300
Attorney for Plaintiffs