STATE OF INDIANA	)	IN THE PULASKI SUPERIOR COURT
	) SS:	
COUNTY OF PULASKI	)	CAUSE NO. 66D01-2110-PL-000012

CONNIE L. EHRLICH, DEAN A. CERVENKA, DONALD J. EHRLICH, LIVING TRUST DATED JANUARY 28, 2002, and RANDY DAVIS, Petitioners, vs. MOSS CREEK SOLAR, LLC, and the PULASKI COUNTY BOARD OF ZONING APPEALS, Respondents.	)	**Hon. Greta Stirling Friedman, Special Judge**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This issue came before the Court as a special judge matter concerning Petitioner's Verified Petition for Judicial Review of the Pulaski County Board of Zoning Appeals ("BZA") decision to grant Moss Creek Solar, LLC's ("Moss Creek") application for special exception ("Application") to build a large commercial solar project (the "Project") on 1,620 acres of farmland in Pulaski County, Indiana. On May 11, 2022, the Court conducted a hearing on the Petition. After having considered all of the evidence in the record, briefs and arguments of the parties, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 2, 2021, Moss Creek filed the Application for a special exception, which was assigned Docket # 09272021-01. The filing of the Application is a requirement of the Pulaski County Unified Development Ordinance "UDO".

2. The Application states that Moss Creek will develop an approximately 200 MW renewable solar project in Pulaski County on 1,620 leased acres of agricultural farmland.

3. The Petitioner believes the application was lacking in many areas including:

- Not identifying the number of panels or the name plate generating capacity
- An Engineering Certificate
- A site layout plan certified by a registered land surveyor
- A topographic map
- A certificate that Moss Creek will comply with the utility notification requirements
- The vegetation types and location
- A showing of existing and proposed landscaping, lighting or signage
- A dimensional representation of the structural components including the base and footings
- A fire-protection and safety plan
- The failure of certain property owners to sign consents as trustees of the property or in a representative capacity

4. The Application was filed and accepted on August 2, 2021 and given Docket # 09272021-01. It was set for hearing by the Zoning Administrator. Said hearing was advertised and scheduled for September 27, 2021.

5. Prior to the hearing, the Application was supplemented and assigned a new Docket # of 39272021-01 but no new hearing date was advertised or set even though a new docket number was assigned.

6. The Petitioners state that even the Application as supplemented was deficient in the following ways:

- The Application did not identify the number of panels
- Did not include the name plate generating capacity
- Did not show the lighting or signage
- Did not include a dimensional representation of structural components
- Did not include a certification that Moss Creek would comply with utility notice requirements
- Did not include a complete fire-safety plan

7. The UDO required Moss Creek to apply for and obtain a special exception from the BZA.

8. Once an Application has been filed, the UDO requires the Zoning Administrator to conduct a completeness review of the Application within 10 days of submission prior to processing an Application for hearing (UDO Section 2.3(B)(6)(a)).

9. On September 27, 2021, the BZA held the public hearing on the supplemented Application under the originally noticed Docket # 09272021-01. The hearing was opened and written submissions, as well as oral testimony was given for several hours by both opponents and proponents for the granting of the special exception for the project proposed by Moss Creek.

10. Following the public hearing, the BZA approved the supplemented Application after asking Moss Creek if they believed the standards of the Pulaski County Unified Development

Ordinance ("UDO") had been met and if the supplemented Application was complete. Moss Creek responded in the affirmative.

11. In order for an Application to be complete, it must contain "all information and materials established by the Administrator as required for submittal of the particular type of Application." (UDO Section 2.3(B)(6)(a)(1).) The Administrator shall not process an Application for further review until it is determined to be complete.

12. Once the Zoning Administrator deems the Application to be complete (UDO Section 2.3(B)(6)(c)), the Zoning Administrator schedules a public hearing for the BZA to either approve or deny the Application, approve with conditions or continue the matter. (R. 2368)

13. In this case, the Zoning Administrator stated that she created "an exhibit list of items that will satisfy the requirements of our ordinance" (AM.R 3-4, Hearing Transcript 3:10 – 4:4). She further made reference to the UDO Section 2.3(B)(2) which gives her authority to amend and update requirements of form and content of the Applications. She stated her inherent authority to amend and update Application requirements would explain any differences between the original Application and the amended Application.

14. Notice of the hearing was published on August 5, 2021 which was several weeks prior to the hearing on September 27, 2021 and prior to any supplemented information filed by Moss Creek.

15. The UDO requires the Zoning Administrator "within a reasonable time period" before the public hearing to "make the Application, related materials, and the staff report available for examination by the public in the office of the Administrator during normal business hours, and make copies of such materials available at a reasonable cost." (R.2342)

16. The Petitioners were at the hearing and spoke based on the information they had available to them.

17. The parties and the public presented evidence at the hearing in September of 2021 which addressed nearly every issue that both the Petitioners and Moss Creek believe support their respective positions on this matter.

18. In looking at what the Petitioner declares to be flaws in the Application, the Court finds the number of panels and name plate generating capacity are found in the record with the number of panels being 629,214 and the name plate generating capacity being 280 MW DC, 21830 MW AC. R. pages 461 and 1478 which is the development plan submitted. It is not possible to tell where the panels will come from. Ten possible companies were mentioned and only one is in the U.S.

19. The Engineering Certification and site layout plan by a registered land surveyor MAY meet the UDO requirements. Metropolitan Dev.Com. v. Camplin, 288 N.E. 2d 569, 573 (Ind. Ct. App. 1972) finds "In reviewing the findings of an administrative agency, courts look to the substance rather than the form of the evidence" which in the case addresses the concern that a registered land surveyor did not create the plan or approve it. In this case, the Ravamp Engineering Inc. firm created the plan. The Zoning Administrator determined that it did meet the requirements since qualified engineers created and approved the plan prior to submission to the BZA, even though a registered land surveyor did not design it.

20. The record at pages 467 and 1490 do show a topographic map was included in the application or the subsequent amendment even though it is difficult to read.

21. The application and supplements seem to show that Moss Creek listed utility notification requirements as condition 13 (AM.R. 300-302) which would APPEAR to meet the UDO requirements on this item.

22. The record on pages 1525-1546 shows that a plan for dealing with vegetation and specific seeding and planting was addressed in accordance with the UDO. The record at 1492-94, 1530-35 also addresses these concerns.

23. The record further spells out on page 1486 very minimally the base and footings as well as structural dimensions. The diagram is minimal at best.

24. A great deal of concern was expressed by the Petitioners and the public about a fire protection and safety plan. In reviewing the record at p. 1554 the supplemented application addresses safety measures necessary to prevent fires and expressly states that "training opportunities and periodic tours of the PV facility will allow first responders to become familiar with the equipment and layout of a project and will allow the local fire officials to work with their teams to develop opperational procedures for dealing with incidents at the solar project." Further, "water sprays as opposed to streams should be used to extinguish fires around PV arrays as straight streams or standard foam can conduct more electrical current than spray patterns." The report notes that frequent vegetation management is a main factor in fire prevention at such sites. The record also reflects this was a topic of discussion at the public hearing and Moss Creek stated that they had already reached out to several fire departments and would offer specific training for the facility and would allow departments to come to the site during construction (R. 1554, AM.R. 120-121).

25. However, all of the information included about fire prevention appear to be just that, information only. An actual fire prevention plan differs from fire safety suggestions

significantly. OSHA fire prevention plans found at 29 CFR 1910.39(c) spell out the minimum elements of a fire prevention plan. Any such plan must include:

> 1910.39(c)(1)
>
> A list of all major fire hazards, proper handling and storage procedures for hazardous materials, potential ignition sources and their control, and the type of fire protection equipment necessary to control each major hazard;
>
> 1910.39(c)(2)
>
> Procedures to control accumulations of flammable and combustible waste materials;
>
> 1910.39(c)(3)
>
> Procedures for regular maintenance of safeguards installed on heat-producing equipment to prevent the accidental ignition of combustible materials;
>
> 1910.39(c)(4)
>
> The name or job title of employees responsible for maintaining equipment to prevent or control sources of ignition or fires; and
>
> 1910.39(c)(5)
>
> The name or job title of employees responsible for the control of fuel source hazards.
>
> 1910.39(d)
>
> ***Employee information.*** An employer must inform employees upon initial assignment to a job of the fire hazards to which they are exposed. An employer must also review with each employee those parts of the fire prevention plan necessary for self-protection.

26. Moss Creek or Next Era operates other solar facilities and as such should have created fairly detailed fire prevention safety plans at other facilities which could be adapted to the Pulaski County project. No such detailed plans were submitted nor were any details given beyond

the written "plan" discussed at the public meeting. In order for the Application under the UDO to be complete, an adequate fire prevention safety plan needed to be submitted and it was not.

27. While many of the omissions or flaws the Petitioners claim exist in the Application or supplemented material do appear to be nominally addressed, the Court finds the lack of an adequate fire prevention safety plan is a fatal flaw, which means the UDO requirements were not fully met. If the UDO requirements were not met, the Application should not have been accepted by the Zoning Administrator.

28. In Pulaski County, "the special exception procedure is intended to consider uses that may be appropriate in a zoning district, but because of their nature, extent and external effects require special consideration of location, design and methods of operation before they can be deemed appropriate and compatible." UDO Section 2.3(P)(I). The BZA Administrator and staff are not at liberty to ignore the requirements of the UDO. Under Section 2.2(E)(2)(b) of the ordinance, the Administrator has the duty to review and make recommendations on Applications with special exceptions.

29. In addition, UDO Section 2.3(4)(2)(6) makes clear that Applications shall be scheduled by the Administrator for public hearing based on the completeness of the Application. Finally, the UDO and BZA roles make clear that, if an application is not complete, it shall not be processed for further review and cannot be scheduled for public hearing.

30. Moss Creek argues that UDO Section 2.3(B)(6) gives the Administrator discretion in determining the completeness of an Application. While this may be stated in the UDO, it is not to be interpreted as giving the Administrator carte blanche to make decisions contrary to the law. While every single detail of every single plan cannot logically be set in stone prior to filing an Application with the BZA, major items such as fire safety plans and properly identified trustees to

the land in question can be delineated in an Application for a special exception. Omissions such as those go beyond the scope of the discretion properly given to a Zoning Administrator. Therefore, to argue that the Zoning Administrator had unlimited discretion as to what constitutes a "complete" Application goes beyond a logical reading of the UDO.

31. In addition to the numerous issues raised by the Petitioners above, the Petitioner states that not only was the Application incomplete even with supplements, but that Moss Creek failed to meet the threshold requirements of establishing the authority to file the Application in the first place. In order for an Application to be filed with the BZA, it must be filed by someone with authority to do so. In many instances that is the owner of the property. In this case, it was Moss Creek who filed on behalf of the property owners who were leasing the land in question to Moss Creek. Since Moss Creek doesn't actually own the property, and because there are multiple owners, the actual owners must either sign the application or a letter consenting to the filing of the Application (R. 2367, Section 2.3(B)(1)(a).

32. In this case, the underlying real estate belongs to seven property owners. Four of these property owners are trusts. However, in a review of the record, none of the consents is identified as being a trust or being signed by a trustee. Nor are any of the signatures on any consents signed in a representative capacity. The UDO requires that property owners sign consents even though four of the seven property owners are trusts, not one of them signed as trustee. The addendums signed by certain individuals that Moss Creek relies on make no mention of who specifically owns the trust property. None of the consents are signed in a representative capacity so it is not possible to tell if the people who signed are the actual trustees. Are they the landowners, legal trustees, both? Without some explanation of their role, it is not possible to tell if they have the authority to act on behalf of the trust. This is a problem and not one that can be glossed over

or minimized. Several of the people who signed the consents have more than one piece of property. Again, without a legal description or specific address of the exact property, the Court cannot guess as to whether "maybe" the consents are adequate to satisfy the UDO. The addendums signed appear to be simply forms signed by someone who suggests that an application can be filed on their behalf, with no reference at all to property they may or may not own. The fact that the Pedroni Affidavit provides for the developer to submit applications on behalf of a property owner doesn't excuse the fact that no one signed on behalf of the trusts. No copies of the trusts were ever filed, and therefore, it is impossible to discern who can or cannot act on behalf of the owner of the trust. Furthermore, from the best the Court can discern not only are the trusts not part of the record, but neither are the leases. No one looking at the record could tell what the terms of the leases are or who signed the leases.

33. While Moss Creek argues that the Affidavits of Consent from each individual property owner acknowledge the application and state "such application may be filed on my/our behalf" none of the consent affidavits filed by the trusts indicate they are acting in their capacity as trustee or indicated they are signing in any representative capacity. Specifically the four trusts referred to are:

- The David W. Busch Living Trust
- Steven L. Cosgray Living Trust / Joy E. Cosgray Living Trust
- Harold R. Johnson Revocable Trust / Carol L. Johnson Revocable Trust
- Meyer Revocable Living Trust

Charles and Bonnie Meyer both signed a "consent" in their individual capacity.

However, neither of them own property that is to be leased as part of the proposed solar project. The record does not reflect copies of any trusts or leases. This is extremely important as a point

of law because with respect to the trust property, only a trustee can legally contract or manage the property (subject to any limitations or restrictions in the trust instrument) as set forth in the statutory provisions delineating the powers and duties of trustees. Ind. Code. Section 30-4-8-3 and 30-4-8-6.

Additionally, it does not appear that in either the application or the supplemented material that the actual trust documents were filed. Without these actual documents, it is impossible to determine if the signing of the consents was permitted by limitations or restrictions in the trust instrument. The Application was therefore incomplete. A completed Application is a mandatory prerequisite to the BZA taking any action on the Application, holding hearings or meetings or rendering a decision on the Application.

34. The Court notes the signed consents contain names similar to those listed on the trusts, but again, without signing as "trustee" or "in representative capacity" it is not possible for the Court to actually know if the individuals who consented to Moss Creek's application actually are the trustees, own the real estate or have the authority to lease the property to Moss Creek. The consents are inadequate as a matter of law. While Courts accord deference to the interpretation of zoning laws, they do not do so in contradiction of ordinary rules of statutory construction. See Burton v Building of Zoning Appeals v. Madison County, 174 N.E. 3d 202 (Ind. Ct. App. 2021).

35. Based on this flaw alone, Moss Creek failed to prove they had the authority to file the Application in the first place. If the threshold question of authority to file the Application is not satisfied then as a matter of law, the Application should not have been accepted nor should it have been set for public hearing. All of those things must have properly been done in order for the BZA to have made any finding whatsoever. In this case, the Application should not have been

processed for further review, should not have been scheduled under either Docket # 09272021-01 or 39272021-01 and should not have been approved.

36. In order for a court to set aside a BZA decision on review under I.C. 36-7-4-1614, a person seeking relief because they believe they were prejudiced by the decision must establish that the decision is:

a. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

b. Contrary to Constitutional right, power, privilege, or immunity;

c. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

d. Without observance of procedure required by law; or

e. Unsupported by substantial evidence

37. The Petitioners further state Moss Creek failed to satisfy the elements for the approval of a special exception which are:

- Proving that a solar farm is compatible with the comprehensive plan.

- Prove the location, nature and height of each building, wall and fence, the nature and extent of landscaping on the site and the location, size, nature, and intensity of each phase of the use and its access streets will be compatible with the appropriate and orderly development of the district in which it is located. Operations related to the use will be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in permitted uses. The proposed use will not

conflict with an existing or programmed public facilities, public services, schools, or roads.

- How will the proposal project impact property values.

- Proving the proposed project is the most desirable use for which the land in the zoned district is adapted.

CONCLUSIONS OF LAW

38. Reversal is appropriate on any of the grounds listed in Paragraph 36. "The function of the trial court when reviewing the BZA's decision is simply to determine if the evidence before the commission taken as a whole provides a reasonable evidentiary basis for its decision." Burcham v Metro Board of Zoning Appeals Div. 1 of Marion County, 883 N.E. 2d 204, 212 (Ind. Ct. App. 2008).

39. On judicial review, the Court should not substitute its judgment for that of the BZA. "it must resolve all doubts about facts in favor of the BZA's decision without reweighing the evidence or reassessing the credibility of the witnesses." Id. at 216. A Court may not try the facts de novo or substitute its judgment for that of a Board of Zoning Appeal. Neither may the Court reweigh the evidence or reassess the credibility of the witnesses. Rather, the Court must accept the facts as found by the board. However, a Court reviews de novo any questions of law decided by the board. The burden of demonstrating the invalidity of a zoning decision is on the party to the judicial review proceeding asserting invalidity. Ind. Code Section 36-7-4-1614(a).

40. The Petitioners allege that as a threshold argument to all others that Moss Creek lacked the authority to file the application in accordance with UDO Section 2.3(B)(I). Specifically Section 2.3(P)(3)(b) establishes that applications for a special exception can only be initiated by

those establishing such authority. The actual owner of the land in question would have the authority to file for a special exception.

41. In this case, it is not a landowner filing for the exception. Rather, it is Moss Creek who seeks to lease the land from the landowners.

42. In this matter, several property owners are involved in the potential lease of the land to Moss Creek. The application listed seven property owner groups whose land would be leased by Moss Creek for the duration of the project. Four of the seven property owner groups were listed as trusts. The David W. Busch Living Trust, Steven L. Cosgray Living Trust / Joy E. Cosgray Living Trust, Harold R. Johnson Revocable Trust / Carol L. Johnson Revocable Trust and Meyer Revocable Living Trust. The consents that were filed by Moss Creek are invalid as they do not establish that the signatures had the authority to act on behalf of the trusts. No trust documents or lease agreements were filed. Based on this finding alone the decision of the BZA is "Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

43. Indiana Code Section 36-7-4-1614 provides that a Court shall grant relief under Section 1615 only if the Court determines that a person seeking judicial relief has been prejudiced by a zoning decision that is:

a. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

b. Contrary to constitutional right, power, privilege, or immunity;

c. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

d. Without observance of procedure required by law; or

e. Unsupported by substantial evidence.

44. The UDO leaves very little room for discretion, and as it pertains to the specifics of who consents to file the special exception. This Court believes there is no discretion as UDO Section 2.3(R)(1) and (3) uses the mandatory language shall. That wording is intended to show that what ever follows must be provided. It is not discretionary. The UDO requires that any CSES Application shall have certain minimum requirements met. Moss Creek argues that any information that could be provided later on is within the Administrator's complete discretion. This Court disagrees because to interpret the UDO in such a manner would render the stated requirements of any Application to be utterly meaningless. As such an incorrect interpretation of the UDO is by definition arbitrary and capricious and thus meets the threshold of granting judicial relief.

45. The parties each focus on the issue of whether a separate showing of prejudice is required in order to reverse a BZA decision. Moss Creek argues that a separate showing of prejudice to the Petitioners is required in order to challenge a zoning decision.

46. The main cases cited by both sides are First American Title Ins. Co. v. Robertson ex rel. Ind. Dept. of Ins., 990 N.E.2d 9.17 (Ind. Ct. App. 2013) which in summary stands for the proposition that if a decision is arbitrary and capricious that by definition then the Petitioner is prejudiced. The other case cited by Moss Creek is Dunmoyer v. Wells County Indiana Area Plan Commission, 32 N.E.3d 785 (Ind. Ct. App. 2015) which they argue stands for the proposition that merely meeting any of the criteria in I.C. Section 36-7-4-1614(a) is not sufficient to get relief under judicial review, but that an additional showing of prejudice or harm must be shown in order to get relief from a BZA decision.

47. The Court finds in this case that the arguments set out in First American are more persuasive. The statutory judicial review process was modeled after the judicial review process

under the Administrative Orders and Procedures Act (AOPA) which contains a provision identical to that in I.C. Section 36-7-4-1614. There is no separate requirement of specific prejudice spelled out in the AOPA so the Court agrees with the finding of First American which finds "no Indiana Case law requires proving anything beyond establishing that the agency action of issue falls into one of the five enumerated categories set forth in the statute. Stated differently, if a Petitioner establishes that a zoning decision was arbitrary and capricious, they are inherently prejudiced. The Court believes this is the proper standard and therefore no additional showing of prejudice is required.

48. Even if this Court accepted the premise that an actual showing of prejudice is required, the fact that one or more of the Petitioners lives in close proximity to the project satisfies such a requirement.

49. Under 36-7-4-1615 "if the Court finds that a person has been prejudiced under Section 1614 (I.C. 36-7-4-1614) of this Chapter, the Court may set aside a zoning decision and:

a. remand the case to the board for further proceedings; or

b. compel a decision that has been unreasonably delayed or unlawfully withheld."

50. Pulaski County adopted the Pulaski County Unified Development Ordinance. The UDO Section 7.1(B) states "the intent of this ordinance is to provide a regulatory scheme for construction and operation...Solar Energy Systems (SES) in the county; subject to reasonable restrictions, these regulations intended to preserve the health and safety of the public." It goes on to state that "no applicant shall conduct, operate, or locate a SES within Pulaski County without having fully complied with the provisions of this Ordinance." UDO Section 7.1(D)

51. If on judicial review of a BZA decision the Court will not reweigh the evidence but instead is tasked with determining if under the legal standards for review a violation has occurred.

While great weight is given to the agency's decisions, if an agency incorrectly interprets the ordinance in question then no weight is to be given to the ordinance. Pierce v. State Dept. of Corrections, 885 N.E.2d 77, 89 (Ind. Ct. App. 2008) found that "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.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. The BZA decision is arbitrary and capricious and contrary to law, not in accordance with the law, and without observance of procedure required by law. As such, the BZA decision is reversed and set aside.
2. The Application as submitted and supplemented was incomplete and should not have been acted upon until such time as the requirements of the UDO had been fully met.
3. That the Petitioners have been prejudiced by these improper actions of the BZA.
4. That in as much as the Court finds the Application to be incomplete and should not have been acted upon by the BZA, in accordance with I.C. 36-7-4-1615, this Court sets aside the actions of the BZA on the Moss Creek Project and remands the case to the BZA for further proceedings.
5. That because the Court finds the actions of the BZA were arbitrary and capricious, because the Application was incomplete and should not have been acted upon, it need not address the merits of the Application. As such this finding addresses only the threshold question of the actions of the BZA based on the incomplete Application and as such declines to review the merits of the Application filed by Moss Creek.

6. That based on the finding that the actions taken by the BZA were arbitrary, capricious and not in accordance with the law and without observance of procedure required by law the matter is vacated and remanded to the Pulaski Board of Zoning Appeals for further action.

So ORDERED this 7th day of October, 2022.

The Honorable Greta Stirling Friedman
Special Judge, Pulaski Superior Court