IN THE CIRCUIT COURT FOR WASHINGTON COUNTY

STATE OF INDIANA

WASHINGTON COUNTY COMMISSIONERS
by and through the WASHINGTON COUNTY
BUILDING DEPARTMENT,
Plaintiff,

v. Case No. 88C01-2105-PL-338

INDIANA-KENTUCKY LAND HOLDINGS, LLC,
SHANNON D. MELTON, and NELLIE M. MELTON,
Defendants.

OBJECTION TO MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Indiana-Kentucky Land Holdings, LLC, (the "LLC") by its attorneys Young, Lind, Endres & Kraft, by John A. Kraft, and responds to Plaintiff Washington County Commissioners by and through the Washington County Building Department (the "County") and respectfully requests that the Court deny the County summary judgment and in support of its objection states as follows:

MOTION TO STRIKE

In support of its Motion for Summary Judgment, the County designated certain materials including the Complaint filed on May 29, 2021 and Amended Complaint filed on July 20, 2021. The LLC moves to strike these documents to the extent they are used as evidence and any statements of fact asserted therein. These documents were not verified. Any statement of fact contained therein that is not otherwise supported cannot be considered as evidence.

DESIGNATION OF EVIDENCE

1. Affidavit of Steven W. Aulbach (Exhibit A);

2. The photographs attached to the Affidavit of Steven W. Aulbach (Exhibit A-1);

3. The Property Report Card for Parcel # 88-25-20-000-002.013-004 (Exhibit A-2);

4. The Property Report Card for Parcel # 88-25-20-000-002.008-004 (Exhibit B);

5. Default Judgment dated January 12, 2022 in Case No. 88C01-2111-PL-664 (Exhibit C).

UNDISPUTED FACTS

The LLC is the owner of certain real estate commonly known as S Side E Pear Orchard Dr, Lot #13, Salem, Indiana (the "Real Estate"). (Ex. A, ¶ 3). On or about December 12, 2018, the LLC entered into a contract to sell the Real Estate to Defendants Shannon D. Melton and Nellie M. Melton (the "Meltons"). (Ex. A, ¶ 4). The LLC only sold vacant land to the Meltons and did not sell a vehicle, any sort of mobile unit, manufactured home or anything similar, or any other personal property. (Ex. A, ¶ 5). There has never been a dwelling or permanent residence constructed upon the Real Estate. (Ex. A, ¶ 7, 8).

At some point while the LLC did not have rights of possession of the Real Estate, someone placed personal property upon the Real Estate. (Ex. A, ¶ 10; Ex. A-1). There is currently a camper and a recreational vehicle placed upon the Real Estate. (Ex. A, ¶ 10; Ex. A-1). Each is on wheels and is not connected to or installed upon the Real Estate. (Ex. A, ¶ 11; Ex. A-1). There is no foundation or other evidence of attachment to the Real Estate. (Ex. A, ¶ 12; Ex. A-1).

The LLC has paid the property taxes and assessments levied against the subject Real Estate to the Washington County Treasurer. (Ex. A, ¶ 13). The assessments have always shown a valuation of improvements as Zero ($0.00) Dollars. (Ex. A, ¶ 13; Ex. A-2).

The Real Estate is not in a flood zone or in a special flood hazard area. (Ex. A, ¶ 14). The LLC has never been notified of remapping of the flood maps. (Ex. A, ¶ 15). The LLC has never purchased flood insurance. (Ex. A, ¶ 16).

These are the *only* undisputed facts. As stated in the Motion to Strike, any facts or exhibits contained therein are not verified and therefore are not admissible into evidence.

STANDARD OF REVIEW

The County has moved the Court for summary judgment. This Court should only grant summary judgment when there are no genuine issues of material fact and the movant has demonstrated that it is entitled to judgment as a matter of law. Hizer v. Holt, 937 N.E.2d 1 (Ind.App. 2010); Ind. TR 56(C). "All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party." Boehringer v. Weber, 2 N.E.3d 807 (Ind.App. 2014). Therefore, all facts and reasonable inferences therefrom must be reviewed and construed in favor of the LLC as the nonmovant. The burden of proving the absence of an issue of material facts is on the movant – here, the County. *Id.* As the moving party, the County has failed to meet their burden of proof to show an absence of material fact. Since the County has failed to meet this burden, there has been no shift to the LLC to show the existence of the same. The County is certainly not entitled to judgment as a matter of law through summary judgment.

In fact, it is clear that the LLC is entitled to summary judgment as a matter of law. Each of the undisputed facts only points in favor of the LLC and the Court should enter judgment accordingly.

ARGUMENT

The County has failed to argue under what theory of recovery it is justified. The Motion for Summary Judgment simply states that it is entitled to judgment. But why? There is no legal argument. In fact, no law is cited at all. It is impossible for the LLC to defend against an unknown

theory and, in fact, the LLC is not required to do so. Based on this alone, the County is not entitled to summary judgment.

In the Affidavit of Travis Elliot, the County asserts that "there exist one or more mobile units on the property without receiving proper septic, building or health department permits required for this property," and "[b]efore a Mobile Unit can be placed on the property a Temporary Site Improvement Application must be made." The LLC is forced to assume that the County is asserting a violation of those sections stated in its Amended Complaint, since the County failed to state any legal principal in its Motion for Summary Judgment. Without waiving the LLC's argument that it should not be forced to defend without actually knowing the theory or its argument that the County has already completely failed to meet its burden, the LLC is forced to pretend as though the ordinance citations of the Amended Complaint are the actual legal theories: Sections 150.58, 150.60 and 151.21 of the Washington Civil Code.

"[Z]oning ordinances limit the free use of property, are in derogation of common law and must be strictly construed." *TW Thom Const., Inc. v. City of Jeffersonville*, 721 N.E.2d 319, 325 (Ind.App. 1999). The ordinance should be interpreted "as a whole" and the Court must "give its words their plain, ordinary, and usual meaning." *Daily v. City of Columbus Bd.*, 904 N.E.2d 343, 345 (Ind.App. 2009). In interpreting an ordinance, the court should "ascertain the intent of the drafter by giving effect to the ordinary and plain meaning of the language used." *TW Thom Const., Inc.*, 721 N.E.2d at 324 (quoting *Bryant v. Indiana State Dep't of Health*, 695 N.E.2d 975, (Ind.Ct.App. 1998)). "Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute." *Id.* (quoting *ModuForm, Inc. v. Harry H. Verkler Contractor, Inc.*, 681 N.E.2d 243 (Ind.Ct.App. 1997)). If this Court reads the three (3) ordinances giving the words used their plain, ordinary, usual meanings, then the Court must interpret the ordinances in favor of the LLC and find that the LLC is not in violation of any of them.

I. The LLC has not violated Section 150.58 as this section requires that "installation" of a home or place of residence exist and the facts show that that does not exist in this case.

Section 150.58 states as follow:

> (A) A local building permit shall be required for the following specific instances:
>
> (1) All new one- and two-family dwellings;
>
> (2) All manufactured homes, including modular homes, single wide manufactured homes or double wide manufactured homes and all other preconstructed or manufactured trailers or units, recreation vehicles or otherwise, in which a permanent place of residence is being established and being transported into the county for installation in the county;
>
> (3) Residential parts of mixed occupancy buildings; and
>
> (4) Conversions of buildings from nonresidential to residential or partly residential.

Nothing in this section requires a building permit in order to place a recreational vehicle or a camper on land. It is only *might* require a permit for a recreational vehicle *if* it is being established as a "permanent place of residence" and is being "installed."

The County has stated that there exist "mobile units" on the Real Estate. To the extent a "mobile unit" qualifies as another "preconstructed or manufactured trailer[] or unit[] . . . in which a permanent place of residence is being established and being transported into the county for installation in the county," is a question of fact as "mobile unit" is not otherwise defined within the Washington County Code nor is "installation" defined in the Washington County Code. The County has offered no facts in support of its conclusion that the subject "mobile unit" falls into those the purview of the ordinance nor, more specifically, that camper falls under this ordinance. In fact, there are a recreational vehicle and a camper placed upon the Real Estate. As for the presence of the recreational vehicle, the County has offered no facts to show that "a permanent place of residence is being established," or that "installation" has occurred. The ordinance does not define these terms. Black's Law Dictionary does not define these terms. Generally,

"installation" requires something more than mere placement in a location. For example, if a person purchases a pool and pays for installation, he would expect that a hole would be dug, the pool leveled, grounded, and secured inside the hole, and then the pool connected to the water lines, pump, motor, et cetera. He would not expect the "installer" to merely place the pool on the ground and leave.

The facts pertinent to this case show that the recreational vehicle and camper placed upon the Real Estate *do not* fall under the purview of this ordinance. The mere presence of a recreational vehicle or camper upon the Real Estate does not qualify as installation. As seen stated in the Affidavit of Steve Aulbach and seen in the photograph, they are on wheels. Neither has a foundation. Neither has any other means of attachment or installation upon the Real Estate. They are merely present as if they were present in a parking lot. The LLC sold the subject real estate to the Defendants Shannon and Nellie Melton on contract. The LLC did *not* sell the recreational vehicle nor the camper to the Meltons as part of a land transaction. Recently, this Court awarded a judgment against the Meltons, declaring the real estate agreement forfeited and the title vested solely in the name of the LLC. (Ex. C). The LLC did *not* lay claim to the recreational vehicle nor the camper as each is personal property. The Meltons are gone. The recreational vehicle and the camper are left. This clearly indicates that a "place of residence" was not being established as each is on wheels and could easily have been driven off the Real Estate with the Meltons.

Therefore, through a plain, ordinary reading of the words of the ordinance, the presence of the recreational vehicle and the camper on the Real Estate does not bring them into the purview of the ordinance.

Further, it is clear that whether or not something is attached to the real estate affects its classification. Attached as Exhibit A-2 is a true and correct copy of the property report card for the subject Real Estate. On the left side under "Property Class" it is stated as "vacant- platted lot."

Likewise, under the "Valuation Records" in the middle of the page, the assessment is $0.00. This indicates that there is no improvement upon the property – obviously nothing is installed. This may be further compared with a property across the street from the subject property. A true and correct property card for Parcel # 88-25-20-000-002.008-004 is attached hereto as Exhibit B. For this comparable, under "Property Class" it specifies "Mobile or Manufactured Home – Plat and under the "Valuation Records" it shows improvements valued at $15,100.00. Further, under "Market Model" it states that it is "singlewide/foundation." It is clear that there is a distinction when a structure is attached to the Real Estate and the same is indicated on the tax records. As shown above, there is no "foundation" or other evidence of attachment or "installation" of a permanent residence here.

The terms "recreational vehicle," "camper," and "installation" are commonplace terms and are not otherwise defined by the Washington County Code. If the drafters of the ordinance wished to include these terms, it had the opportunity to do so. However, they elected not to include them. Presumably this is because recreational vehicles and campers do not generally do not become "installed" upon real estate or attached to the ground via a foundation. Regardless, because Washington County is the drafter of this ordinance, it must be interpreted in favor of the LLC. It is clear that the LLC is not in violation of Section 150.58 of the Washington Civil Code. Summary judgment cannot be granted in favor of the County and, really, should be granted in favor of the LLC.

II. The LLC cannot be in violation of Section 150.60 as this section only applies if a permit is required which, as shown above, does not apply here.

Again, without waiving argument herein, in its Amended Complaint, the County alleged that the LLC is in violation of Section 150.60. That section establishes a few "minimum housing standards." In the Affidavit by Travis Elliot submitted by the County, it merely says that "there

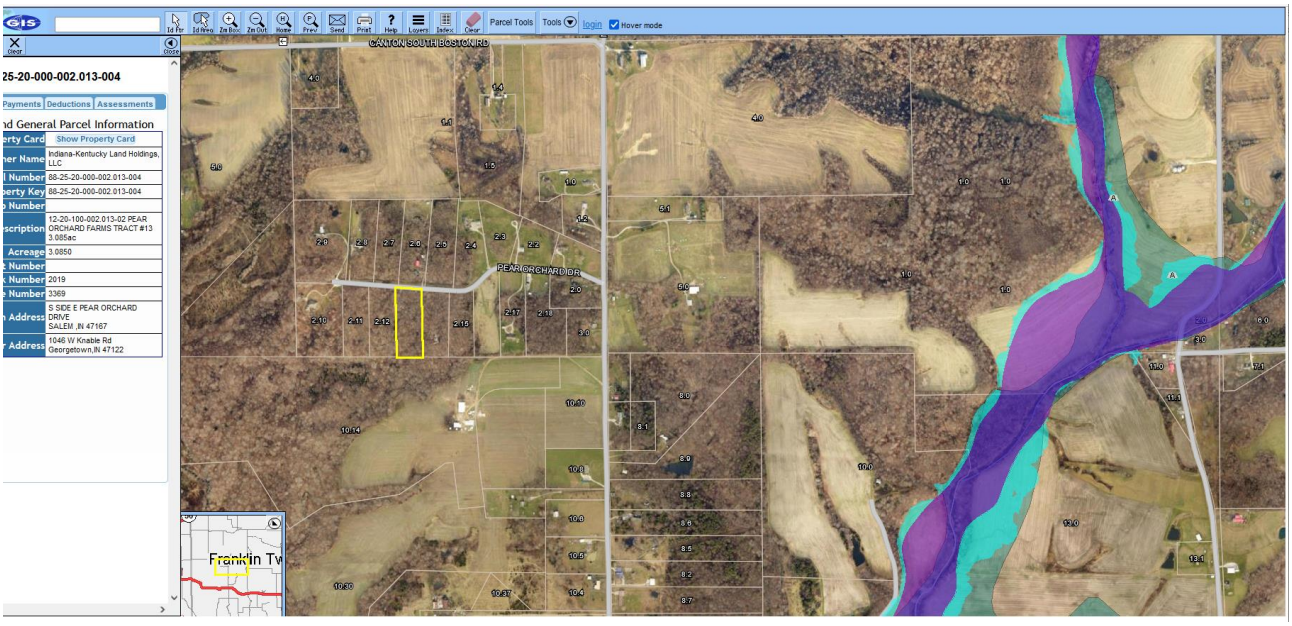
exist one or more mobile units on the property without receiving proper septic, building or health department permits required for this property." However, it does not say what permits are missing or are required. The County has, again, failed to show that it can require permits as no permanent place of residence has been or is being installed on the Real Estate. It does not even appear as though the County knows what is "missing" as it says septic, building "*or*" health department permits are missing.

The County does allege that a "temporary site improvement application" must be made before a mobile unit can be placed on the property. However, the County does not show the law that requires this. It certainly is not required by Title XV: Land Usage of the Washington County Code which encumbers the subject sections alleged of 150.58, 150.60, and 151.21.

The County has failed to demonstrate what exactly the violation is. Once again, there is certainly a genuine issue of material fact present. The LLC is completely unable to defend against this allegation as no specific facts are present. Clearly, summary judgment is wildly inappropriate.

III. As the subject Real Estate is not within a flood zone or special flood hazard area, Section 151.21 does not apply to it and the LLC cannot be in violation.

Again, without waiving argument herein, in its Amended Complaint, the County alleged that the LLC is in violation of Section 151.21. The land in question is not even subject to this section. Section 151.10 defines the "Lands to Which This Chapter Applies,"" as "all [Special Flood Hazard Areas] and known flood prone areas within the jurisdiction of Washington County." The subject property is not within the SFHA or other flood zone. A screen shot of the GIS map shows the subject property outlined in yellow while the layers for "Flood Plains" and "Flood Plains IN DNR Best Available" were activated. Those areas are highlighted in teal and purple to the right of the picture and are clearly *very* far away from the subject property.



So, it is clear that the LLC cannot be in violation of this section. Even more importantly, the County did not even allege that the LLC was in the flood zone nor provide any evidence thereof. The LLC has denied that it is in a flood zone or special flood hazard area. So, the County has failed to meet its burden of proof in demonstrating that it is entitled to judgment. Once again, it is clear that summary judgment should be entered in favor of the LLC as it cannot be in violation of this ordinance section.

IV. The County is not entitled to damages as (1) there are no violations of the Washington County Code and (2) it has not requested any.

Additionally, even if the County is successful on its claims for violations of the Washington County Code, it has not requested damages nor given evidence of any damages. Therefore, a monetary fine under the code cannot be awarded.

Without waiving the argument that (1) there have been no violations on which to award damages and (2) that the County has not even asked for damages, it is clear that the Court cannot award damages because the County has not submitted any evidence of what the damages are.

Section 150.99(D) of the Washington County Code outlines a potential *penalty* for violations of Sections 150.55 through 150.61, allowing for a fine of $250. Section 150.99(A) outlines a potential *penalty* for violation of Section 151.21, allowing for "a fine *not exceeding* $2,500." Therefore, even if the Court were to find that damage should be awarded, it has complete discretion in the award.

Further, the Court must take into consideration that these are *penalties* prescribed by the ordinance rather than a provision for liquidated damages or a measure of actual damages. Penalties are often unenforceable. An ordinance is merely a contract between the governing entity and the persons who are located there. In order for a person to lawfully exist in within the governing entity's borders, he must comply with the rules. Indiana courts "have refused to enforce contracts when their provisions are unconscionable or when they offend the laws of this State." *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*, 136 N.E.3d 208 (Ind. 2019). A party seeking to enforce such a clause "may be required to show a correlation between the liquidated damages and actual damages in order to assure that a sum charged may fairly be attributed to the breach." *Id.* (quoting *Harbours Condo. Ass'n v. Hudson*, 852 N.E.2d 985 (Ind.Ct.App. 2006)). "When liquidated damages are grossly disproportionate to the loss that results from the breach or are unconscionably in excess of the loss sought to be asserted, [] courts will treat the sum as an unenforceable penalty." *Id.* (quoting *Art Country Squire, L.L.C. v. Inland Mortg. Corp.*, 745 N.E.2d 885 (Ind.Ct.App. 2001)). It is not clear how having a moveable recreational vehicle and trailer present on the Real Estate correlates to a penalty of $250.00 per day of violation. It is not clear how not have a specific permit only applicable to properties within the flood zone or special flood hazard area of correlates to a penalty of $2,500.00 per day of violation. In fact, the amount of damages to remove a recreational vehicle and camper *on wheels* is entirely quantifiable thereby making a penalty even more inappropriate.

Again, the County has not even requested damages and has given no facts in support of such an award. Because the County is the party requesting summary judgment and has the burden of proof, it can only be awarded nothing.

CONCLUSION

The Washington County Commissioners by and through the Washington County Building Department has failed to demonstrate that there are no arguable issues of material fact entitling it to judgment and therefore, the Court must deny the same. There is no evidence of damages of which to award the County either. For the same reasons, the Court should enter summary judgment in favor of Defendant Indiana-Kentucky Land Holdings, LLC.

Respectfully submitted,

/s/ John A. Kraft

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served through the Indiana e-filing system this 26th day of January, 2022 upon John F. Dietrich.

/s/ John A. Kraft

John A. Kraft #54966-22