COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING
CASE NO. 2020-00417

JOHN PITT AND STEVE BALDWIN, Intervening Parties

In the Matter of:
ELECTRONIC APPLICATION OF HORUS
KENTUCKY 1 LLC FOR A CERTIFICATE
OF CONSTRUCTION FOR AN APPROXIMATELY
69.3 MEGAWATT MERCHANT ELECTRIC
SOLAR GENERATING FACILITY IN SIMPSON
COUNTY, KENTUCKY

NOTICE OF FILING ON BEHALF OF JOHN PITT AND STEVEN BALDWIN

Come now the Intervening Parties, John Pitt and Steve Baldwin, by and through counsel, and hereby provide notice of the filing of the following documents, attached hereto:

- Simpson Circuit, Civil Action No. 21-CI-00064- Verified Complaint
- Simpson Circuit, Civil Action No. 21-CI-00064- Memorandum, Opinion and Order Granting Defendants' Motion to Dismiss
- Simpson Circuit, Civil Action No. 21-CI-00064- Plaintiffs' Motion to Alter, Amend or Vacate Memorandum, Opinion and Order Granting Defendants' Motion to Dismiss
- Simpson Circuit, Civil Action No. 21-CI-00064- Order Denying Plaintiffs' Motion to Alter, Amend or Vacate
- Simpson Circuit, Civil Action No. 21-CI-00064- Notice of Video Appeal
- Simpson Circuit, Civil Action No. 21-CI-00135- Verified Complaint

- Simpson Circuit, Civil Action No. 21-CI-00135- Memorandum, Opinion and Order Denying in Part and Granting in Part Defendants' Motion to Dismiss

This the 12 day of November 2021.

Respectfully submitted,
BRODERICK & DAVENPORT, PLLC
921 College Street-Phoenix Place
Post Office Box 3100
Bowling Green, KY 42102-3100
Telephone: (270) 782-6700
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DAVID F. BRODERICK
BRANDON T. MURLEY

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing was filed electronically with the Kentucky Public Service Commission by using the Commission's eFiling system, and that a true and exact copy of the same was sent via electronic mail to:

Randall L. Saunders
Nelson Mullins Riley & Scarborough LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
randy.saunders@nelsonmullins.com
Co-Counsel for Defendants Roger Hoffman, Summers Hodges Farm, LLC and Horus Kentucky I, LLC

This the 12 day of November 2021.

DAVID F. BRODERICK
BRANDON T. MURLEY

COMMONWEALTH OF KENTUCKY
SIMPSON CIRCUIT COURT
CIVIL ACTION NO. 21-CI-00064
ELECTRONICALLY FILED

STEVE BALDWIN and
JOHN PITT PLAINTIFFS

v.

VERIFIED COMPLAINT

FRANKLIN-SIMPSON COUNTY
PLANNING & ZONING
ADJUSTMENT BOARD;

Please serve:
Franklin-Simpson County
Planning & Zoning Adjustment Board
Chris Kummer, *Chairman*
101 Courthouse Square
Franklin, KY 42134

Carter Munday
P&Z Administrator
101 Courthouse Square
Franklin, KY 42134

W. Scott Crabtree
Franklin-Simpson City Attorney
212 S. College Street
Franklin, KY 42134

Robert Link
Franklin-Simpson Planning and Zoning Attorney
205 W. Kentucky Ave.
Franklin, KY 42134

ROGER HOFFMAN;

Please serve:
Roger Hoffman
1515 Roark Road
Franklin, KY 42134

SUMMERS HODGES FARM, LLC;

Please serve:
Gary Summers, Registered Agent

640 Kenny Perry Drive
Franklin, KY 42134

and

HORUS KENTUCKY 1, LLC

DEFENDANTS

Please serve:
Cogency Global Inc., Registered Agent
828 Lane Allen Road, Suite 219
Lexington, KY 40504

Comes now the Plaintiffs, Steve Baldwin and John Pitt, by and through counsel, pursuant to KRS § 418.040, *et seq.* and KRS § 100.347, and for their Verified Complaint, state as follows:

PARTIES AND JURISDICTION

1. The Plaintiff, Steve Baldwin, is the owner of real property located at 172 Hendricks Road, Franklin, Kentucky.

2. The Plaintiff, John Pitt, works and farms the real property located at 172 Hendricks Road, Franklin, Kentucky.

3. The Defendant, Franklin-Simpson County Planning & Zoning Adjustment Board (hereinafter "Franklin-Simpson BOA") is an entity created under the authority of KRS Chapter 100, and is empowered with creating and administering rules and regulations governing the use of land in the city and county of Franklin, Simpson County, Kentucky. Its agents for service of process are: Board of Adjustment Chairman, Chris Kummer, 101 Courthouse Square, Franklin, KY 42134; Planning and Zoning Administrator, Carter Munday, 101 Courthouse Square, Franklin, KY 42134; Franklin-Simpson City Attorney, W. Scott Crabtree, 212 S. College Street, Franklin, KY 42134; and

Planning and Zoning Attorney, Robert Link, 205 W. Kentucky Avenue, Franklin, KY 42134.

4. Upon information and belief, the Defendant, Roger Hoffman, is a Kentucky citizen owning real property in Franklin, Simpson County, Kentucky.

5. The Defendant, Summers Hodges Farm, LLC (hereinafter "Summers Hodges Farm"), is a Kentucky limited liability company registered with the Kentucky Secretary of State, having its principal office and registered agent, Gary Summers, located at 640 Kenny Perry Drive, Franklin, KY 42134.

6. The Defendant, Horus Kentucky 1, LLC, (hereinafter "HK1"), is a foreign limited liability company registered with the Kentucky Secretary of State, having its principal office located at 1030 Riverside Parkway, Suite 130, West Sacramento, CA 95605. Its registered agent for service of process is Cogency Global, Inc., 828 Lane Allen Road, Suite 219, Lexington, KY 40504.

7. Venue is proper in this Court as all acts complained of herein occurred in Simpson County, Kentucky.

FACTUAL ALLEGATIONS

8. The property that the Plaintiffs have a shared interest in is located at 172 Hendricks Road, Franklin, KY (hereinafter "Plaintiffs' property"), and is in close proximity to real property owned by Roger Hoffman and Summers Hodges Farm on Tyree Chapel Road, Franklin, KY.[1]

[1] Hoffman is the owner of 309.14 acres and Summers Hodges Farm, LLC owns 124.6658 acres.

9. The land in this portion of Simpson County is primarily used for agricultural purposes, including Plaintiffs' property and the Defendants Hoffman and Summers Hodges Farms' properties. Agricultural use of the parties' land is in conformity with applicable zoning regulations and other surrounding lots.

10. On or about January 5, 2021, HK1, through an agent, applied for a conditional use permit to be heard before the Franklin-Simpson BOA on behalf of Hoffman and Summers Hodges Farm.

11. From the application, it appears that the Defendant HK1 desires to construct and install solar panels on some, or all, of the approximate 434 acres owned by Hoffman and Summers Hodges Farm on Tyree Chapel Road. No limiting condition regarding scope, size or acreage of the proposed solar farm was offered by HK1 with the conditional use permit application.

12. Upon information and belief, the lease(s) between Defendants HK1 and Hoffman and/or Summers Hodges Farms would have term(s) of at least thirty, but up to forty years of solar panel operation on the subject land.

13. Pursuant to the Franklin-Simpson County Zoning Regulations, Article 12 (Board of Adjustment), Section 12.1.2, all conditional use permit applications are heard and decided by the Franklin-Simpson BOA.

14. A public hearing for this matter was held before the Franklin-Simpson BOA on February 22, 2021. (Transcript of the February 22, 2021 Hearing, in relevant portion, is attached hereto as Exhibit A).

15. During said hearing, various neighbors of Hoffman and Summers Hodges Farm attended the hearing and voiced their concerns, including the Plaintiffs, who were represented by the undersigned at said hearing.

16. An HK1 representative, Braden Houston, was present at the hearing and indicated that HK1 entered into a long-term power purchase agreement with the Tennessee Valley Authority, which was seemingly contingent upon the solar panels being constructed at Tyree Chapel Road.

17. Article 8 (Schedule of Zoning District Regulations), Section 8.2 of the Franklin-Simpson County Zoning Regulations address conditional use permits for property in agricultural districts. Specifically, Section 8.2.3 provides applicable conditional use permits that may be granted in agricultural zones:

> Subject to the approval of the Board of Adjustment, the following uses *may* be approved within an agricultural district:
>
> a. One duplex per lot; airports and landing strips, *solar farms as in Section 9.8*, cemeteries, hospitals, public or private schools or colleges, home occupations when in compliance with section 9.3, oil or gas wells, country club or gold course, public parks, playgrounds and community centers, private marine, boat dock, boat ramp, driving range or private outdoor recreational activity, manufactured some parks complying with section 8.8.13.
>
> b. Other uses which are similar in nature to the uses listed in 8.2.3.A and *which would not be detrimental to or alter the basic agricultural character of the neighborhood* in which the use is located. (*See* Franklin-Simpson County Zoning Regulations, Article 8, Section 8.2.3)(emphasis ours).

18. Notably, Article 9 (Special Regulations), Section 9.8 of the Franklin-Simpson County Zoning Regulations states that a Developmental Plan is required for

Solar Farms of 10 acres or more. This Section includes many specific requirements for a Developmental Plan, including: "the location and dimensions of all proposed areas for placement of solar panels, screening and fencing and related structures; location of any proposed solar access easements[;] . . . locations for wiring interconnections . . . [;] Decommissioning plan that describes the anticipated life of the solar farm . . . [; etc.]".

19. Additionally, Article 12, Section 12.2.2(b) states that:

> [t]he application for a conditional use permit **shall** include the application form and a plan. The plan, drawn to scale, shall show as a minimum, the dimensions of the lot to be built upon, the outside dimensions of all existing buildings and all buildings to be constructed or altered. In addition, the use of buildings, yard depths, and any other information necessary in order to refer a decision on the conditional use permit. (*See* Franklin-Simpson County Zoning Regulations, Article 12, Section 12.2.2(b))(emphasis added).

20. The application of the Defendants' conditional use permit included no "plan" meeting the requirements of Sections 9.8 and/or 12.2.2(b) of the Franklin-Simpson County Zoning Regulations.

21. In addition to this application flaw, the main concern of the Plaintiffs, and other neighboring landowners, is that the proposed solar farm would significantly alter the basic agricultural zoning character of the 434 acres, as well as the surrounding properties, in contradiction of Franklin-Simpson Zoning Regulations Section 8.2.3.

22. Ultimately, the Franklin-Simpson BOA granted the conditional use permit, without making any kind of written or oral adjudicative findings of fact.

23. As the intended use of the 434 acres does not align with the character of the surrounding properties, the Plaintiffs seek declaratory and injunctive relief from this Court.

CAUSES OF ACTION:

Count I - Appeal Pursuant to KRS § 100.347(1)

24. Plaintiffs incorporate Paragraphs 1-23 as if fully stated herein and further allege as follows.

25. The oral grant of the conditional use permit by the Franklin-Simpson Board of Adjustment was arbitrary, capricious, without substantial evidence, and in contradiction with Franklin-Simpson Zoning Regulations.

26. Additionally, the failure of the Franklin-Simpson BOA to make any written or oral adjudicative findings of fact regarding the grant of the conditional use permit was arbitrary, capricious, without substantial evidence, and in contradiction with Franklin-Simpson Zoning Regulations.

27. Due to the aforementioned actions of the Franklin-Simpson BOA, the substantive rights of the Plaintiffs have been materially prejudiced, with the only adequate remedy being reversal of the Franklin-Simpson BOA's grant of the Defendants' conditional use permit.

Count II - Declaratory Judgment as to the Approval of the Building Permit

28. Plaintiffs incorporate Paragraphs 1-27 as if fully set forth herein and further allege as follows.

29. An actual controversy exists as to whether the conditional use permit at issue should have been granted, considering the use requirements of the subject

property's current agricultural zoning and the Defendants' failure to meet the applicable standards set forth in Franklin-Simpson County Zoning Regulations.

30. Accordingly, Plaintiffs request the entry of a declaratory judgment stating that the actions of the Franklin-Simpson BOA were arbitrary, capricious and/or without substantial evidence.

31. Further, Plaintiffs seek a declaratory judgment that the Franklin-Simpson BOA's grant of the conditional use permit was in error and contrary to relevant city ordinances and/or regulations.

WHEREFORE, the Plaintiffs, Steve Baldwin and John Pitt, request the following relief:

1. A trial by jury on all such issues so triable;
2. A judgment that the actions of the Franklin-Simpson County Planning & Zoning Adjustment Board, in granting the Defendants' conditional use permit, were arbitrary, capricious, and/or without substantial evidence;
3. An appeal and review of the actions of the Franklin-Simpson County Planning & Zoning Adjustment Board, and ultimately, a judgment reversing and rescinding the Franklin-Simpson Board of Adjustment's grant of the Defendants' conditional use permit, further preventing the Franklin-Simpson Board of Adjustment from granting any conditional use permit for the subject land that is not in conformity with the agricultural district's character; and
4. Any and all other relief to which the Plaintiffs may appear entitled.

This the 11 day of March, 2021.

Respectfully submitted,

BRODERICK & DAVENPORT, PLLC
921 College Street-Phoenix Place
Post Office Box 3100
Bowling Green, KY 42102-3100
Telephone: (270) 782-6700
Facsimile: (270) 782-3110

____
DAVID F. BRODERICK
BRANDON T. MURLEY
Counsel for Plaintiffs

VERIFICATION

I, John Pitt, acknowledge that I have read the foregoing and the statements contained herein are true and correct to the best of my knowledge and belief.

JOHN PITT
Plaintiff

COMMONWEALTH OF KENTUCKY)
COUNTY OF Simpson)§
)

ACKNOWLEDGED, SUBSCRIBED AND SWORN to before me on this 9th day of March, 2021 by John Pitt, knowingly and as his free act and deed.

NOTARY PUBLIC, STATE AT LARGE
My Commission Expires: 10/24/2024
Notary Identification No.: KYNP16955

VERIFICATION

I, Steve Baldwin, acknowledge that I have read the foregoing and the statements contained herein are true and correct to the best of my knowledge and belief.

Steve Baldwin
STEVE BALDWIN
Plaintiff

COMMONWEALTH OF KENTUCKY)
COUNTY OF Simpson)§
)

ACKNOWLEDGED, SUBSCRIBED AND SWORN to before me on this 9th day of March, 2021 by Steve Baldwin, knowingly and as his free act and deed.

Winona L. Fisher
NOTARY PUBLIC, STATE AT LARGE
My Commission Expires: 10/24/2024
Notary Identification No.: KYNP16955

HOFFMAN & SUMMERS APPLICATION FOR CONDITIONAL USE PERMIT ON TYREE CHAPEL ROAD TRANSCRIPTION

SIMPSON COUNTY

Time starts – 41:52.

DFB – I am David Broderick; I am an attorney from Bowling Green Kentucky. I represent Mr. Baldwin and Mr. Pitt. Mr. Baldwin owns the property, Mr. Pitt works the property, they're close by neighbors in this situation. I have some questions for Mr. Houston and also for one thing I would like to ask Mr. *inaudible* (42:27) one question, I understand under your rules and regulations under 9.8, the criteria are that this would not alter the agricultural area of the neighborhood. Is that correct?

Mr. Link – I don't know if that is quite the proper way to put it, but any traditional use-they look at it's impact on the surrounding areas.

DFB – In particular when we have the solar farm, it talks about the actual *inaudible* (42:54) does it not? In 9.8?

Mr. Link – Uh, I don't know.

DFB – Excuse me, I mean 8.2.3.

Mr. Link – You're in what section David?

DFB – 8.2.3. In section B it says, "Which would not be detrimental or alter the basic agricultural character of the neighborhood which use is located.

Mr. Link – Well that's talking about other uses.

DFB – It's all under conditional-

Mr. Link – A talks about things that may be conditionally permeated. And B says other uses which are similar in nature may also be in A23A and which would not be detrimental to or alter the basic agricultural character.

DFB – And that's the standard I thought we would be applying tonight, because you have to get a conditional use permit.

Mr. Link – Well that particular language is only talking about other uses.

DFB – Okay, well again that's part of our argument and questions that I like to ask. Mr. Houston I'd like to talk to.

DFB – Mr. Houston I'd like to establish some things, one the use of this 436.81 acre farm is not going to be of any agricultural use it.

Houston – I would-

DFB – Do you know what a farm is?

Houston – That's not the primary use-it would be a solar farm.

DFB – I understand your solar panels, but what about crops-

Houston -For the most part, maybe some sheep but-

DFB – And you talk about neighborhoods but how many neighbors did you talk to about your project?

DFB – I apologize, I literally picked this project up a couple years ago, maybe a couple months ago. So I don't know if the people prior to me reached out to anybody locally or not.

DFB – So you couldn't tell the members of the commission tonight that no neighbors know of the 436 plus acres of solar panels-

Houston – Let me ask just one quick question-(directed to person behind him) have we reached out to anybody locally, within the neighborhood?

? - *inaudible* (46:00)

Houston – Okay so it sounds like we reached out to the neighbors-*inaudible discussion between DFB and person off camera* (46:16) – so basically to answer your question we initially when we started the process, we reached out to a number of neighbors in that area that would be interested in working with us to have solar panels put on their property. So depending on how those interactions work out, sometimes we leave a message or never get a call back, sometimes we reach out and nobody is home or sometimes we reach out and somebody doesn't live on the property. We do a very extensive job of reaching out to neighbors, but sometimes we don't everybody-

DFB – How many letters did you send?

Houston – I don't know, how many letters did we send? (directed to someone off camera & mic)

DFB – I'm just trying to get the communication *inaudible* before we get a family lawsuit out before we fault anybody (46:55)

Houston – Like I said, we did reach out. This was our initial process, we reach out to many neighbors and if we like the location-imagine, it's right under that transmission line. We reached

out to-I wanna say, and again I did not do this, but I wanna say we reached out to 7 or 8 neighbors all within that area. Now smaller properties may not fit our criteria, but I know for a fact we reached out to a number of property owners here, we mentioned what we wanted to do, sometimes we did not get the feedback, sometimes we get feedback where they're not interested very much but we did actively reach out to those individuals at the time.

DFB – "We" as in not you?

Houston – "We" as in a company. Yes, that's correct.

DFB – While were on about your company since you brought it up, every member of the board of directory is a citizen *inaudible* (47:43) correct?

Houston – That is correct, Yep.

DFB – So there isn't a U.S citizen involved in this at all is there?

Houston – I'm a U.S citizen I'm a D-

DFB – Yes but you're a (inaudible* (47:50) correct?

Houston - *nods in agreeance*

DFB – Now where is it that you live?

Houston – I live in Eastern Massachusetts.

DFB – I understand that your company sometimes says that it's headquarters are in Sacramento California?

Houston – Uh, that is where we used to be headquartered at and now we are headquartered in Florida.

DFB – And that just changed didn't it?

Houston – Uh, yeah obviously months ago.

DFB – Okay because your secretary of state says your headquarters are in Sacramento.

Houston – Well, again we are based out of Florida. We are a Delaware Company.

DFB – You are a Delaware company, with only directors and *inaudible* (48:27)

Houston – Okay.

DFB – Is that correct?

Houston – That is correct.

DFB – Now so-you're not the owner of the company?

Houston – No

DFB – You're simply here as the promoter for the company.

Houston – I'm the lead developer so I have a good handle on what's going on-

DFB – Well the reason I asked is in the application they talk about who is going to be the principal person and you signed your name-

Houston – That's correct.

DFB - which you're really not the principal person are you?

Houston – I am the primary developer; I am in charge of this project. That is me signing it-it's pretty accurate.

DFB – Name of principal petitioner, it says it's you *inaudible* (49:08)

Houston – Yes that's correct, and I am-

DFB – You made reference to what you were going to do with all of the land surrounding this area-

Houston – Yes, most of it.

DFB – So you agree that what you're doing is different than all of the land around it, is that correct?

Houston – I would say it's different, of course yes.

DFB – Well, it's different than an agricultural farm.

Houston – Yes.

DFB – So that is altering the area correct?

Houston – I would say *inaudible* (49:35)

Tim – Let's just do this before you move on, because you've asked Mr. Link this, and I want the Board to understand that our position on the law is different than Mr. Broderick's position on the law. When you look at section 8.2.3, it's broken down into two categories of projects-

DFB – Mr. Chairman, can I make the suggestion, if we're gonna make arguments let's do it later on, let me finish what I was doing.

Houston – I think this is part of the issue.

Chris K – I'm gonna call time-out, I've been on this board for about two years and I wanna make sure we get this right for everybody's benefit that's here and people that are for or against it.

Counselor - Every member needs to look and read section 8.2.3. So they understand what they're ruling.

Chris K – I don't have that in my notes that we've had *inaudible* (50:40)

Counselor – This is conditional uses in an ag zone.

Chris K – Does everyone else have it? *replies in agreeance* I guess I'm missing it in my notes, um now I'm gonna take a minute and read it.

side conversations about notes

Board member – I just want to be sure-I'm not going to be able to address this issue at this point in time.

Chris K – I just want to make sure everybody's heard, it's not a courtroom. I mean I've spent a lot of time with you on planning and zoning on a fight called triple m once one time. I certainly understand the neighbors concern and everything else, I want everybody to be heard in a respectful manner without Mr. Houston being crashed on all sides and I don't know the best way to do that, I mean I'll be honest. I think maybe proceed like we are and have a rebuttal if you will, if that's fair enough let's go one at a time and the neighbors can speak, I don't know how far I wanna go with neighbors questioning but-

Houston – Yeah I'm here to answer everybody's questions, that's why I'm here. If you guys have questions I might have the answers-

Chris K – So for right now, Mr. Broderick is the first to ask questions so let's just continue down this path with him and go from there please.

DFB – So, I understand your approach tonight is that you will increase *inaudible* (55:00) correct?

Houston – That-yeah that's pretty evident.

DFB – So do you have a letter from the department of revenue saying that's what the *inaudible* (55:05) will do?

Houston – I do not no, this is what the assessor will do once the project is finally constructed, the assessor will tell us what that amount will be.

Houston – I understand that, but when you presented to these gentlemen tonight as if it were the *inaudible* (55:22)-

Houston – No, it is not the *inaudible* (55:23) if you recall, I said "I am not the one that's makes this decision". The assessor will tell us once this project is finally constructed, what exactly our tax bill will be.

DFB – So you do not know what the tax bill will be?

Houston – I do not know, it is going to be in the range-based on what we looked at, of approximately-

DFB – How do you know that if you didn't talk to anybody?

Houston – We looked it up, it's public information.

DFB – You looked up what the department of revenue-

Houston – How the taxes were broken down in Simpson County.

DFB – What did you use, I'd be interested to see.

Houston - *to board member* What did we use?

Board member – We contacted the PVA office.

DFB – PVA office here? I'm asking if you contacted the Kentucky Department of Revenue, did you contact them?

Houston – Kentucky Department of Revenue? I have contacted them, the Kentucky Department of Revenue, I contacted them about 6 months ago and I can get you the exact name of the person I spoke to out there, um I have that in my notes and I can definitely pull that up for you if you wanted to see that.

DFB – Is it on this project?

Houston – It is on this project.

DFB – The 4-

Houston – I'm sorry what?

DFB – The 436 acres?

Houston – Correct. I contacted the Kentucky Revenue Department about this, I spoke to an individual out there, I can get his name from my notes. But I definitely, 100% made that phone call and spoke to him at length.

DFB – 6 months ago?

Houston – Mhm, approximately.

DFB – When did you execute the lease in this case?

Houston – Um I executed the option lease about a year and a half ago I would say.

DFB – Is the grid we're talking about not in existence yet?

Houston – I'm sorry is the-what?

DFB – Is the grid, G-R-I-D, the grid-

Houston – Is the grid not in existence? All of these lights right now are powered by the grid. It's one entity, for everything-

DFB - *inaudible* (57:05)

Houston – Everything in terms of *inaudible* (57:10) is interconnected throughout the entire U.S essentially, that is part of this grid the way it has been for 30 some-70 some-odd years.

DFB – So what you're saying is this lease is continuous for 30 years, maybe 40?

Houston – Approximately, yep. That's pretty fair.

DFB – So this is proof tonight that 40 years-

Houston – Yep, potentially-

DFB – for 30 years at least, that's what's gonna be here.

Houston – Yep, yes that's correct. That's the expectation, that we would run that project, it would be economically beneficial to the county, the landowners, yes that's correct.

DFB – Well, when we talk about an agricultural zone now-clearly this is an ag zone is it not?

Houston – Yep.

DFB – What you're asking for is an exception, to the normal zoning process are you not?

Houston – That's my understanding of the process right now.

DFB – And it's something for *inaudible* (58:03) is that correct?

Houston – I can't speak to the legality of that, I'm not sure exactly what the *inaudible* (58:07) is, my council could answer that better than I could.

DFB – You wouldn't be here is you didn't think you needed to get their permission.

Houston – Of course, I mean we come here and talk to them about it.

DFB – When we talk about these other two-this man here, is he a representative of this as well?

Houston – Yes, he helped us reach out to landowners.

DFB – You were reaching out to see if they would agree, to have a solar farm on their property correct?

Houston – That's correct.

DFB – Once you decided you were gonna put it on this land, with these two families that own this property did you go back and say, "Hey, we're not gonna use your land, but we are gonna use this land that's right next to it.".

Houston – I don't know the answer to that.

DFB – Do you know of anybody else?

Houston – He's not here tonight, but yeah.

DFB – Any writings where you notified people?

Houston – I'd have to check that, I don't know the answer to that.

DFB – Can I assume you have something to check to see if you sent of them out?

Houston – Not here tonight, I'd have to get on a server and make a few phone calls.

DFB – And when we talk about *inaudible* (59:13), first of all what is the bond gonna be? How much are you gonna start with?

Houston – Again, this process on the bond is; I'm gonna reach out to companies in the area, I will tell them what is in the field, I will tell them what has to be done in order to remove that grid, I will give them weights on steel, copper and aluminum. They will take that number, they will use scrap items and salvage items for that, they will figure out how many pounds for this per this, how we will break out the concrete, how we're gonna do all that, at that point they're gonna give me that number. Okay? I'll probably get three quotes; at that point I will give that to Mr. Monday, he will verify the most reasonable, he will probably make a few phone calls or ask a few questions of those specific wrecker companies and that's how that number will be settled, a number that will have been quoted.

DFB – Let me ask you this, you say you have two other operations now in the United States?

Houston – More than that, but we have two we're expecting to build in a year and a half.

DFB – Are they approved?

Houston – Uh, in different counties yes.

DFB – What's the funds on those?

Houston – Again, it has to be quoted. Once the final layout is laid out. So in terms of our project in West Virginia, that needs to get final approval from the county in that particular case.

DFB – So you agree, the bond is kind of like the tax ratio?

Houston – We don't exactly what the numbers gonna be.

DFB – By the way, does this really change the value on the tax on *inaudible* (1:00:48)?

Houston – Uh-I don't know if-I'm sorry explain that-

DFB – Is that gonna change the value of the tax that's done on the real estate? This is intangible property, right?

Houston – Yes, I mean the real estate tax right now is approximately $5,000, if we were to add to that-I mean typically the way we look at this is the total amount that he paid to county. Part of that is gonna be real, part of that is gonna be personal.

DFB – So what-when have you done this in the Commonwealth of Kentucky?

Houston – I have not.

DFB – Is there a similar state where you paid this much in tax?

Houston – Um, where we've paid the tax?

DFB – Yes.

Houston – I've done different companies, yes, I've done Massachusetts, I've done California, I've done Oregon, I've done-Um- I'm trying to think of some wind projects that I was involved-solar projects, Connecticut-

DFB – This is a solar farm not a wind-

Houston – Yep, it's very similar process. You go out, you convert it from-

DFB – Alright, let's take this-it's a Commonwealth, what's the tax-

Houston - *inaudible* (1:01:57) It's three megawatts, and this size project is gonna be 70. So, off the top of my head, I don't know what it's-hundreds of thousands of dollars-

DFB – Is it fair to say you've never done a project this size in the United States?

Houston – I've done projects larger than this in the United States, with this company? No.

DFB – This is the first time you've done it?

Houston – This size in the U.S, we've done projects this size in other countries, but this is the first time in the U.S.

DFB – So we're the experiment?

Houston – You're not the experiment. We've done this multiple times, all over the world. I personally have done these projects all over the country. So I have a good deal of experience with these projects, I've been doing this quite some time-almost 20 years. Developing energy projects, so I have very good experience. Worked with dozens of projects over that period of time.

DFB – Let's see if we can establish-I thought I understood you but maybe not. This is the first time this company has ever done a project this size in the U.S correct?

Houston – That's correct.

DFB – So when I use the word "first time" that's correct right?

Houston – If you're talking about the company yes, if you're talking about lead developer, that's me, then no I have a great deal of experience like I said, all over the country.

DFB – When you say you're the developer does that mean you're employed by this company?

Houston – I'm sorry I feel like I'm getting off track here, in terms of-

DFB – What you're saying is-

Houston – Let me ask you a question-

DFB – I get to ask the questions-

Houston – Well, I get to ask you questions too because if you need to say something-

DFB – *inaudible* (1:03:44)

Mr. Link – David let's not get argumentative, let him say what he needs to say, okay?

Houston – I'm happy to answer your questions about the project, I'm happy to answer any questions about the company, I'm happy to answer any questions about my personal experience, I'm happy to do that. *inaudible*(1:04:00), I live next door-what's gonna be like for me to live next door. I think if you wanna ask those questions I'd be more than happy to answer everything you wanna know and I encourage you guys to ask these questions too, I feel like we went a little off track-you're asking me about projects in Connecticut, you're asking me about-I honestly don't think it's relevant but I assume folks wanna know, is project gonna be put out in the field, is it gonna run for the next 30-40 years. Is it gonna be an eye-sore for the next 30-40 years or does it run properly-that sort of stuff is what I think you guys really wanna hear. And I'm more than happy to answer all of those questions but like you're asking me questions that really relate to that-

DFB – Well let me ask you this-

Houston – Okay.

DFB – Do you work for this company? Are you employed?

Houston – Yes, yes I do. That was very clear.

DFB – Well I just want to make sure *inaudible* (1:05:12). In this application you indicated that you probably wouldn't do this until-it wouldn't start up until next spring?

Houston – Well the construction would probably start August, September, October. Depending on weather conditions, but the operation-we would get feedback from TBA, you're probably talking about a 10-month period, give or take.

DFB – Is the lease with TBA contingent with *inaudible* (1:05:49)

Houston – There is no lease with TBA.

DFB – Who is the lease with?

Houston – Mr. Summers, Mr. Hoffman-

DFB – Well I thought y'all were a big company, have a lease with TBA-

Houston – TBA doesn't have *inaudible* (1:06:01)

DFB – I'm not saying that, do you have an agreement with TBA to supply power-

Houston – Yes. We do have-It's called a power purchase agreement. We signed that contract a year and a half ago. To supply power the next 30 years.

DFB – Is it contingent upon this *inaudible* (1:06:18)

Houston – Is it contingent? Well yes if we can't run the project then we'll have to be-

DFB – Thank you gentlemen.

Chris K – Alright Tim I think you wanted to get in while ago so go ahead.

Tim – The only thing that I wanted to say was, when you look at your regulations-

Chris K – Tim will you take your mask down-thank you.

Tim – Section 8.2.3, so what you've got is conditional uses that I would describe as allowed or permitted conditional uses. That's the one duplex per lot, airports, the landing strip, and solar farms is in section 9.8. Cemeteries, hospitals, then there's another paragraph and the paragraph says-as my way of speaking it-there may be other things that I fear that are not specifically described in paragraph A, and they would be okay if not to be detrimental to alter the agricultural character of the neighborhood. This applies to that other stuff that may be out there, but it doesn't apply to things in paragraph A. That language at the end of B does not apply to a solar farm. That's the only point I wanted to make. Thank you.

Chris K – Alright we have an audience here, I guess if anyone wants to speak step forward and state your name and your address just for the record so we can have a documented record-I guess I can take my mask off now so y'all can hear me better. If anyone wishes to speak please step forward, state your name and address for the record so we can have it documented and we'll be happy to hear you.

Carter - *inaudible* (1:08:42)

Chris K – What was that Carter?

Carter - *inaudible* (1:08:43)

Chris K – Alright Carter says if you need to make a statement, we'd like to swear you in, that's pretty simple. Step forward, and Mr. Link here the boards attorney will swear you in.

Link – State your name please.

Joe Tyree – Uh Joe Tyree-

Link – Joe Tyree? Everything you say here will be the truth and nothing but the truth?

Joe Tyree – Swear to god.

Chris K – Joe if you will stand in front of the microphone and state your name and address for the record.

Joe Tyree – My name is Joe Tyree, my address is 716 Getty's Road, it's Tyree farm. My dad was sick in the bed so I don't know how he spoke to my dad at the time but he says he did, my dad and mom both passed away recently and I'm the executor of that estate, the farm-I do have some questions about the farming issue so, when I have the guy out there farming my land and the dust gets over on the panels am I going to be in charge-because my next door neighbor- am I going to be in any way charged for the dust getting on those panels?

Houston – Absolutely not. The way this works is, but in this part of the country *inaudible* (1:10:01), you are in no way responsible, you have your land next to it, you can farm it, you can spray it, you can do whatever you like to on that land. We do not impact it-it's you land you can do whatever you want, we will not interfere with you, but if you have dust going all over it, it is not an issue. *inaudible* (1:10:27).

Joe Tyree – So you all don't use any type of chemicals to wash those panels?

Houston – No we don't.

Joe Tyree - There was another question I had, I noticed y'all were talking about the copper, the aluminum and all that. But what about the panels themselves? *inaudible*(1:11:08)

Houston – To be clear there's two kinds of panels. Thin film panels, which do have some of those heavy metals. We do not use them. We use solar-pv panels, uses the same things as those

calculators, the same type of technology. It's a very ____ material. So you've got the different copper stuff in there, basically at that point there are heavy metals that are not in there. There are not chemicals in those panels. Not our panels. *inaudible*(1:11:48) it'll probably be 6 feet by 3 feet, something like that. And at that point they're encased so the rain doesn't get in there, the bugs don't get in there, dirt, all of that stuff doesn't get in there. And that's why we use those particular panels because they're clean *inaudible*(1:12:15)

Joe Tyree – How close to my property are y'all gonna put that fence?

Houston – Do we have the numbers on the step dax? *inaudible*(1:12:27) we have an acquired step dax from your property.

Joe Tyree – I tell you if my timber falls over and hits one of them panels-

Houston – Nope, unless we tell you-I don't know exactly what Kentucky that is- if your timber falls over, it's my property.

Joe Tyree – So you're not gonna charge me that either right?

Houston – No, like I said we're gonna be far enough away-I don't know how tall your trees are but I can't imagine more than 50 ft high-our objective is not to impact you in any way, I want you to continue on exactly have you've been doing it – we 're in the business of putting solar energy in the grid, be quiet, keep our head down, no noise, we just want to get out there and do our thing and again, I've done things all over the country-and I apologize that Mike did not come and knock on your door personally and say "My name is Mike Berry, I-we're doing this project down the street, here it is and I wanted to tell you about it.". I sincerely apologize, if someone did that to me, I would be upset too-

Joe Tyree – That one guy-I think it was you *motions off camera* that talked to me and never told me that they was *inaudible* (1:14:15)

Houston – And here's what-fantastic question, in terms of the roads-I think we're gonna get county road *inaudible* (1:14:45) at the end of that, if we've tore that up or it's in bad condition we're responsible for paving that, we're responsible for fixing it whatever the case may be. And again we won't have a lot of heavy trucks we will have some trucks going out there-regular semis going in there, turning around and go back out-we'll impact the road you know-

Joe Tyree – Well that's a small road that's gonna tear it up-I've run trucks-

Houston – Exactly-exactly-and we're gonna have, as a part of the county road permit, there's gonna be a stipulation in there where we're gonna have to put it back in good shape whether it's repaving it-we don't know what the county is gonna require-but yeah the expectation is that we're not going out there tearing it up, tractors going down there, throwing rocks and breaking you know a PTO shaft, I don't know. But you're not going to be in that, that's what the county will protect.

Joe Tyree – That way right there is the only way-most of the time my way out is that road. Because it'll shut us off my normal route, nothing against you but it has to do with-I guess the town, so fire department comes out that way if we have a problem. But I do wonder what the town is gonna do with a site of depreciation and the fact of the roads being used, and that- I mean that's just a question.

Houston – Like I said-

Joe Tyree – You can't answer that but-

Houston – The road, the permit, we'll require that-we haven't even applied for that, but it will require whatever the county deems necessary to get it into shape again.

Joe Tyree – What about lights in that place? Is it gonna be lit up?

Houston – No, no basically what will happen is we'll have a little tool shed sort of thing for lawnmowers and stuff like that and little light there but there's not going to be any big, giant overhead light lighting it up at night. We don't do that, like I said it may be a light at the entrance and on the shed or something but-

Joe Tyree – And I hunt, I've always hunted back there but you're putting fence directly where I hunt. Since I was a kid there, and I also watch the Quail, in the state of Kentucky it's just appreciation of the quail and actually that farm there-my farm and another farm close by-it's came back the past couple of years. I'm hoping that doesn't destroy that part of-

Houston – Here's-And I'm not-I don't know this for sure, but we're gonna take that 436 acres and it's gonna have panels on it, and no tillage for 3-4 years. I hope that would generate some native habitat, it's gonna be short grass, but's gonna generate native habitat-and again, I don't know how to answer this question-

Joe Tyree – That's another question, say somebody on my place shoots a gun and it goes through. Who's at fault-

Houston – I mean, it's like anything else if you go out there and shoot and miss and it goes through somebody's house, yeah you're probably gonna have to fix the window, I mean you go out and have to be conscious of what's back there when you shoot. If you've got a 12-gauge, you know what your range is, if you got a rifle you know how far that range is, you just have to conscious of what's behind so-

Joe Tyree – What I'm saying is, it's my land-somebody trespasses on it, the do it. Am I gonna be-What if it had nothing to do with me?

Houston – Yeah, this is a good question. I don't know, if someone is trespassing on the land, we don't want that, you don't want that. If he comes out there and shoots then you know he's gonna be reliable for that, if he's trespassing on your land and he's not supposed to be out there and does something without your permission, it's on him at the end of the day. And honestly-$1,000 maybe-I don't know, like I said our job is not to impact you-I know the frustration, I've had problems with developers at my house doing things at different times of the day. I fully recognize the fact that it's incredibly disrespectful not to come out, knock on your door and say okay we're going in with this, we were out here a few months ago but now it's a real thing and I fully understand and respect that, I sincerely apologize-

Joe Tyree – No I was told somewhat about it-I was told it was on the other side of the road from us to start with and-but-at any rate I feel like they should have come to me *inaudible* (1:20:10)

Houston – And like I said, I took this project over from a guy that's not doing it anymore and moved on to another company and honestly, I'm pretty happy with this. And this is why, I wanted to come out at any point for folks who had an issue and that's why I'm here tonight is to talk to you guys and say hey-and honestly I can come back anytime you want, I'll take you guys out and walk the field, show you what it's gonna look like in more detail. I'll have a construction guy come out and he can answer these questions in detail about exactly what these machines look like, exactly what-the decibels are gonna be. All of these things are gonna be, you live there, it's your property and if it's not addressed properly-you know some guys coming in and doing all of this without talking to me first-I'm trying to fix this because clearly the communication was horrific. I-

Joe Tyree – I wanted to hear what you had to say-

Houston – Yep, that's why I'm here because I want to talk to you guys about this, if you have certain things, you'd like to recommend to us-like I said we're pretty open. I've been trying to do this for you know, for now 3,4,5 months but I've done other projects as I've mentioned all over the world and I talk about them all the time. You know I've got a pond out there I like to fish on and could you not put a panel near where I fish, stuff like that. Make it accommodating, like I said I'm more than happy to come back, sit down with you guys and address any concerns that weren't voiced tonight-

Joe Tyree – I appreciate it thank you.

Chris K – Stand at the microphone and state your name please.

George Rediker – George *inaudible*(1:30:57) –

Chris K – We'd like to swear you in first, did you say Rediker-

George Rediker – R-e-d-i-k-e-r.

Mr. Link – Mr. Rediker do you swear you'll give us the truth and nothing but the truth?

George Rediker – Yes sir.

Chris K – Okay, thank you.

George Rediker – Question, the projects you've done with your company before, what has this done to your represented values?

Houston – Here's the thing, I don't know the answer to that. Every project is different. Now, different areas of the country, if I put this thing in Western Louisiana, the guy next door's

property value goes up. But here's the thing, from your perspective it's more the aesthetic, I see this thing out in the yard. Do I like it, do I not? Is it gonna have an impact on the resale value of my property? There have been studies in both directions. Some good, some bad. Some people ask if they can see it from their window, it doesn't have an impact at all. It could be different. It depends on who it is.

George Rediker – What happens if they go bankrupt?

Chris K – Uh that's not a-we're an adjusting board that's nothing we'd have any control over-

George Rediker – Right but-

Chris K – If the bond were issued to the county by the landowner, the county would have some responsibility at that point, and the clean up. I mean it would have to-

George Rediker – I mean just throwing up numbers, he said originally it would be worth around $100 million. And he set a bond, I know isn't set in stone, around $100,000. Well that's less than 1%, of the net value of this project. I don't see it costing $100,000 to remove 435 acres of-

Houston – It would probably be $500,000-

George Rediker – Right, I'm just saying in that short fall of that, the county is making 1 million dollars a year pure profit. So is the county going to fill the gap?

Chris K – The answer to that here tonight would be the county has no obligation to this project at this time whatsoever. That would have to be addressed by a Fiscal Court. *inaudible discussion, leaves mic and DFB enters* (1:36:19-1:38:04)

Chris K – State your name and address please.

Steve Baldwin – My name is Steve Baldwin, I live at 1570 Petermill road.

Mr. Link – Alright Mr. Baldwin do you swear to tell the truth and nothing but the truth?

Steve Baldwin – I do.

DFB – Mr. Baldwin, as it relates to this situation, where is your property?

Steve Baldwin – Across the road to the side.

DFB – How many acres do you have in those locations?

Steve Baldwin – 150-160

DFB – What do you use those acres for?

Steve Baldwin – Raise cattle and hay.

DFB – Purely farming operations isn't it?

Steve Baldwin – That's correct.

DFB - By the way did Mr. Houston or Mr. Hill or anybody come see you?

Steve Baldwin – They did not.

DFB – Did they write you a letter?

Steve Baldwin – They did not.

DFB – How long have you been in operation?

Steve Baldwin – 15-20 years.

DFB – Is it primarily agricultural land?

Steve Baldwin – Yes.

DFB – And what's your concern about this project?

Steve Baldwin – My main concern is it's not agricultural and I doubt very many people including the board would like to look out their window or check on cows and what they see is a solar farm. I know if I wanted to buy property next to a solar farm, that's where I'd purchase it. Not in an agricultural area.

DFB – Gentlemen, this is agricultural land. Contrary to what my opposing council will tell you, this is a conditional use permit, it's not automatic. It says you may do this; it doesn't say you shall do it. Our concern from Mr. Baldwin and Mr. Pitt as you've heard from the other fellows is this; this is gonna alter the agricultural character of the neighborhood. This gentlemen, Mr. Houston, is a very good salesman for his company. But when you get down to the point it's not an agricultural pursuit. It's going to be there for 40 years, it's gonna be something that's gonna change the character and use of the neighborhood. But the reason you get permission from this board is because of a chain of agricultural zones. Perhaps the best farmland in this state is from this county. Perhaps Christian county may be the best and this is the runner up, the more you take away the less you have. This is why this is in an agricultural zone. This isn't industrial use. I ask you to deny it, thank you.

discussion among board members

Chris K – So I guess if we're at the point of this where someone's in favor of this we need a motion to do something here-let me-to grant a conditional use permit to allow the installation of solar panels on a 309.14-acre tract and a 126.86 tract of land located at and to the south of 1271 Tyree Chapel road. Owners are Mr. Rogers and the Hoffman and Summers farm.

Hunter Boland – I make a motion to approve the conditional use permit, obviously it will go though planning and zoning for further investigation.

Chris K – Another second?

Jason – I second.

Chris K – A second by Jason. All right is there any discussion among the board? All in favor please say "I".

unanimous agreeance

Chris K – We have three I's; the chamber does vote. Our meeting is adjourned.

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT
SIMPSON CIRCUIT COURT, DIV. I
CASE NO. 21-CI-00064

STEVE BALDWIN and
JOHN PITT

PLAINTIFFS

vs.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

FRANKLIN-SIMPSON COUNTY PLANNING
& ZONING ADJUSTMENT BOARD
ROGER HOFFMAN
SUMMERS HODGES FARM, LLC and
HORUS KENTUCKY 1, LLC

DEFENDANTS

This matter is before the Court on a motion to dismiss by Defendants Roger Hoffman ("Hoffman"), Summers Hodges Farm, LLC ("Summers Hodges") and Horus Kentucky 1, LLC ("HK1") as well as a motion for leave to file an Amended Verified Complaint by Plaintiffs Steve Baldwin ("Baldwin") and John Pitt ("Pitt") (collectively the "Plaintiffs"). The Court heard the respective motions at a hearing on May 3, 2021. Hon. David F. Broderick and Hon. Brandon T. Murley appeared on behalf of the Plaintiffs. Hon. Randall L. Saunders and Hon. Timothy D. Mefford appeared on behalf of Defendants Hoffman, Summers Hodges, and HK1. The Court, having reviewed the record in its entirety, including the respective motions, memoranda, and proposed orders, findings of fact and conclusions of law tendered by the parties, and being otherwise sufficiently advised, hereby issues the following memorandum opinion and order:

FACTS AND PROCEDURAL HISTORY

This matter arises from the application on January 5, 2021 of Defendant Horus Kentucky 1, LLC for a conditional use permit ("CUP") for the construction and installation of solar panels on approximately 434 acres of land (the "CUP property") owned by Defendants Roger Hoffman

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(309.14 acres) and Summers Hodges Farm, LLC (124.6658 acres) on Tyree Chapel Road in Franklin, Simpson County, Kentucky. The CUP property and the property surrounding it are primarily used for agricultural purposes.

The Franklin-Simpson County Planning & Zoning Board of Adjustment (the "Board of Adjustment") held a public hearing on the application on February 22, 2021. At the hearing, Plaintiff Steve Baldwin, the owner of property adjacent to the CUP property, and Plaintiff John Pitt, an individual who works and farms Baldwin's property, were represented by counsel and voiced their concerns about the CUP application. At the conclusion of the hearing, the Board of Adjustment granted the conditional use permit authorizing the use of the CUP property as a solar farm.

On March 11, 2021, the Plaintiffs filed the Verified Complaint (the "Complaint") initiating this action in Simpson Circuit Court. The Complaint sets forth two (2) causes of action: (1) an appeal pursuant to KRS 100.347(1) of the Board of Adjustment's action of granting the CUP; and (2) a declaratory judgment "stating that the actions of the Franklin-Simpson BOA were arbitrary, capricious and/or without substantial evidence" and that the "grant of the conditional use permit was in error and contrary to relevant city ordinances and/or regulations."

The Plaintiffs specifically allege in Count I of the Complaint that the Board of Adjustment erred in granting the CUP because the application did not include a Development Plan per Article 9, § 9.8 and Article 12, § 12.2.2(b) of the Franklin-Simpson County Zoning Regulations, that the granting of the CUP would alter the agricultural zoning character of the Hoffman / Summers Hodges land "as well as the surrounding properties, in contradiction of Franklin-Simpson Zoning Regulations Section 8.2.3" and that the Board of Adjustment erred in

KM

granting the CUP without making adjudicative findings of fact. Based on the foregoing, the Plaintiffs claim generally that "the substantive rights of the Plaintiffs have been materially prejudiced."

On April 12, 2021, Defendants Hoffman, Summers Hodges, and HK1 filed a motion to dismiss Plaintiffs' Complaint and a memorandum of law in support thereof. Relying on the Kentucky Supreme Court's recent decision in *Kenton County Board of Adjustment v. Meitzen*, 607 S.W.3d 586 (Ky. 2020), the Defendants contend that the Plaintiffs have failed to perfect their administrative appeal pursuant to KRS 100.347(1) because they did not plead a specific injury or aggrievement as required by the statute. Defendants further contend that the Plaintiffs' claim for declaratory judgment will not lie because declaratory judgment actions are not appropriate when identical relief is sought by the administrative appeal. As a result, the Defendants allege that the Court does not have jurisdiction due to the Plaintiff's failure to perfect their administrative appeal and request dismissal of all claims.

On April 26, 2021, the Plaintiffs filed a motion for leave to amend their Complaint and tendered an Amended Verified Complaint. The proposed Amended Complaint contains the same allegations as the original Complaint with two additions: (1) Plaintiffs now allege that the alteration of the basic agricultural zoning character of the CUP property and "surrounding properties" "has injured Plaintiffs by decreasing the value of their neighboring properties," and (2) Plaintiffs include a new claim that the granting of the CUP violates the "agricultural supremacy clause" set forth by KRS 100.203(4). Defendants Hoffman, Summers Hodges, and HK1 oppose the amendment of the Plaintiffs' Complaint on the grounds that the Rules of Civil Procedure do not apply to an appeal under KRS 100.347(1) which has not been perfected. Defendants further contend that the agricultural supremacy clause does not address the kinds of

uses which may be permitted within an agricultural zone but merely prohibits a city or county from redefining agricultural use property beyond what is allowed by statute.

Having carefully considered all of the foregoing, the Court finds that the Plaintiffs have failed to perfect their appeal pursuant to KRS 100.347(1) and that dismissal of the Plaintiffs' claims is appropriate for the reasons set forth hereinbelow.

ANALYSIS

I. The Plaintiffs have failed to allege a specific injury or aggrievement necessary to invoke the Court's jurisdiction under KRS 100.347(1).

The first issue before the Court is whether the Plaintiffs have sufficiently perfected their appeal of the final action of an administrative board pursuant to KRS 100.347(1). Defendants allege that the Plaintiffs have failed to sufficiently state an injury or aggrievement under the statute as interpreted by the Kentucky Supreme Court in *Meitzen*. Plaintiffs contend that their general allegation that the issuance of the CUP has significantly altered the basic agricultural character of the CUP property "as well as the surrounding properties" sufficiently satisfies the injury or aggrievement requirement. The Court disagrees.

An appeal from an administrative decision is a matter of legislative grace and not a right. *Triad Development/Alta Glyne, Inc. v. Gelhaus*, 150 S.W.3d 43, 47 (Ky. 2004). Where an appeal is filed in the circuit court by grant of a statute, the parties must strictly comply with the dictates of that statute. *Spencer County Preservation, Inc. v. Beacon Hill*, 214 S.W.3d 327, 329 (Ky.App. 2007). Thus, the failure to follow statutory guidelines is fatal. *Triad* at 47. A person seeking review of administrative decisions must strictly follow the applicable procedures. *Id.*, citing *Taylor v. Duke*, 896 S.W.2d 618 (Ky.App. 1995).

In the case *sub judice*, the applicable statute is KRS 100.347(1), which sets forth in pertinent part:

> Any person or entity ***claiming to be injured or aggrieved*** by any final action of the board of adjustment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the action of the board of adjustment, lies (emphasis added).

The issue to be determined by the Court herein is whether the Plaintiffs' respective assertions of error by the Board of Adjustment constitute "injuries" or "aggrievements" within the meaning of KRS 100.347(1). If the Plaintiffs have properly claimed injury or aggrievement, then the Court has jurisdiction to hear the appeal. If the Plaintiffs' Complaint does not plead injury or aggrievement as required by KRS 100.347(1), then the appeal has not been perfected and must be dismissed because the Court does not have jurisdiction.

The Kentucky Supreme Court recently undertook this precise analysis in *Kentucky County Board of Adjustment v. Meitzen*, 607 S.W.3d 586 (Ky. 2020). In *Meitzen*, the Kenton County Board of Adjustment approved a conditional use permit application for a commercial nursery school. Adjoining property owners Gaddis, Meitzen and Nageleisen (the "CUP opponents") appealed the Board's granting of the permit by filing a circuit court action pursuant to KRS 100.347(1). In their complaint, the CUP opponents alleged that the Board had acted improperly because it granted the conditional use permit in contravention of the applicable zoning regulations and because placing a daycare facility in the area would put the general public and local school children in immediate and present danger.

Noting that KRS Chapter 100 does not define "claiming," "injured," or "aggrieved," the Supreme Court ascertained the meaning of those terms from their common, dictionary definitions. *Meitzen* at 592. Accordingly, the Supreme Court defined "claim" as "to assert in the face of possible contradiction," "to ask for," "a demand for something due or believed to be due," "the assertion of an existing right; any right...to an equitable remedy," or "a demand for a legal remedy to which one asserts a right." *Id.*

The court found "injury" to mean "hurt, damage, or loss sustained" or a "violation of another's rights for which the law allows an action to recover damages." *Id.* Finally, the Supreme Court determined that the definition of "aggrieved" is "suffering from an infringement or denial of legal rights" and "showing or expressing grief, injury, or offense." *Id.* Ultimately, the court concluded that "a party pursuing an appeal from a board of adjustment must claim some type of hurt or damage, or some form of suffering or infringement that the party will experience as a result of the board's decision." *Id.* at 592-593.

The *Meitzen* court expressly distinguished a proper claim of injury or aggrievement from a mere explanation of how the claimants believe a board of adjustment has erred legally. If a complaint simply sets forth a critique of a board of adjustment's decision to grant the conditional use permit without setting forth how the alleged errors cause injury or aggrievement to the parties, then it has not properly perfected an appeal pursuant to KRS 100.347(1). The *Meitzen* court concluded that the CUP opponents' claims that the board of adjustment erred in granting the permit and that the daycare facility would place the community's children in danger were not "injuries or aggrievements" which were sufficient to invoke the court's jurisdiction.

Put another way, the *Meitzen* court appears to be holding that parties contesting a final action of a board of adjustment are required to show a particularized, specific injury resulting from the board's action in order to invoke the circuit court's jurisdiction. The particularized injury or aggrievement must be separate from the general effect that the board's action may have on the community at large. Examples of such specific injuries or aggrievements would be allegations that board action will result in increased traffic or noises, odors, water runoff or other environmental impacts, or interference with a party's use or view of or from his or her own property. Plaintiffs Baldwin and Pitt do not allege any such particularized injury herein.

Instead, Baldwin and Pitt claim that the Franklin-Simpson Board of Adjustment erred in granting the conditional use permit because the application did not include a Development Plan and did not make adjudicative findings of fact. Neither of these claims contain an injury or aggrievement specific to the Plaintiffs and are instead mere critiques of the Board's decision to grant the permit.

The Plaintiffs' remaining assertion, that their substantive rights have been prejudiced because the granting of the permit will alter the agricultural zoning character of the Hoffman / Summers Hodges land "as well as the surrounding properties, ***in contradiction of Franklin-Simpson Zoning Regulations Section 8.2.3***" (emphasis added) similarly fails to set forth a particularized injury or aggrievement as defined by the Kentucky Supreme Court in *Meitzen*. As noted by the Court of Appeals in *Spencer County Preservation*, it is incumbent on a challenger to a board action "to claim that it had been injured or aggrieved by the final action of the [agency]...**and to allege facts supporting such claim in the complaint**" (emphasis added). Baldwin and Pitt do not allege specific facts suggesting how or why the proposed solar farm will negatively impact the Baldwin property; instead, they merely allege that the agriculture zoning character of the area will be altered. The Court finds this allegation, like the allegation of danger to the community's school children in *Meitzen*, to be general in nature and not particular enough to the Plaintiffs to satisfy the requirements of KRS 100.347(1).

Moreover, the Plaintiffs again to appear to simply be alleging not that they are suffering a particularized injury, but that the Board of Adjustment erred by not complying with the standard set forth in Section 8.2.3(b) of the Franklin-Simpson Zoning Regulations. Plaintiffs' reliance on this paragraph is misplaced for two reasons: (1) it does not set forth a particularized injury or aggrievement sufficient to invoke the Court's jurisdiction; and (2) Section 8.2.3(b) does not

appear to apply to a circumstance where the proposed use is a solar farm. Section 8.2.3 sets forth in its entirety as follows:

> Subject to the approval of the Board of Adjustment, the following uses may be approved within an agricultural district:
>
> (a) One duplex per lot; airports and landing strips, ***solar farms as in Section 9.8***, cemeteries, hospitals, public or private schools or colleges, home occupations when in compliance with section 9.3, oil or gas wells, country club or golf course, public parks, playgrounds and community centers, private marine, boat dock, boat ramp, driving range or private outdoor recreational activity, manufactured some parks complying with section 8.8.13.
>
> (b) ***Other uses*** which are ***similar in nature to the uses listed in 8.2.3.A*** and which would not be detrimental to or alter the basic agricultural character of the neighborhood in which the use is located (emphasis added).

Plaintiffs rely exclusively on Section 8.2.3(b) for their contention that their rights were prejudiced due to the alleged alteration of the agricultural character of the CUP property and surrounding properties. However, by paragraph 8.2.3(b)'s own terms, it only applies to "other uses" "similar in nature to the uses listed in 8.2.3.A." Because solar farm is a use specifically listed in paragraph 8.2.3(a), paragraph 8.2.3(b) does not apply to solar farms. As such, Plaintiffs' contention that their rights have been impaired because the Board did not apply the standard set forth in paragraph 8.2.3(b) is without merit.

Based on the holding in *Meitzen*, the Court concludes as a matter of law that the Plaintiffs have failed to perfect their appeal of the final action of the Board of Adjustment by claiming a specific injury or aggrievement as required by KRS 100.347(1). Because failure to comply with the requirements of KRS 100.347(1) creates a fatal jurisdictional issue, the Court is required by law to dismiss the Plaintiffs' complaint with prejudice.

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II. The Plaintiffs are prohibited from amending their complaint pursuant to CR 15.01 because the Court lacks jurisdiction.

The next issue for the Court's consideration is whether to allow the Plaintiffs to attempt to cure the deficiencies in their original Complaint by allowing them to file an Amended Complaint herein. The Kentucky Supreme Court's analysis in *Meitzen* again is instructive as to this issue. In *Meitzen*, the plaintiffs attempted to amend their complaint pursuant to CR 15.01 after the defendants alleged that they had failed to properly allege that they had been injured or aggrieved under KRS 100.347(1). The trial court denied the motion because at that point it was after the expiration of the time for perfecting the administrative appeal. The Kentucky Supreme Court agreed, holding that CR 15.01 (the Civil Rule allowing a party to amend his complaint by leave of court) does not apply until after an appeal has been perfected. *Meitzen* at 598, citing *Board of Adjustments v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978). The *Meitzen* court specifically held that "[w]ithout a properly perfected appeal, CR 15.01 did not apply, and the circuit court properly denied the motion to amend the complaint." *Id.*

Here, the Board of Adjustment granted the conditional use permit on February 22, 2021.[1] Pursuant to KRS 100.347(1), the Plaintiffs had thirty (30) days to appeal this action and did so by filing their original Complaint on March 11, 2021. However, the Plaintiffs' motion to amend their Complaint was not filed until April 26, 2021, after the expiration of the time for perfecting their appeal under KRS 100.347(1). As set forth in *Meitzen*, CR 15.01 does not apply because the administrative appeal was not properly perfected, and the Plaintiffs cannot otherwise amend their Complaint because the time for perfecting such appeal had expired by the time they filed

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[1] Pursuant to KRS 100.347(5), "final action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body."

their motion to amend. As such, the Defendants' motion to amend their Complaint must be denied pursuant to the holdings in *Meitzen* and *Flood.*

As the Plaintiffs' motion to amend their Complaint is denied herein, the Court need not address the additional issues raised in the Amended Complaint such as whether the Plaintiffs' claim that the solar farm caused a decrease in the value of their property constitutes an injury or aggrievement pursuant to KRS 100.347(1) or whether the conditional use permit violated the agricultural supremacy clause.

III. Plaintiffs' claim for declaratory judgment is indistinguishable from its administrative appeal and therefore must be dismissed because the appeal was an adequate remedy.

Finally, the Court must consider whether the Plaintiffs' assertion of a claim for declaratory judgment is sufficiently distinguishable from their administrative appeal pursuant to KRS 100.347(1) to survive dismissal. The Court concludes that it is not.

The Kentucky Court of Appeals has held that because KRS 100.347 affords an adequate remedy for administrative appeals, a separate declaratory judgment action is not appropriate. *Warren County Citizens for Managed Growth, Inc. v. Board of Commissioners of City of Bowling Green*, 207 S.W.3d 7, 17 (Ky.App. 2006). A separate declaratory judgment action may be appropriate under certain limited circumstances such as to appeal ministerial aspects of the administrative process occurring after the agency's final action,[2] if the complaint asserts claims which are broader in scope than what is implicated in an ordinary zoning appeal,[3] or if the complaint, judged by its content, is far more than appeal under the aegis of KRS 100.347.[4]

[2] *See Triad Development/Alta Glyne, Inc.* at 47.
[3] *See Simpson v. Laytart*, 962 S.W.2d 392, 395 (Ky. 1998).
[4] *See Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, 602 S.W.2d 427, 429 (Ky. 1980)

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As noted hereinabove, Plaintiffs' declaratory judgment count seeks entry of a judgment holding that the actions of the Board of Adjustment in granting the conditional use permit were arbitrary, capricious, without substantial evidence, and contrary to relevant city ordinances and/or regulations. The relief sought by declaratory judgment is thus indistinguishable from the relief sought by the administrative appeal pursuant to KRS 100.347(1) (reversal of the grant of the conditional use permit because it was arbitrary, capricious, without substantial evidence, and in contradiction with Franklin-Simpson Zoning Regulations). Because the Plaintiffs' claim for declaratory judgment is not broader in scope than what is implicated in the administrative appeal, the appeal itself was an adequate remedy and dismissal of the declaratory judgment claim is appropriate herein.

ACCORDINGLY, IT IS HEREBY ORDERED AS FOLLOWS:

1. Plaintiffs' motion for leave to file an amended complaint is hereby **DENIED.**

2. The motion to dismiss by Defendants Hoffman, Summers Hodges Farm, LLC and Horus Kentucky 1, LLC is **GRANTED** and all claims set forth herein by the Plaintiffs are hereby **DISMISSED WITH PREJUDICE.**

3. This is a final and appealable order, and there is no just cause for delay.

SO ORDERED this the 20th day of July, 2021.

ENTERED
BETH [illegible] CLERK
JUL 26 2021
SIMPSON [illegible]
BY [illegible] D.C.

MARK A. THURMOND, Judge
Simpson Circuit Court, Div. I

Clerk, copies to:

Hon. David F. Broderick / Hon. Brandon T. Murley, *Counsel for Plaintiffs*
Hon. Randall L. Saunders, *Counsel for Defendants Hoffman, Summers Hodges, and HK1*
Hon. Timothy D. Mefford, *Counsel for Defendants Hoffman, Summers Hodges, and HK1*
Franklin-Simpson County Planning & Zoning Board of Adjustment
c/o Hon. Robert Y. Link and Hon. W. Scott Crabtree, *Defendant*

COMMONWEALTH OF KENTUCKY
SIMPSON CIRCUIT COURT
CIVIL ACTION NO. 21-CI-00064
(TENDERED ELECTRONICALLY)

STEVEN BALDWIN and
JOHN PITT PLAINTIFF

v.

PLAINTIFFS' MOTION TO ALTER, AMEND, OR VACATE MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

FRANKLIN-SIMPSON COUNTY
PLANNING & ZONING ADJUSTMENT
BOARD; ROGER HOFFMAN;
SUMMERS HODGES FARM, LLC; and
HORUS KENTUCKY 1, LLC DEFENDANTS

Comes the Plaintiffs, by and through Counsel, and pursuant to CR 59 and CR 59.05 and for their Motion to Alter, Amend, or Vacate Memorandum Opinion and Order Granting Defendants' Motion to Dismiss, and submits as follows:

CR 59.05 sets forth that "a motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." CR 59.01(f) sets forth in pertinent parts that a new trial may be granted if "the verdict is not sustained by sufficient evidence, or is contrary to law." In this matter, the Court erred as a matter of law in its Memorandum Opinion and Order Granting Defendant's Motion to Dismiss which was entered on or about July 26, 2021.

1. **THIS COURT ERRED AS A MATTER OF LAW IN HOLDING PLAINTIFFS FAILED TO PERFECT THEIR ADMINISTRATIVE APPEAL PURSUANT TO KRS 100.347.**

KRS 100.347 provides persons aggrieved by any final action of the board of adjustments a right to appeal to Circuit Court. KRS 100.347 does not specify the form of the appeal, and the Kentucky Court of Appeals has previously held that a timely filed complaint containing all the

necessary allegations is sufficient to perfect an appeal. *See Lexington-Fayette County Planning and Zoning Commission v. Levas*, 504 S.W.2d 685 (Ky. App. 1973).

In *Kenton County Board of Adjustment v. Meitzen*, 607 S.W.3d 568 (Ky. 2020), the Supreme Court of Kentucky was faced with interpreting the first sentence of KRS 100.347, specifically, "[a]ny person or entity claiming to be injured or aggrieved." The Supreme Court of Kentucky began their analysis by noting that KRS Chapter 100 does not provide definitions for "claiming," "injured," or "aggrieved." Therefore, the Supreme Court of Kentucky was required to look to the plain meaning of this language. "Taking the plain meanings of these words in the context of KRS 100.347(1), we conclude that a party pursuing an appeal from a board of adjustment must claim some type of hurt or damage, or some form of suffering or infringement that the party will experience as a result of the board's decision." *Id.*, at 592-593.

In *Meitzen*, the Supreme Court specifically held that "these particular words are not necessarily required." *Id.*, at 593. The only jurisdictional requirement found in KRS 100.347 is that the complaint must "reflect how the plaintiff fits into the statutory language authorizing an appeal." *Id.* The instant complaint alleged sufficient injury to invoke the jurisdiction of this Court pursuant to KRS 100.347.

Specifically, in Plaintiffs' Verified Complaint, it is alleged that the proposed solar farm would significantly alter the basic agricultural zoning character of the 434 acres, as well as the surrounding properties, and as a result, Plaintiffs have been materially prejudiced. This Court held that the Supreme Court's reference to definitions of "claiming," "injured," and "aggrieved" in dicta stands for a judicial adoption of said definitions in the context of KRS 100.347. However, that is not the case. The words "claiming," "injured," and "aggrieved" in the context of KRS 100.347

remain undefined and the Supreme Court of Kentucky, in *Meitzen*, has directed courts to apply the plain meaning of these words.

The Supreme Court's decline to require particularized and technical legal jargon as a requirement to invoke jurisdiction pursuant to KRS 100.347 is even more apparent when the Supreme Court critiques the underlying complaint in *Meitzen*. Specifically, the Supreme Court notes that the underlying complaint in *Meitzen* failed to even contain synonyms of words such as "injured" or "aggrieved." In the instant matter, the word "prejudice" (used by Plaintiffs herein) is synonymous to the word "injured" and is therefore sufficient.

In *Meitzen*, the Supreme Court's analysis of the common meaning of the words contained in KRS 100.347, the Supreme Court looked to Merriam Webster's Dictionary. Therefore, it is appropriate for this Court to consider Merriam Webster's definition of the word "prejudice" used by the Plaintiffs in their Verified Complaint. Merriam Webster defines "prejudice" as "***injury*** or damage resulting from some judgment or action of another in disregard of one's rights; especially: detriment to one's legal rights or claims" (emphasis added). Thus, it is apparent that the use of the term "prejudice" by Plaintiffs herein as opposed to "injury" or "claim" or "aggrieved" is a distinction without a difference.

This Court's interpretation of *Meitzen* as a basis to heighten the pleading standard to require showing "a particularized, specific injury" is erroneous as a matter of law.

In this matter, a review of the allegations contained in Plaintiffs' Verified Complaint show that Plaintiffs have plead that as neighboring property owners, that the grant of the conditional use permit has significantly alter the basic agricultural zoning character subject acreage, as well as the surrounding properties, in contradiction of Franklin-Simpson Zoning Regulations Section 8.2.3. More importantly, the Plaintiffs have clearly plead and stated that the significant change and

alteration of the basic agricultural zoning character of the subject acreage has prejudiced them by changing the character of their property, which has materially prejudiced them. Finally, the Plaintiffs have plead that the intended use of the subject acreage does not align with the character of the surrounding properties, which resulted in their substantive rights being materially prejudiced. Thus, the Plaintiffs being individuals who have interests and rights in properties in direct proximity to the acreage at issue herein, have alleged an individual injury (the right to own property in close proximity that aligns and conforms to the usage of their own property) and sought declaratory and injunctive relief from this Court. Clearly, this Court erred as a matter of law in finding that the general public complaint made in *Meitzen* was similar to the injury alleged in this case, as the same is wholly distinguishable from a vague, general public complaint as was made in the *Meitzen* matter.

For these reasons, this Court has erred as matter of law in granting the instant motion and the order referenced above should be altered, amended or vacated.

2. THIS COURT ERRED IN DENYING PLAINTIFFS' REQUEST FOR LEAVE TO FILE AN AMENDED COMPLAINT.

This Court held that because of the alleged failure by the Plaintiffs to perfect their appeal pursuant to KRS 100.347, Plaintiffs were not entitled to rely on CR 15.01 in an attempt to amend their Verified Complaint. However, as set forth hereinabove, the Plaintiffs did perfect their appeal, and therefore CR 15.01 is applicable herein. Plaintiffs chosen terminology of "prejudice" is synonymous with the plain language contained in KRS 100.347.

CR 15.01 provides that "leave shall be freely given when justice so requires." The Response in Opposition to Plaintiffs' Motion for Leave to File Amended Verified Complaint filed by Defendants Hoffman, Summer Hodges Farm, LLC, and Horus Kentucky 1, LLC does not allege

any prejudice that would result to them if amendment is allowed. Since no prejudice is allowed, leave must be freely given herein.

For these reasons, this Court has erred as matter of law in granting the instant motion and the order referenced above should be altered, amended or vacated.

3. THIS COURT ERRED IN DISMISSING THE PLAINTIFFS' DECLARATORY JUDGMENT ACTION.

When considering a CR 12.02 motion to dismiss, the pleadings must be "construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987).

Greater Cincinnati Marine Service, Inc., v. City of Ludlow, 602 S.W.2d 427 (Ky. 1980) stands for the position that an action containing both a statutory appeal pursuant to KRS 100.347 as well as a petition for declaratory judgment may be permitted, if the pleading "judged by its content, [was] far more than an appeal under the aegis of KRS 100.347(2)." *Id.*, at 249.

The Plaintiffs herein allege that an actual controversy exists regarding the legality of the actions taken by the Board of Adjustments herein, specifically ministerial acts of the Board of Adjustments. Specifically, paragraphs 17 – 20 set forth failures contained in the Defendants' conditional use permit that the Board of Adjustments apparently ignored. This allegation, taken as true, is sufficient to avoid a 12.02 motion to dismiss and is not merely a recitation of the Plaintiffs' appellate relief under KRS 100.347.

For these reasons, this Court has erred as matter of law in granting the instant motion and the order referenced above should be altered, amended or vacated.

WHEREFORE, Defendant, Plaintiffs, Steve Baldwin and John Pitt respectfully request the relief herein and above sought.

This the 2 day of August, 2021.

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921 College Street- Phoenix Place
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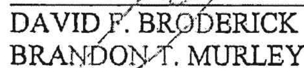
Telephone: 270-782-6700
Telefax: 270-782-3110



DAVID F. BRODERICK
BRANDON T. MURLEY

NOTICE OF HEARING

Notice is hereby given that the foregoing Motion will be brought on for hearing before the Simpson Circuit Court, on the 20th day of August, 2021 at the hour of 1:30 p.m., or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing was filed electronically with the clerk by using the court's eFiling system, which will send a notice of electronic filing, with a link to the pleading, to registered users, and that a true and accurate copy of the same was sent via email to the following:

Randall L. Saunders
Nelson Mullins Riley & Scarborough LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
randy.saunders@nelsonmullins.com
Co-Counsel for Defendants
Roger Hoffman, Summer Hodges
Farm, LLC and Horus Kentucky 1, LLC

Timothy D. Mefford
Mefford & Phillips
303 N. College Street
Franklin, KY 42134
tim-sam@meffordandphillipslaw.com
Co-Counsel for Defendants
Roger Hoffman, Summer Hodges
Farm, LLC and Horus Kentucky 1, LLC

And via First-Class United States Mail, postage prepaid and addressed to:

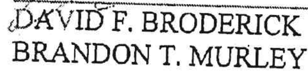
Franklin-Simpson County
Planning & Zoning Adjustment Board
Chris Kummer, Chairman
101 Courthouse Square
Franklin, KY 42134

Carter Munday
P&Z Administrator
101 Courthouse Square
Franklin, KY 42134

W. Scott Crabtree
Franklin-Simpson City Attorney
212 S. College Street
Franklin, KY 42134

Robert Link
Franklin-Simpson Planning and Zoning Attorney
205 W. Kentucky Ave.
Franklin, KY 42134

This the 5 day of August, 2021.



DAVID F. BRODERICK
BRANDON T. MURLEY

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT
SIMPSON CIRCUIT COURT, DIV. I
CASE NO. 21-CI-00064

STEVE BALDWIN and
JOHN PITT PLAINTIFFS

vs.

ORDER DENYING PLAINTIFFS' MOTION TO ALTER, AMEND OR VACATE

FRANKLIN-SIMPSON COUNTY PLANNING
& ZONING ADJUSTMENT BOARD
ROGER HOFFMAN
SUMMERS HODGES FARM, LLC and
HORUS KENTUCKY 1, LLC DEFENDANTS

This matter is back before the Court on a motion by Plaintiffs Baldwin and Pitt to alter, amend, or vacate the Court's order dismissing their administrative appeal and declaratory judgment action and denying their request to amend their complaint herein. The Court heard argument on the motion on September 20, 2021. Hon. Brandon T. Murley appeared on behalf of the Plaintiffs. Hon. Randall L. Saunders and Hon. Timothy D. Mefford appeared on behalf of Defendants Hoffman, Summers Hodges, and HK1. The Court, having reviewed the respective motion and response filed herein, and having heard the statements and arguments of counsel, finds no reason to alter or amend the findings and substantive conclusions set forth in the Court's Memorandum Opinion and Order entered herein on July 26, 2021. Accordingly, the Court being otherwise sufficiently advised, the Court hereby denies the Plaintiffs' motion for the reasons set forth hereinbelow.

I.

The Plaintiffs' first contention is that the Court erred as a matter of law by holding that they failed to perfect their administrative appeal pursuant to KRS 100.347(1). Plaintiffs argue

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that the Court misinterpreted *Kenton County Board of Adjustment v. Meitzen*, 607 S.W.3d 586 (Ky. 2020) by applying a heightened pleading standard requiring "a particularized, specific injury" when any showing of injury or aggrievement would be sufficient.

To the extent that the Court's order of dismissal referenced "a particularized, specific injury," the Court's meaning was particularized or specific ***to the Plaintiffs***, as opposed to a claim by any citizen who disagrees with a decision of the Board of Adjustments. As the Court noted, "[t]he particularized injury or aggrievement must be separate from the general effect that the board's action may have on the community at large." Opinion and Order at 6.

In *Meitzen*, CUP opponents Meitzen and Nageleisen claimed that "to place a daycare facility in this area would put the general public and our school children in immediate and present danger." *Meitzen* at 590. The trial court held that it was without jurisdiction to hear the appeal "[w]ithout an express claim that Meitzen and Nageleisen ***themselves*** were injured and aggrieved in some way by the Board's action." *Id.* (emphasis added). The Supreme Court of Kentucky upheld the trial court's dismissal, finding that Meitzen and Nageleisen "failed to provide any factual allegations to support a claim that ***they themselves*** were injured or aggrieved in some way by the Board's action" and that they "explain how they believe the Board erred legally but ***they fail to state how the alleged errors affect them or cause injury to them***." *Id.* at 593 (emphasis added). As such, the Court's conclusion that a party appealing an administrative decision pursuant to KRS 103.347(1) must state a particularized injury or aggrievement specific to that party is consistent with holding in *Meitzen*.

In the case *sub judice*, the Plaintiffs, like the opponents in *Meitzen*, have failed to properly claim how Plaintiffs themselves are injured or aggrieved by the Board's granting of the conditional use permit. Count I of the Plaintiffs' Complaint, which contains Plaintiffs'

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administrative appeal, merely alleges that the granting of the CUP "was arbitrary, capricious, without substantial evidence, and in contradiction with Franklin-Simpson Zoning Regulations"[1] and further that the Board of Adjustments' "failure ... to make any written or oral adjudicative findings of fact regarding the conditional use permit was arbitrary, capricious, without substantial evidence, and in contradiction with Franklin-Simpson Zoning Regulations."[2] Neither of these allegations contain a claim of injury or aggrievement specific to the Plaintiffs, as both are simply alleging that the Board erred legally.

Plaintiffs allege elsewhere in their Complaint "that the proposed solar farm would significantly alter the basic agricultural zoning character of [Defendants' property], as well as the surrounding properties, in contradiction of Franklin-Simpson Zoning Regulations Section 8.2.3."[3] Again, the Plaintiffs are alleging that the Board erred legally by granting the CUP "in contradiction of Franklin-Simpson Zoning Regulations Section 8.2.3" but fail to otherwise state a claim as to how this alleged error causes injury or aggrievement to them. The thrust of Plaintiffs' allegation is that the use of the Defendants' property as a solar farm will be incompatible with the "basic agricultural zoning character" of "surrounding properties." The Court does not believe this allegation contains a statement of injury or aggrievement which is sufficient to invoke the Court's jurisdiction for an administrative appeal under KRS 103.347(1). The bare allegation is that the "zoning character" of the properties will be altered without stating how this alteration will negatively impact the Plaintiffs' property, and the Court finds this allegation to be even more general in nature than the allegation in *Meitzen*. This allegation

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[1] Compl. at ¶ 25.
[2] *Id.* at ¶ 26.
[3] *Id.* at ¶ 21.

therefore fails to properly claim an injury or aggrievement under KRS 103.347(1) as interpreted by *Meitzen.*

II.

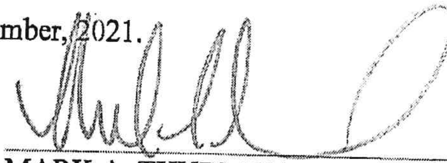
Plaintiffs next allege that the Court erred in denying their motion to amend their Complaint by holding that CR 15.01 does not apply when an appeal has not been perfected. Plaintiffs' sole contention is that their appeal was properly perfected and therefore they should have been allowed to amend their complaint pursuant to CR 15.01. The Court has addressed this issue above, and it is clear that "the Civil Rules do not apply under *after* an appeal has been perfected." *Meitzen* at 598, citing *Board of Adjustments v. Flood,* 581 S.W.2d 1, 2 (Ky. 1978) (original emphasis).

III.

Finally, Plaintiffs allege that the Court erred in dismissing their claim for declaratory judgment. Plaintiffs contend that their claim that the Board granted the Defendants' conditional use permit without requiring a development plan constitutes a claim which is "far more than an appeal under the aegis of [an administrative appeal]" due to the ministerial nature of these acts. Plaintiffs' contention that a claim for declaratory judgment is proper when it invokes "ministerial acts" of the board is misplaced, as such acts are only beyond the scope of the administrative appeal when they occur ***after*** the board's final action. *See Simpson v. Laytart,* 962 S.W.2d 392, 395 (Ky. 1998). Here, the alleged "ministerial acts" of the Board were neither after the Board's final action nor were they otherwise beyond the scope of the administrative appeal. As such, this claim was properly dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiffs' motion to alter, amend, or vacate the Court's Opinion and Order entered herein on July 26, 2021 is hereby **DENIED.**

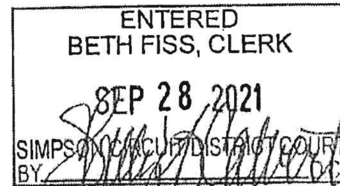
SO ORDERED this the 27th day of September, 2021.



MARK A. THURMOND, Judge
Simpson Circuit Court, Div. I

Clerk, copies to:

Hon. David F. Broderick / Hon. Brandon T. Murley, *Counsel for Plaintiffs*
Hon. Randall L. Saunders, *Counsel for Defendants Hoffman, Summers Hodges, and HK1*
Hon. Timothy D. Mefford, *Counsel for Defendants Hoffman, Summers Hodges, and HK1*
Franklin-Simpson County Planning & Zoning Board of Adjustment
c/o Hon. Robert Y. Link and Hon. W. Scott Crabtree, *Defendant*



COMMONWEALTH OF KENTUCKY
SIMPSON CIRCUIT COURT
CIVIL ACTION NO. 21-CI-00064
(ELECTRONICALLY FILED)

STEVE BALDWIN and
JOHN PITT — PLAINTIFFS

v.

NOTICE OF VIDEO APPEAL

FRANKLIN-SIMPSON COUNTY
PLANNING & ZONING ADJUSTMENT
BOARD; ROGER HOFFMAN;
SUMMERS HODGES FARM, LLC; and
HORUS KENTUCKY 1, LLC — DEFENDANTS

*** *** *** *** ***

Come now the Plaintiffs, by and through Counsel, and pursuant to CR 73, tender their Notice of Appeal.

The Appellants are Steve Baldwin and John Pitt, who are represented by Hon. David F. Broderick and Hon. Brandon T. Murley, Broderick & Davenport, Attorneys at Law, 921 College Street-Phoenix Place, Post Office Box 3100, Bowling Green, KY 42102-3100; Phone: (270) 782-6700, Fax: (270) 782-3110.

The Appellees are Franklin-Simpson County Planning and Zoning Adjustment Board, Roger Hoffman, Summers Hodges Farm, LLC, and Horus Kentucky 1, LLC. Defendants Roger Hoffman, Summers Hodges Farm, LLC, and Horus Kentucky 1, LLC are represented by Co-Counsel, Randall L. Saunders, Nelson Mullins Riley & Scarborough LLP, 949 Third Avenue, Suite 200, Huntington, WV 25701 and Timothy D. Mefford, Mefford & Phillips, 303 N. College Street, Franklin, KY 42134. Franklin-Simpson

County Planning & Zoning Adjustment Board, is represented by Co-Counsel although the same have never entered an appearance in the above-styled matter, so in addition to the Franklin-Simpson County Planning & Zoning Adjustment Board, the same will be served upon, W. Scott Crabtree, Franklin-Simpson City Attorney, 212 S. College Street, Franklin, KY 42134 and Robert Link, Franklin-Simpson Planning and Zoning Attorney, 205 W. Kentucky Ave., Franklin, KY 42134.

The Orders appealed from are the Order Denying Plaintiffs' Motion to Alter, Amend, or Vacate, entered on or about September 28, 2021, in Simpson Circuit Court, Division I and the Memorandum, Opinion and Order Granting Defendants' Motion to Dismiss, entered on or about July 26, 2021, in Simpson Circuit Court, Division I.

This the 21st day of October, 2021.

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Attorneys at Law
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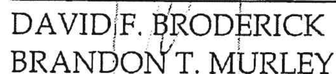

DAVID F. BRODERICK
BRANDON T. MURLEY

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing was filed electronically with the clerk by using the court's eFiling system, which will send a notice of electronic filing, with a link to the pleading, to registered users, and that a true and accurate copy of the same was sent via email to the following:

Randall L. Saunders
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Co-Counsel for Defendants
Roger Hoffman, Summer Hodges
Farm, LLC and Horus Kentucky 1, LLC

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Co-Counsel for Defendants
Roger Hoffman, Summer Hodges
Farm, LLC and Horus Kentucky 1, LLC

And via First-Class United States Mail, postage prepaid and addressed to:

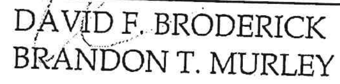
Franklin-Simpson County
Planning & Zoning Adjustment Board
Chris Kummer, Chairman
101 Courthouse Square
Franklin, KY 42134

Carter Munday
P&Z Administrator
101 Courthouse Square
Franklin, KY 42134

W. Scott Crabtree
Franklin-Simpson City Attorney
212 S. College Street
Franklin, KY 42134

Robert Link
Franklin-Simpson Planning and Zoning Attorney
205 W. Kentucky Ave.
Franklin, KY 42134

This the 21st day of October, 2021.



DAVID F. BRODERICK
BRANDON T. MURLEY

COMMONWEALTH OF KENTUCKY
SIMPSON CIRCUIT COURT
CIVIL ACTION NO. 21-CI-00135
(ELECTRONICALLY FILED)

STEVE BALDWIN and
JOHN PITT PLAINTIFFS

v.

VERIFIED COMPLAINT

FRANKLIN-SIMPSON COUNTY
PLANNING & ZONING
ADJUSTMENT BOARD;

Please serve:
Franklin-Simpson County
Planning & Zoning Adjustment Board
Chris Kummer, *Chairman*
101 Courthouse Square
Franklin, KY 42134

Carter Munday
P&Z Administrator
101 Courthouse Square
Franklin, KY 42134

W. Scott Crabtree
Franklin-Simpson City Attorney
212 S. College Street
Franklin, KY 42134

Robert Link
Franklin-Simpson Planning and Zoning Attorney
205 W. Kentucky Ave.
Franklin, KY 42134

SUMMERS HODGES FARM, LLC;

Please serve:
Gary Summers, Registered Agent
640 Kenny Perry Drive
Franklin, KY 42134

SUMMERS ROSDEUTSCHER FARM, LLC;

Please serve:
Gary Summers, Registered Agent
640 Kenny Perry Drive
Franklin, KY 42134

and

HORUS KENTUCKY 1, LLC DEFENDANTS

Please serve:
Cogency Global Inc., Registered Agent
828 Lane Allen Road, Suite 219
Lexington, KY 40504

Come now the Plaintiffs, Steve Baldwin and John Pitt, by and through counsel, pursuant to KRS § 418.040, *et seq.* and KRS § 100.347, and for their Verified Complaint, state as follows:

PARTIES AND JURISDICTION

1. The Plaintiff, Steve Baldwin, is the owner of real property located at 172 Hendricks Road, Franklin, Kentucky.

2. The Plaintiff, John Pitt, works and farms the real property located at 172 Hendricks Road, Franklin, Kentucky.

3. The Defendant, Franklin-Simpson County Planning & Zoning Adjustment Board (hereinafter "Franklin-Simpson BOA") is an entity created under the authority of KRS Chapter 100, and is empowered with creating and administering rules and regulations governing the use of land in the city and county of Franklin, Simpson County, Kentucky. Its agents for service of process are: Board of Adjustment Chairman, Chris Kummer, 101 Courthouse Square, Franklin, KY 42134; Planning and Zoning

Administrator, Carter Munday, 101 Courthouse Square, Franklin, KY 42134; Franklin-Simpson City Attorney, W. Scott Crabtree, 212 S. College Street, Franklin, KY 42134; and Planning and Zoning Attorney, Robert Link, 205 W. Kentucky Avenue, Franklin, KY 42134.

4. The Defendant, Summers Hodges Farm, LLC (hereinafter "Summers Hodges Farm"), is a Kentucky limited liability company registered with the Kentucky Secretary of State, having its principal office and registered agent, Gary Summers, located at 640 Kenny Perry Drive, Franklin, KY 42134.

5. The Defendant, Summers Rosdeutscher Farm, LLC (hereinafter "Summers Rosdeutscher Farm"), is a Kentucky limited liability company registered with the Kentucky Secretary of State, having its principal office and registered agent, Gary Summers, located at 640 Kenny Perry Drive, Franklin, KY 42134.

6. The Defendant, Horus Kentucky 1, LLC, (hereinafter "HK1"), is a foreign limited liability company registered with the Kentucky Secretary of State, having its principal office located at 1030 Riverside Parkway, Suite 130, West Sacramento, CA 95605. Its registered agent for service of process is Cogency Global, Inc., 828 Lane Allen Road, Suite 219, Lexington, KY 40504.

7. Venue is proper in this Court as all acts complained of herein occurred in Simpson County, Kentucky.

FACTUAL ALLEGATIONS

8. The property that the Plaintiffs have a shared interest in is located at 172 Hendricks Road, Franklin, KY (hereinafter "Plaintiffs' property"), and is in close and

direct proximity to real property owned by Summers Hodges Farm and Summers Rosdeutscher Farm on Tyree Chapel Road, Franklin, KY.[1]

9. The land in this portion of Simpson County is primarily used for agricultural purposes, including Plaintiffs' property and the Defendants Summers Hodges Farms' and Summers Rosdeutscher Farm's properties. Agricultural use of the parties' land is in conformity with applicable zoning regulations and other surrounding lots.

10. On or about April 1, 2021, HK1, through an agent, applied for a conditional use permit to be heard before the Franklin-Simpson BOA on behalf of Summers Hodges Farm and Summers Rosdeutscher Farm.

11. From the application, it appears that the Defendant HK1 desires to construct and install solar panels on some, or all, of the approximate 136.23 acres owned by Summers Hodges Farm and Summers Rosdeutscher Farm on Tyree Chapel Road. No limiting condition regarding scope, size or acreage of the proposed solar farm was offered by HK1 with the conditional use permit application.

12. Upon information and belief, there is a lease(s) between Defendants HK1 and/or Summers Hodges Farms and/or Summers Rosdeutscher Farm that would have term(s) of at least thirty, but up to forty years of solar panel operation on the subject land.

[1] Summers Hodges Farm is the owner of 86.17 acres and Summers Rosdeutscher Farm owns 50.06 acres.

13. Pursuant to the Franklin-Simpson County Zoning Regulations, Article 12 (Board of Adjustment), Section 12.1.2, all conditional use permit applications are heard and decided by the Franklin-Simpson BOA.

14. A public hearing for this matter was held before the Franklin-Simpson BOA on April 26, 2021. (Transcript of the April 26, 2021 Hearing was unavailable but will be filed upon receipt).

15. During said hearing, various neighbors of Summers Hodges Farm and Summer Rosdeutscher Farm attended the hearing and voiced their concerns, including the Plaintiffs, who were represented by the undersigned at said hearing.

16. Article 8 (Schedule of Zoning District Regulations), Section 8.2 of the Franklin-Simpson County Zoning Regulations address conditional use permits for property in agricultural districts. Specifically, Section 8.2.3 provides applicable conditional use permits that may be granted in agricultural zones:

> Subject to the approval of the Board of Adjustment, the following uses *may* be approved within an agricultural district:
>
> a. One duplex per lot; airports and landing strips, *solar farms as in Section 9.8*, cemeteries, hospitals, public or private schools or colleges, home occupations when in compliance with section 9.3, oil or gas wells, country club or gold course, public parks, playgrounds and community centers, private marine, boat dock, boat ramp, driving range or private outdoor recreational activity, manufactured some parks complying with section 8.8.13.
>
> b. Other uses which are similar in nature to the uses listed in 8.2.3.A and *which would not be detrimental to or alter the basic agricultural character of the neighborhood* in which the use is located. (*See* Franklin-Simpson County Zoning Regulations, Article 8, Section 8.2.3)(emphasis ours).

17. Notably, Article 9 (Special Regulations), Section 9.8 of the Franklin-Simpson County Zoning Regulations states that a Developmental Plan is required for Solar Farms of 10 acres or more. This Section includes many specific requirements for a Developmental Plan, including: "the location and dimensions of all proposed areas for placement of solar panels, screening and fencing and related structures; location of any proposed solar access easements[;] . . . locations for wiring interconnections . . . [;] Decommissioning plan that describes the anticipated life of the solar farm . . . [; etc.]".

18. Additionally, Article 12, Section 12.2.2(b) states that:

> [t]he application for a conditional use permit **shall** include the application form and a plan. The plan, drawn to scale, shall show as a minimum, the dimensions of the lot to be built upon, the outside dimensions of all existing buildings and all buildings to be constructed or altered. In addition, the use of buildings, yard depths, and any other information necessary in order to refer a decision on the conditional use permit. (*See* Franklin-Simpson County Zoning Regulations, Article 12, Section 12.2.2(b))(emphasis added).

19. The application of the Defendants' conditional use permit included no "plan" meeting the requirements of Sections 9.8 and/or 12.2.2(b) of the Franklin-Simpson County Zoning Regulations.

20. In addition to this application flaw, the main concern of the Plaintiffs, and other neighboring landowners, is that the proposed solar farm would significantly alter the basic agricultural zoning character of the 136.23 acres, as well as the surrounding properties, in contradiction of Franklin-Simpson Zoning Regulations Section 8.2.3.

21. The significant change and alteration of the basic agricultural zoning character of the 136.23 acres has damaged, injured and aggrieved Plaintiffs by changing

and altering the nature of their adjoining properties to use that is inconsistent with agricultural use of their own property and by decreasing the value of the same.

22. Ultimately, the Franklin-Simpson BOA granted the conditional use permit, without making any kind of written or oral adjudicative findings of fact.

23. As the intended use of the 434 acres does not align with the character of the surrounding properties, the Plaintiffs, being individuals who have interests and rights in properties in direct proximity to the 136.23 acres at issue herein, have been individually injured and seek declaratory and injunctive relief from this Court.

CAUSES OF ACTION:

Count I – Appeal Pursuant to KRS § 100.347(1)

24. Plaintiffs incorporate Paragraphs 1-23 as if fully stated herein and further allege as follows.

25. The oral grant of the conditional use permit by the Franklin-Simpson Board of Adjustment was arbitrary, capricious, without substantial evidence, and in contradiction with Franklin-Simpson Zoning Regulations.

26. Additionally, the failure of the Franklin-Simpson BOA to make any written or oral adjudicative findings of fact regarding the grant of the conditional use permit was arbitrary, capricious, without substantial evidence, and in contradiction with Franklin-Simpson Zoning Regulations.

27. Due to the aforementioned actions of the Franklin-Simpson BOA, the substantive rights of the Plaintiffs to not have the value of their property decreased or

neighboring property allowed to be used in a manner that is inconsistent with the agricultural purposes for which their property is used, have been materially prejudiced, individually injured, and aggrieved, pursuant to KRS 100.347 with the only adequate remedy being reversal of the Franklin-Simpson BOA's grant of the Defendants' conditional use permit.

Count II – Declaratory Judgment as to the Approval of the Building Permit

28. Plaintiffs incorporate Paragraphs 1-27 as if fully set forth herein and further allege as follows.

29. An actual controversy exists as to whether the conditional use permit at issue should have been granted, considering the use requirements of the subject property's current agricultural zoning and the Defendants' failure to meet the applicable standards set forth in Franklin-Simpson County Zoning Regulations.

30. Accordingly, Plaintiffs request the entry of a declaratory judgment stating that the actions of the Franklin-Simpson BOA were arbitrary, capricious and/or without substantial evidence.

31. Further, Plaintiffs seek a declaratory judgment that the Franklin-Simpson BOA's grant of the conditional use permit was in error and contrary to relevant city ordinances, regulations and the applicable Kentucky statutory scheme, including but not limited to KRS 100.203 and KRS 100.111.

Count III - Violation of KRS 100.203 and KRS 100.111

32. Plaintiffs incorporate Paragraphs 1-31 as if fully set forth herein and further allege as follows.

33. KRS 100.111(2) defines "agricultural use" as follows:

> (a) A tract of at least five (5) contiguous acres for the production of agricultural or horticultural crops, including but not limited to livestock, livestock products, poultry, poultry products, grain, hay, pastures, soybeans, tobacco, timber, orchard fruits, vegetables, flowers, or ornamental plants, including provision for dwellings for persons and their families who are engaged in the agricultural use on the tract, but not including residential building development for sale or lease to the public. For purposes of this subsection, "livestock" means cattle, sheep, swine, goats, horses, alpacas, llamas, buffaloes, and any other animals of the bovine, ovine, porcine, caprine, equine, or camelid species.

34. In the instant matter, the land that the Plaintiffs own and the subject land qualifies as land used for agricultural purposes.

35. KRS 100.203(4) states in pertinent parts as follows:

> Cities and counties may enact zoning regulations which shall contain... text provisions to the effect that land which is used for agricultural purposes shall have no regulations except that: (a) Setback lines may be required for the protection of existing and proposed streets and highways; (b) All buildings or structures in a designated floodway or flood plain or which tend to increase flood heights or obstruct the flow of flood waters may be fully regulated; (c) Mobile homes and other dwellings may be permitted but shall have regulations imposed which are applicable, such as zoning, building, and certificates of occupancy; and (d) The uses set out in KRS 100.111(2)(c) may be subject to regulation as a conditional use.

36. In the instant matter, the conditional use permit and the grant of the same is in violation of KRS 100.203(4) as it regulates land used for agricultural purposes in manners inconsistent with those set forth in KRS 100.203(4) and is therefore in violation of the same, which has caused Plaintiffs damages in the instant matter as neighboring property owners who are using their property for agricultural purposes.

37. Pursuant to KRS 446.070, Plaintiffs are entitled to recover all damages they have suffered as a result of the above violations of KRS 100.203 and 100.111 from Defendants.

38. That Plaintiffs have been injured and harmed by the above violation.

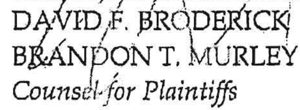
WHEREFORE, the Plaintiffs, Steve Baldwin and John Pitt, request the following relief:

1. A trial by jury on all such issues so triable;
2. A judgment that the actions of the Franklin-Simpson County Planning & Zoning Adjustment Board, in granting the Defendants' conditional use permit, were arbitrary, capricious, and/or without substantial evidence;
3. An appeal and review of the actions of the Franklin-Simpson County Planning & Zoning Adjustment Board, and ultimately, a judgment reversing and rescinding the Franklin-Simpson Board of Adjustment's grant of the Defendants' conditional use permit, further preventing the Franklin-Simpson Board of Adjustment from granting any conditional use permit for the subject land that is not in conformity with the agricultural district's character;
4. For any and all damages that Plaintiffs are entitled to for the statutory violations of Defendants herein; and
5. Any and all other relief to which the Plaintiffs may appear entitled.

This the 12 day of May, 2021.

Respectfully submitted,

BRODERICK & DAVENPORT, PLLC
921 College Street-Phoenix Place
Post Office Box 3100
Bowling Green, KY 42102-3100
Telephone: (270) 782-6700
Facsimile: (270) 782-3110



DAVID F. BRODERICK
BRANDON T. MURLEY
Counsel for Plaintiffs

VERIFICATION

I, Steve Baldwin, acknowledge that I have read the foregoing and the statements contained herein are true and correct to the best of my knowledge and belief.

Steve Baldwin

STEVE BALDWIN
Plaintiff

COMMONWEALTH OF KENTUCKY)
)§
COUNTY OF Simpson)

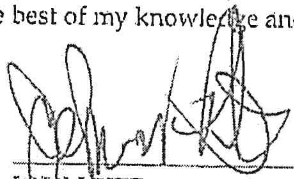
ACKNOWLEDGED, SUBSCRIBED AND SWORN to before me on this 11th day of May, 2021 by Steve Baldwin, knowingly and as his free act and deed.

[signature]

NOTARY PUBLIC, STATE AT LARGE
My Commission Expires: 10/24/2024
Notary Identification No.: KYNP16955

VERIFICATION

I, John Pitt, acknowledge that I have read the foregoing and the statements contained herein are true and correct to the best of my knowledge and belief.



JOHN PITT
Plaintiff

COMMONWEALTH OF KENTUCKY)
)§
COUNTY OF Simpson)

ACKNOWLEDGED, SUBSCRIBED AND SWORN to before me on this 11th day of May, 2021 by John Pitt, knowingly and as his free act and deed.

NOTARY PUBLIC, STATE AT LARGE
My Commission Expires: 10/24/2024
Notary Identification No.: KYNP16955

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT
SIMPSON CIRCUIT COURT, DIV. I
CASE NO. 21-CI-00135

STEVE BALDWIN and
JOHN PITT PLAINTIFFS

vs.

MEMORANDUM OPINION AND ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION TO DISMISS

FRANKLIN-SIMPSON COUNTY PLANNING
& ZONING ADJUSTMENT BOARD
SUMMERS HODGES FARM, LLC
SUMMERS ROSDEUTSCHER FARM, LLC and
HORUS KENTUCKY 1, LLC DEFENDANTS

This matter came before the Court for hearing on July 19, 2021 on an amended motion to dismiss by Defendants Summers Hodges Farm, LLC ("Summers Hodges"), Summers Rosdeutcher Farm, LLC ("Summers Rosdeutcher"), and Horus Kentucky 1, LLC ("HK1"). Hon. David F. Broderick and Hon. Brandon T. Murley appeared on behalf of the Plaintiffs. Hon. Randall L. Saunders and Hon. Timothy D. Mefford appeared on behalf of Defendants Summers Hodges, Summers Rosdeutcher, and HK1. The Court, having reviewed the record herein, and being otherwise sufficiently advised, hereby issues the following memorandum opinion and order:

FACTS AND PROCEDURAL HISTORY

These Plaintiffs and some of the Defendants were previously before the Court in Simpson Circuit Court, Division I case 21-CI-00064, *Baldwin, et al v. Franklin-Simpson County Planning & Zoning Adjustment Board, et al* (hereinafter "*Baldwin I*"). In that case, HK1 applied for and was granted a conditional use permit to construct and install solar panels on approximately 434 acres of land also on Tyree Chapel Road but owned by Roger Hoffman (309.14 acres) and

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Summers Hodges (124.6658 acres). The Plaintiffs initiated an administrative appeal of the issuance of this CUP in the Circuit Court, claiming that the Board of Adjustment erred in granting the CUP because the Board did not enforce its own regulations by requiring a Development Plan, did not make adjudicative findings of fact, and that granting the CUP altered the agricultural zoning character of the subject land and surrounding properties. The Court dismissed the appeal, holding that the Plaintiffs failed to state a particularized injury or aggrievement sufficient to invoke the Court's jurisdiction pursuant to the holding in *Kenton County Board of Adjustment v. Meitzen*, 607 S.W.3d 586 (Ky. 2020).[1]

The Plaintiffs are now back before the Court on a new matter arising from the separate application on April 1, 2021 of Defendant HK1 for a conditional use permit for the construction and installation of solar panels on some or all of approximately 136.23 acres of land (the "Additional CUP Property") owned by Defendants Summers Hodges Farm, LLC (86.17 acres) and Summer Rosdeutscher Farm, LLC (50.06 acres) also on Tyree Chapel Road. As before, the Additional CUP Property and the property surrounding it are primarily used for agricultural purposes.

The Franklin-Simpson County Planning & Zoning Board of Adjustment (the "Board of Adjustment") held a public hearing on the application on April 26, 2021. At the hearing, Plaintiff Steve Baldwin ("Baldwin"), the owner of property adjacent to the Additional CUP Property, and Plaintiff John Pitt ("Pitt"), and individual who works and farms Baldwin's property, were represented by counsel and voiced their concerns about the Additional CUP application. At the conclusion of the hearing, the Board of Adjustment granted the conditional use permit authorizing the use of the Additional CUP Property as a solar farm.

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[1] Plaintiffs have filed a motion to alter, amend or vacate in *Baldwin I* which is scheduled for hearing on September 20, 2021.

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On May 12, 2021, the Plaintiffs filed a Verified Complaint (the "Complaint") initiating this new action in Simpson Circuit Court. This Complaint sets forth three (3) claims: (1) an appeal pursuant to KRS 100.347(1) of the Board of Adjustment's granting of the conditional use permit for the Additional CUP Property; (2) a declaratory judgment "stating that the actions of the Franklin-Simpson BOA were arbitrary, capricious and/or without substantial evidence" and that the "grant of the conditional use permit was in error and contrary to relevant city ordinances, regulations and the applicable Kentucky statutory scheme, including but not limited to KRS 100.203 and KRS 100.111"; and (3) a claim that the granting of the conditional use permit violated KRS 100.203 and KRS 100.111.

The Plaintiffs specifically allege that the Board of Adjustment erred in granting the conditional use permit because the application did not include a Development Plan per Article 9, § 9.8 and Article 12, §12.2.2(b) of the Franklin-Simpson County Zoning Regulations. Compl. at ¶s 17-19. The Plaintiffs further allege that the proposed solar farm will significantly alter the agricultural zoning character of the Additional CUP Property owned by the Summers entities "as well as the surrounding properties, in contradiction of Franklin-Simpson Zoning Regulations Section 8.2.3." Compl. at ¶ 20. Unlike *Baldwin I*, the Plaintiffs now allege that the change in the agricultural character of the Additional CUP Property "has damaged, injured and aggrieved Plaintiffs by changing and altering the nature of their adjoining properties to use that is inconsistent with agricultural use of their own property ***and by decreasing the value of the same.***" Compl. at ¶ 21 (emphasis added). Finally, the Plaintiffs allege that the Board of Adjustment erred in granting the conditional use permit without making adjudicative findings of fact. Compl. at ¶ 22. As in *Baldwin I*, the Plaintiffs include a claim for declaratory judgment but

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also include a new claim that the granting of the CUP violates the "agricultural supremacy clause" set forth in KRS 100.203(4). Compl. at ¶s 32 - 38.

On June 21, 2021, the Defendants filed a motion to dismiss Plaintiffs' Complaint and a memorandum of law in support thereof. The Defendants again allege that the Plaintiffs' complaint fails to allege an injury or aggrievement as required by KRS 100.347(1) and ask the Court to dismiss because the Court lacks jurisdiction. The Defendants further allege that the Plaintiffs' declaratory judgment claim must be dismissed because the Plaintiffs' sole remedy was administrative appeal. The Defendants finally contend that the Plaintiffs' claim that the Board's actions violated the agricultural supremacy clause is not a cognizable action and must also be dismissed. On July 14, 2021, Plaintiffs filed a written response to the Defendants' motion to dismiss, and the Court heard oral arguments at a hearing on July 19, 2021.

Having carefully considered the foregoing, and for the reasons set forth hereinbelow, the Court finds that the Plaintiffs have sufficiently plead an injury or aggrievement pursuant to KRS 100.347(1) to invoke the Court's jurisdiction for an administrative appeal herein. However, the Court further finds that Plaintiffs' claim of a violation of the agricultural supremacy clause is not an action for which relief may be granted herein and therefore dismisses same. Having dismissed Plaintiffs' only claim which is broader in scope than the administrative appeal and beyond the aegis of KRS 100.347, the Court also dismisses the Plaintiffs' claim for declaratory judgment.

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ANALYSIS

I. Unlike *Baldwin I*, Count I of the Plaintiffs' Complaint herein sets forth a claim of a specific injury or aggrievement as required by KRS 100.347(1) and described by the Supreme Court of Kentucky in *Meitzen*.

As in *Baldwin I*, the primary issue before the Court is whether that Plaintiffs have perfected their appeal of an administrative final action by sufficiently stating an injury or aggrievement pursuant to KRS 100.347(1) as interpreted by the Supreme Court of Kentucky in *Meitzen*. Here, Plaintiffs contend that they have suffered four (4) injuries as a result of the Board's granting of the CUP: (1) the significant alteration of the basic agricultural zoning character of the 136.23 acres, as well as the surrounding properties, in contradiction of Franklin-Simpson Zoning Regulations Section 8.2.3; (2) the changing and alteration of the nature of the subject property to a use that is inconsistent with the agricultural use of Plaintiffs' property; (3) the misalignment of the proposed use of the subject property with the character of the surrounding properties; and (4) a decrease in the value of Plaintiffs' own property.

The Plaintiffs' first three (3) claims of harm are similar in that each alleges an incompatibility between the use of the Additional CUP Property as a solar farm and the agricultural use of the surrounding property. The Court remains unpersuaded that that these allegations, standing alone, state a sufficient injury or aggrievement under KRS 100.347(1) as interpreted by *Meitzen*.

The Supreme Court of Kentucky held in *Meitzen* that "[t]he language in KRS 100.347(1) is clear and unequivocal – a party must *claim* to be "*injured or aggrieved*" by a board's final action. *Meitzen* at 593 (original emphasis). The court concluded that the plain meanings of the words "claim," injury," and "aggrieved" mean that "a party pursuing an appeal from a board of adjustment must claim <u>**some type of hurt or damage**</u>, or <u>**some form of suffering or**</u>

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infringement that the party will experience as a result of the board's decision." *Id.* (emphasis added). A pleading which merely sets forth a critique of a board's decision to grant a conditional use permit and which otherwise fails to state how the alleged errors affect or cause injury to the plaintiffs is a not a claim of injury or aggrievement which is sufficient to invoke the Court's jurisdiction pursuant to KRS 100.347(1). *Id.*

As this Court held in *Baldwin I*, Plaintiffs' allegations of incompatibility between the agricultural use of their property and the proposed use of the Defendants' property are general in nature and do not specifically state how the CUP will negatively impact the Plaintiffs' property; Plaintiffs merely allege that the zoning character of the property will be altered without including any specific claim as to how they will suffer a hurt, damage, suffering or infringement as a result of the CUP. Plaintiffs' claims are akin to the general allegation of danger to the community's school children in *Meitzen* in that said claims, standing alone, do not allege particularized harm to the Plaintiffs which is sufficient to satisfy KRS 100.347(1). In addition, the thrust of the first claim is that the CUP was granted in violation of the standard set forth in Section 8.2.3(b) of the zoning regulations, which only applies to "other uses" than those listed in Section 8.2.3(a). Because "solar farms" are expressly included as uses in Section 8.2.3(a), such farms are not "other uses" as contemplated by Section 8.2.3(b) and thus Plaintiffs' claim that the CUP violates this provision of the regulations is without merit.

However, unlike *Baldwin I*, the Plaintiffs allege herein that the Board's granting of the CUP and the resulting alteration of the agricultural character of the property has harmed them by specifically diminishing the value of their adjoining property. This claim is not a critique of the Board's action or a general claim but is instead an allegation of harm that is specific to the Plaintiffs. A claim that Plaintiffs' property value will decrease constitutes a "hurt or damage"

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that Plaintiffs will experience as a result of the Board's action. Accordingly, the Court finds that the Plaintiffs' Complaint sufficiently alleges an injury or aggrievement pursuant to KRS 100.347(1) and *Meitzen*. The Court's jurisdictional threshold for an administrative appeal therefore has been met.

The Defendants contend that the Plaintiffs still have not stated a particularized injury because property owners do not have an individual substantive right to not have their property values decreased. In support of this argument, Defendants rely on the holding in *Pierson Trapp Co. v. Peak*, 340 S.W.2d 456, 460 (Ky. 1960) that the purpose of rezoning is not to protect property rights. The Defendants' reliance on *Peak* is misplaced. In *Peak*, the Fayette County Planning Commission approved the rezoning of a 30 acre tract from residential to commercial so that it could used for a shopping center. Pierson Trapp Company, the owner of a shopping center in the same vicinity, brought suit to void the rezoning. The trial court upheld the rezoning and the appellate court reversed on grounds which are not germane to the case at bar.

One of the Pierson Trapp's contentions in opposition to the zone change was that it would damage or diminish the value of its own nearby property. The Defendants herein cite the *Peak* court's holding that "[t]he purpose of zoning is not to protect the value of the property of particular individuals, but rather to promote the welfare of the community as a whole." *Peak* at 460. However, Defendants omit the *Peak* court's observation that "[i]t is true that **the effect of a zoning change on the value of neighboring property is one factor that may be taken into consideration** in determining the reasonableness of the change." *Id.* (emphasis added). Though the *Peak* court ultimately rejected this argument on the basis that diminution of property value **alone** does not state a ground of relief, it did conclude that such diminution was a factor for the Court to consider.

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The case *sub judice* differs factually from *Peak*. In *Peak*, Pierson Trapp opposed the zone change because it classified the subject property **the same as** Pierson Trapp's own commercial property and allegedly devalued it due to the possible competition of another shopping center. The court's holding was that this potential devaluation alone was insufficient for relief. Unlike Pierson Trapp in *Peak*, the Plaintiffs herein allege that the proposed use of the subject property is **incompatible** with the use of their land **and** that this incompatibility devalues their property. Accordingly, *Peak* is distinguishable and the Court finds that Plaintiffs' claim of incompatibility plus property value diminution is sufficient to proceed under KRS 100.347(1).

Defendants next appear to contend that Plaintiffs' claim is deficient because an allegation of deprivation of due process is insufficient under KRS 100.347(1). As an initial matter, it appears that to some degree Defendants have mischaracterized the basis of the Plaintiffs' administrative appeal. While Plaintiffs have made some allegations with respect to the administrative procedure[2] that resulted in the contested CUP, their appeal does not appear to be based solely on deprivation of due process. Instead, Plaintiffs allege that the Board's decision to grant the decision was arbitrary, capricious, without substantial evidence, and in contradiction with applicable regulations. As stated specifically in the Complaint, the Plaintiffs' "main concern" "is that the proposed solar farm would significantly alter the basic agricultural zoning character" of the subject property, "as well as the surrounding properties." Compl. at ¶ 20. As discussed in detail above, Plaintiffs further allege that they will suffer harm or injury by a decrease in the value of their property as a result of the incompatibility of the use of the subject property as a solar farm with the agricultural use of their own property. Accordingly, the

[2] Specifically, Plaintiffs allege that the Board failed to make written findings of fact in support of its decision and the Defendants failed to include a development plan with its application as required by the regulations.

Plaintiffs' administrative appeal does not appear to be based on a claim of deprivation of due process as suggested by the Defendants.

In support of their argument, the Defendants cite the Court to two unpublished opinions, *Barber v. Topgolf USA Louisville, LLC*, No. 2019-CA-1112-MR, 2020 WL 7419028, at *9, (Ky. Ct. App. Dec. 18, 2020) and *Citizens for Preservation of Jessamine County, LLC v. Jessamine County*, No. 2010-CA-000722-MR, 2011 WL 1706760, at *4 (Ky. Ct. App. May 6, 2011). The holdings of each of these cases are distinguishable from the issues raised herein. In *Barber*, the residents' specific complaint was essentially that as neighbors, they had been "inappropriately required to analyze the applicants' submissions and present their own evidence" and thus they had been deprived of their asserted right to an impartial tribunal. *Barber* at *9. In *Jessamine County*, the complainant failed to allege a specific injury or harm and instead relied "on allegations included in its complaint indicating that it had been deprived of due process and that it is entitled to recover money damages, attorney's fees, and costs." *Jessamine County* at *4. As discussed hereinabove, Plaintiffs' administrative appeal herein is not solely based on a claim of deprivation of due process and Defendants' reliance on the foregoing cases therefore is misplaced.

Finally, the Defendants contend that Plaintiffs' administrative appeal must fail because the Plaintiffs failed to include evidence supporting their claim of a diminution in property value in their Complaint. Specifically, Defendants allege that pursuant to *Spencer County Preservation, Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, 330 (Ky. Ct. App. 2007), Plaintiffs are required to claim an injury or aggrievement **and** factual allegations supporting their claim. The Court does not interpret *Beacon Hill* as creating such a heightened pleading standard requiring both a statement of a claim and supporting factual evidence. In *Beacon Hill*, the plaintiffs'

argument was that the simple act of filing a complaint was itself sufficient to perfect their administrative appeal. The quotation cited by the Defendants indicates that the *Beacon Hill* plaintiffs failed to meet KRS 100.347(1)'s requirement that a claim must state an injury or aggrievement both by failing to state the claim and by failing to provide any supporting evidence. The very next sentence of the *Beacon Hill* opinion sets forth that "[i]n the absence of such a claim ***or*** facts in the complaint, a statutory mandate for the exercise of judicial power by the circuit court was not met." *Id.* at 330 (emphasis added). The implication is that the *Beacon Hill* plaintiffs potentially could have met the statutory requirement either by properly stating its claim or by providing facts which could be interpreted as supporting such a claim, but because they did neither their claim had to be dismissed.

Defendants' reading of *Beacon Hill* is further inconsistent with Kentucky's well-settled principles of notice pleading. Kentucky is a notice pleading jurisdiction, where the "central purpose of pleadings remain notice of claims and defenses." *Russell v. Johnson & Johnson, Inc.*, 610 S.W.3d 233, 240 (Ky. 2020). It is not necessary to state a claim with technical precision under CR 8.01(1)[3], the applicable Rule of Civil Procedure, "as long as a complaint gives a defendant fair notice and identifies the claim." *Russell* at 241, citing *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 844 (Ky. 2005).

Notably, the pertinent enabling statute itself, KRS 100.347(1), merely sets forth that "[a]ny person or entity claiming to be injured or aggrieved by any final action of the board of adjustment shall appeal from the action to the Circuit Court of the county in which the property

[3] CR 8.01(1) sets forth, in pertinent part, that "[a] pleading which sets forth a claim for relief... shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled."

… lies." There is no heightened pleading standard requiring both the statement of a claim and a statement of supporting facts set forth in this statute.

Based on this review of the enabling statute and the application of the principles of notice pleading to a complaint initiating an administrative appeal, the Court is satisfied that the Plaintiffs' Complaint sufficiently states an administrative appeal pursuant to KRS 100.347(1).

II. The Board's granting of a conditional use permit for land lying in an agricultural zone does not violate the "agricultural supremacy clause" provisions set forth in KRS 100.111(2) and 100.203(4).

The next issue the Court will address is the Defendants' motion to dismiss Plaintiffs' claim set forth in Count III of the Complaint that the Board's granting of the conditional use permit violated the "agricultural supremacy clause." Plaintiffs allege that the current use of the subject land constitutes "agricultural use" pursuant to KRS 100.111(2). Compl. at ¶ 34. Plaintiffs reason that the Board's granting of the conditional use permit for the solar farm in land zoned agricultural constitutes the regulation of land used for agricultural purposes in violation of KRS 100.203(4). Def. Resp. at 15. In short, Plaintiffs claim that the Board's granting of the conditional use permit for the use of a solar farm in an agricultural zone violates the agricultural supremacy clause because a "'solar farm' is not a farm at all, it is a power plant." Defs. Resp. at 16.

Defendants seek dismissal of this claim on the ground that Plaintiffs have not brought a cognizable cause of action. The Court construes Defendants' motion as a motion for failure to state a claim upon which relief can be granted under CR 12.02(f). Such a motion should not be granted "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. *Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 563 (Ky. Ct. App. 2017), citing *Pari-Mutuel Clerks' Union of Kentucky, Local 541,*

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SEIU, AFL-CIO v. Kentucky Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977). The pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true. *Id.*, citing *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. Ct. App. 2007).

The so-called "agricultural supremacy clause" is not a specific provision or clause set forth in Kentucky Revised Statutes Chapter 100 but is instead a doctrine that is woven throughout the Chapter. *Nash v. Campbell County Fiscal Court*, 345 S.W.3d 811, 817 (Ky. 2011). KRS 100.203(4) specifically exempts "land which is used for agricultural purposes" from zoning regulations, except for setbacks, use of flood plains, mobile homes, and certain uses relating to activities involving horses. KRS 100.203(4). *See also Grannis v. Schroeder*, 978 S.W.2d 328, 330 (Ky. Ct. App. 1997). KRS 100.111(2) defines the "agricultural use[s]" which, when considered along with KRS 100.203(4), would qualify the properties being used for agricultural purposes for exemption from zoning regulation pursuant to the "agricultural supremacy clause."

As recognized by the Kentucky Supreme Court in *Nash*, the "agricultural supremacy clause" "takes agricultural *uses* outside the jurisdiction of zoning ordinances and agricultural *divisions* outside the jurisdiction of subdivision regulations." *Nash* at 817 (original emphasis). A typical example of the application of the "agricultural supremacy clause" with regard to an agricultural use would be a landowner owning property which was subject to zoning regulations in a residential zone who desired to use his property for agricultural purposes. If the desired use constitutes one of the specifically enumerated "agricultural use[s]" in KRS 100.111(2), courts

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have held that such uses are exempt from zoning regulation pursuant to the agricultural supremacy clause.[4]

The *Nash* cited by the Plaintiffs provides an example of the application of the "agricultural supremacy clause" to a **division** of agricultural property. In that case, the landowner desired to subdivide his property into 5 acre lots but wanted the resulting lots to be exempt from the local zoning authority's subdivision regulations. The *Nash* court noted that to qualify for exemption from the subdivision regulations pursuant to the "agricultural supremacy clause," the resulting properties after division would each have to meet the requirements for "agricultural use" set forth in KRS 100.111(2). *Nash* at 817-18. In *Nash*, the "agricultural supremacy clause" thus was not being applied to prohibit all non-agricultural uses of the land after division; it was being applied instead to confine the properties' eligibility for exemption from the subdivision regulations to those meeting the definition of "agricultural use."

In the case *sub judice*, the Defendants do not seek exemption from zoning regulations based on an "agricultural use," and so the "agricultural supremacy clause" cited by the Plaintiffs does not apply. Instead, the Defendants were granted a conditional use permit for a use (solar farm) which already had been identified by the local governing body as an acceptable conditional use in an agricultural zone. Plaintiffs contend that the Board's granting of the CUP herein violated KRS 100.203(4) because it regulated land used for agricultural purposes in a manner inconsistent with the "agricultural supremacy clause." Again, the issue with respect to application of the "agricultural supremacy clause" is whether the proposed use still allows the landowner to qualify for exemption from further regulation, **not** whether the land may be used at all for non-agricultural uses.

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[4] *See Oldham County Bd. of Adjustments and Appeals v. Davis*, No. 2003-CA-001492-MR, 2004 WL 1857309, at *3 (Ky. Ct. App. Aug. 20, 2004).

The Kentucky Court of Appeals made this distinction abundantly clear in *Sladon v. Shawk*, 815 S.W.2d 404 (Ky. Ct. App. 1991). In *Sladon*, the landowner owned 9.5 acres within a district zoned agricultural. The landowner sought to subdivide this property into parcels consisting of 6.624, .052, and 1.823 acres, respectively, each of which would have been used for a non-agricultural purpose (residence). Opponents of this division of properties contended that the Planning Commission erred by approving the subdivision plat because it did not have the authority to permit residential use in an agricultural zone pursuant to KRS 100.111(2), part of the "agricultural supremacy clause." The trial court and the Court of Appeals disagreed, holding that "KRS 100.111(2) has nothing to do with the kinds of uses which may be permitted within an area zoned agricultural." *Sladon* at 405. Instead, the court noted that "[t]he ultimate authority to establish various zones and the uses permitted within each of those zones is given to local governments to be exercised through zoning regulations." *Id.* at 406.

The Court of Appeals reached a similar conclusion in *Grannis v. Schroder*. In that case, the court noted that

> Agricultural zones ... typically include some nonagricultural uses as principal permitted uses, such as hospitals, day cares, and churches. Some nonagricultural uses are listed as conditional uses in the [agricultural] zone, like recreational facilities, slaughterhouses, feedlots, and home occupations. These uses, also being nonagricultural in the sense that they are not typical farming operations, are subject to the [Board of Adjustment]'s approval which may be given subject to certain conditions....

Here, Defendants seek to use property lying in a district zoned agricultural for the non-agricultural use of solar farm, which is one of the specific authorized conditional uses set forth in the local zoning regulations. As set forth in *Sladon*, the "agricultural supremacy clause" has nothing to do with whether a conditional use permit may be issued for this non-agricultural use in an agricultural zone. As noted in *Grannis*, such use is subject to the approval of the Board of

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Adjustment pursuant to KRS 100.237 and the local zoning regulations, which is precisely what occurred with respect to HK1's application for a conditional use permit herein.

As such, based on the foregoing, Plaintiffs' claim for relief pursuant to the "agricultural supremacy clause" set forth in Count III of the Complaint is without merit and will be dismissed.

III. After dismissal of the claim for violation of the "agricultural supremacy clause," the remaining assertions by Plaintiff for declaratory judgment in Count II are not beyond the scope of the administrative appeal sought in Count I of the Complaint.

The final substantive issue to be considered by the Court is Defendants' motion to dismiss Plaintiffs' claim for a declaratory judgment. This claim is set forth in Count II of the Plaintiffs' Complaint. Count II alleges an actual controversy as to whether the Board should have granted the conditional use permit. Compl. at ¶ 29. Plaintiffs therefore request a declaratory judgment stating that the actions of the Board in granting the CUP were arbitrary, capricious and/or without substantial evidence. Compl. at ¶ 30. Finally, the Plaintiffs aver that "the Franklin-Simpson BOA's grant of the conditional use permit was in error and contrary to relevant city ordinances, regulations and the applicable Kentucky statutory scheme, including but not limited to KRS 100.203 and KRS 100.111." Compl. at ¶ 31.

Defendants contend that Plaintiffs' claim for declaratory judgment must be dismissed because the allegations and relief sought thereunder fall within the scope of the administrative appeal pursuant to KRS 100.347 set forth in Count I of the Plaintiffs' Complaint. The Plaintiffs argue that the claim set forth in paragraph 31 of the Complaint alleging that the actions of the Board in granting the CUP were contrary to Board regulations, city ordinances, the agricultural supremacy clause and the pertinent statutory scheme constitute a claim beyond the scope of an administrative appeal. As in *Baldwin I*, the Court disagrees.

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As the Court noted previously, case precedent sets forth that if a statute affords an adequate remedy, a separate declaratory judgment action is not appropriate. *Warren County Citizens for Managed Growth, Inc. v. Board of Commissioners of City of Bowling Green*, 207 S.W.3d 7, 17 (Ky. Ct. App. 2006). A separate declaratory judgment action may be appropriate under certain limited circumstances such as to appeal ministerial aspects of the administrative process occurring after the agency's final action,[5] if the complaint asserts claims which are broader in scope than what is implicated in an ordinary zoning appeal,[6] or if the complaint, judged by its content, is far more than appeal under the aegis of KRS 100.347.[7]

The primary relief sought by Plaintiffs' claim for declaratory judgment is reversal of the Board's granting of the conditional use permit herein due to Plaintiffs' allegation that said decision was arbitrary, capricious and without substantial evidence. This portion of the declaratory judgment claim is virtually identical to the claim for administrative appeal. The remaining portion of Count II requests the same relief on the grounds that the Board's action violated the Board's regulations, the city's ordinances and regulations, and Kentucky's statutory scheme, including the "agricultural supremacy clause." With the exception of the claim regarding the agricultural supremacy clause, each of these assertions again falls within the scope of the administrative appeal. As the claim for violation of the "agricultural supremacy clause" has been dismissed hereinabove, the remaining assertions, judged by their contents, are not "far more than an appeal under ... KRS 100.347(1)." Accordingly, the claim for declaratory judgment brought in Count II of the Complaint will be dismissed herein, as this claim is no more than the reassertion of claims previously alleged under Count I.

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[5] *See Triad Development/Alta Glyne, Inc.* at 47.
[6] *See Simpson v. Laytart*, 962 S.W.2d 392, 395 (Ky. 1998).
[7] *See Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, 602 S.W.2d 427, 429 (Ky. 1980)

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ACCORDINGLY, IT IS HEREBY ORDERED AS FOLLOWS:

1. The amended motion to dismiss by Defendants Summers Hodges Farm, LLC, Summers Rosdeutscher Farm, LLC, and Horus Kentucky 1, LLC is hereby **DENIED** with respect to Count I of the Plaintiffs' Complaint herein and Plaintiffs shall proceed with their administrative appeal pursuant to KRS 100.347(1) accordingly.

2. The amended motion to dismiss by Defendants is hereby **GRANTED** with respect to Counts II and III of the Plaintiffs' Complaint, and said claims are hereby **DISMISSED WITH PREJUDICE.**

SO ORDERED this the 20th day of September, 2021

MARK A. THURMOND, Judge
Simpson Circuit Court, Div. I

Clerk, copies to:

Hon. David F. Broderick / Hon. Brandon T. Murley, *Counsel for Plaintiffs*
Hon. Randall L. Saunders, *Counsel for Defendants Summers Hodges, Summers Rosdeutscher and HK1*
Hon. Timothy D. Mefford, *Counsel for Defendants Summers Hodges, Summers Rosdeutcher and HK1*
Franklin-Simpson County Planning & Zoning Board of Adjustment
c/o Hon. Robert Y. Link and Hon. W. Scott Crabtree, *Defendant*