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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

S BAR RANCH, an Idaho limited liability
company,)
)
Petitioner/Plaintiff,)
)
vs.)
)
ELMORE COUNTY, IDAHO, a political)
subdivision of the State of Idaho,)
)
Respondent/Defendant.)
)
_____)

Case No. CV20-18-00525
PETITION FOR JUDICIAL REVIEW /
COMPLAINT

COMES NOW Petitioner/Plaintiff, S Bar Ranch, LLC (“**S Bar Ranch**”) by an through its
attorneys of record and petitions, complains and alleges as follows:

I. PARTIES, JURISDICTION, ENGLAND RESERVATION & VENUE

1. S Bar Ranch is the owner of real property in Elmore County, Idaho, which is located less than one (1) mile from the location of the proposed development.
2. Elmore County, Idaho, is a political subdivision of the State of Idaho.

3. This Petition/Complaint raises multiple claims including, but not limited to, a claim for judicial review brought pursuant to Idaho Code § 67-6521(1); a claim for declaratory relief; a claim for inverse condemnation action brought pursuant to Idaho Code § 67-652(2)(b); and a claim for deprivation of due process and other civil rights brought pursuant to 42 U.S.C. § 1983.

4. The claim asserted herein for inverse condemnation pursuant to the provisions of Idaho Code § 67-6521(2)(b) is made to comply with the United States Supreme Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The Plaintiffs hereby reserve their right, in accordance with *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) to litigate their federal claims, including those for federal constitutional protection, in the United States District Court for the District of Idaho.

5. Venue for this action is proper in Elmore County, Idaho pursuant to Idaho Code § 67-5272 because the real property at issue is located in Elmore County.

II. GENERAL ALLEGATIONS

6. Cat Creek Energy, LLC (“**Cat Creek**”) submitted five Conditional Use Permit (“**CUP**”) applications to the County for various projects in the Agriculture and Area of Critical Concern Overlay Zones. Those projects include the installation of: (1) transmission lines (“**CUP-2015-03**”); (2) a pump storage hydro electrical generating facility (“**CUP-2015-04**”); (3) a PV solar electrical generating facility (“**CUP-2015-05**”); (4) a wind turbine electrical generating facility (“**CUP-2015-06**”); and (5) a substation (“**CUP-2015-07**”), (collectively the “**CUPs**”)

7. The CUPs came before the Planning and Zoning Commission of Elmore County, Idaho (the “**Commission**”) on June 15, 2016, for public hearing, and on July 13, 2016, for deliberation.

8. Evidence was presented to the Commission that the CUPs were not in harmony with the Comprehensive Plan and would have a negative impact on the surrounding area.

9. The Commission, after finding that the CUPs were dependent on each other and could not exist separately, denied the CUPs. In its Findings of Fact, Conclusions of Law and Order, the Commission found, among other things, that the CUPs would have a negative impact on the surrounding area and property and would have a negative effect on the scenic characteristics and visual aspects of the area (the “**Commission’s Decision**”).

10. S Bar Ranch, although an affected party as defined under Idaho Code § 67-6521, did not receive notice of the hearing on the CUPs before the Commission and therefore did not have the opportunity to be heard on the CUPs before the Commission issued its decision.

11. Cat Creek appealed the Commission’s Decision to the Elmore County (“**County**”) Board of Commissioners (“**Board**”).

12. The Board held a hearing on the appeal of the Commission’s Decision on November 16, 2016, at which time Cat Creek presented new evidence, for the first time, that materially changed the CUPs, including a new master site plan.

13. This new evidence was not properly noticed as part of the hearing and S Bar Ranch did not have a proper opportunity to respond to this new evidence.

14. The Board held deliberations on the appeal of the Commission’s Decision on January 13, 2017, February 3, 2017, and February 10, 2017. Immediately following deliberations on February 10, 2017, the Board issued its Findings of Fact, Conclusions of Law and Order (“**February 2017 Order**”).

15. In its **February 2017 Order** the Board reversed the Commission’s Decision and provisionally approved the CUPs on the condition that various requirements were met

(“**Conditions**”). One of those conditions was that the Board required the execution and recordation of a Development Agreement by and between the County, Cat Creek, and the entities owning the land where the projects are to be located (“**Development Agreement**”).

16. However, the Board affirmed the Commission’s finding that the five separate CUPs were dependent on each other and could not exist separately.

17. The Board also found that the County Zoning Ordinance, Section 6-8-94 Electrical Generating Facilities, applied to the CUPs and that the CUPs were in compliance with said ordinance.

18. Over the course of approximately one-year, Cat Creek and the County met on several occasions to draft, discuss and negotiate the terms of the Development Agreement. The Development Agreement materially altered the CUPs. The Development Agreement was approved, executed and recorded following a hearing and deliberations on February 9, 2018.

19. Thereafter, on February 16, 2018, S Bar Ranch filed a Request for Reconsideration of the approval of the CUPs and the Development Agreement. The Request for Reconsideration claimed violations of due process; violations of the Local Land Use Planning Act, Idaho Code § § 67-6501 through -6538 (“**LLUPA**”); and violations of the County Code and Ordinances.

20. On March 16, 2018, before ruling on S Bar Ranch’s Request for Reconsideration, the Board held deliberations and made additional Findings of Fact, Conclusions of Law and Order – CUP Amendments (“**Modified Findings**”). These Modified Findings materially altered the **February 2017 Order**. In particular, and among other things, the Board specifically found in its Modified Findings that “as a result in approving the Development Agreement, the Board approved changes to the [CUPs] and Conditions;” that the Development Agreement was not

subject to LLUPA; and that the five CUPs were no longer dependent on each other and instead found that the CUPs could be approved separately.

21. On April 6, 2018, the Board denied S Bar Ranch's Request for Reconsideration. In doing so, the Board found, among other things, that (1) because the CUPs were no longer dependent on each other, S Bar Ranch was only an affected party under Idaho Code § 67-6521 as pertaining to the CUP for the wind turbines but not the other four CUPs; (2) that S Bar Ranch did not timely seek reconsideration of the February 2017 Order; (3) that changes made to the CUPs during the November 16, 2017 hearing did not violate Idaho Code § 67-6509 or § 67-6512(e); (4) that the Development Agreement was not governed by LLUPA; that S Bar Ranch's due process rights were not violated; and (5) the CUPs and Development Agreement did not violate the applicable County Code or Ordinances.

22. The approval of the CUPs will negatively impact S Bar Ranch's property, as found by the Commission. Further, the windmill turbines that are the subject of CUP-2015-06 will diminish the value of S Bar Ranch's property by obstructing and polluting the scenic view and natural landscape of S Bar Ranch's property and for other reasons that will be proven at trial. S Bar Ranch has not been provided compensation for this diminution in value and was deprived of the opportunity to be properly heard before the Board approved and modified the CUPs approval Conditions and Development Agreement.

23. The Board's actions have deprived S Bar Ranch of substantial rights as its actions have deprived S Bar Ranch of property without the payment of just compensation and has deprived them of due process and equal protection.

**III. COUNT ONE
JUDICIAL REVIEW
(INFORMATION AND STATEMENT REQUIRED BY I.R.C.P. 84)**

24. S Bar Ranch incorporates herein by reference paragraphs 1-23.

25. S Bar Ranch has exhausted all available administrative remedies and seeks judicial review of the County's actions and decisions pursuant to Idaho Code § 67-6521(1) and applicable United States law.

26. The name of the agency for which judicial review is sought is the Elmore County Board of Commissioners.

27. The district court to which this petition is taken is the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Elmore.

28. The action for which judicial review is sought is the Board's approval of CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, CUP-2015-07 and the approval and amendments to the Development Agreement associated therewith (collectively the "**Matter**").

29. Multiple hearings have been held on the Matter at which oral and written presentations were submitted, all of which are incorporated herein. A recording of each hearing was made. Petitioner believes, and therefore alleges, that the Elmore County Clerk possess a copy of each such recording, together with minutes or transcripts of such hearings, if any, and all exhibits submitted at such hearings. The address of the Elmore County Clerk is 150 S 4th E St #5, Mountain Home, ID 83647.

30. A statement of the issues Petitioner intends to assert on judicial review, provided this statement does not prevent Petitioner from asserting other issues later discovered, are as follows:

- (A) The Board erred by concluding that S Bar Ranch is not an affected party under Idaho Code § 67-6521(1)(a)(i) for CUP-2015-03, CUP-2015-04, CUP-2015-05, and CUP-2015-07.
- (B) The Board erred by concluding that the time has passed to seek reconsideration of the **February 2017 Order** under Idaho Code § 67-6535(2) and the County Zoning and Development Ordinance § 6-3-2.F.

- (C) The Board erred by concluding that changes made to the Development Agreement, which included changes to the CUPs, were not violations to the notice and hearing requirements of Idaho Code § 67-6509 or § 67-6512(e).
- (D) The Board erred by concluding that the changes made during the November 16 and 17, 2016 appeal hearings were not in violation of Idaho Code § 67-6509 or § 67-6512(e).
- (E) The Board erred by concluding that the County did not violate the County Zoning and Development Ordinances in connection with its approval of the Development Agreement.
- (F) The Board erred by finding and concluding that S Bar Ranch did not present any evidence of how it might be adversely affected by CUP-2015--03, CUP-2015-04, CUP-2015-05 and CUP-2015-07.
- (G) The Board erred by finding and concluding that the S Bar Ranch's time to seek reconsideration of the Approval expired on February 24, 2017 under Idaho Code § 67-6535(2)(b) and February 20, 2017 under Elmore County Code § 6-3-2.F., and was therefore untimely.
- (H) The Board erred by finding and concluding that the Conditions placed on the CUPs were in accordance with Idaho Code § 67-6512(d).
- (I) The Board erred by finding and concluding that the Development Agreement as a Condition of the Approval was not reviewable.
- (J) The Board erred by finding and concluding that the Board did not amend the Approval and the Conditions until March 16, 2018, when it adopted the CUP Amendment Findings.
- (K) The Board erred by finding and concluding that the CUP Amendment Findings comply with Idaho Code
- (L) The Board erred by finding and concluding that Idaho Code 67-6535(2) does not give S Bar Ranch the right to object to the terms of the Development Agreement beyond those which amend the Approval and the Conditions.
- (M) The Board erred by finding and concluding that the Zoning Ordinance, Title 6, Chapter 3 does not give S Bar Ranch the right to object to the terms of the Development Agreement beyond those which amend the Approval and the Conditions.
- (N) The Board erred by finding and concluding that while changes to the Applications were proposed during the November 16 and 17 Board appeal hearing, the public was given notice of the hearing, the public was permitted to provide written and verbal testimony concerning the matter and review

changes to the site plan as proposed by the Applicant, and that such procedure complied with the law.

- (O) The Board erred by finding and concluding that the Development Agreement is not governed by Idaho Code § 67-6511A, but rather is an agreement between the parties as a condition to the approval of the conditional use permits.
- (P) The Board erred by finding and concluding that the failure to serve notice of the hearings of the Planning and Zoning Commission did not result in S Bar Ranch suffering any harm because the Applications were denied by the Commission and S Bar Ranch could not have provided further input which would have caused the Commission to deny the Applications, notwithstanding that S Bar Ranch was entitled to notice and could have used the opportunity to place testimony and other evidence into the record before it was presented to the Board.
- (Q) The Board erred by finding and concluding that S Bar Ranch did not allege actual harm or violation of fundamental rights in the Request for Reconsideration.
- (R) The Board erred by finding and concluding that Applicant did not violate § 6-8-94.A.7 of the Zoning Ordinance as claimed by S Bar Ranch.
- (S) The Board erred by finding and concluding that the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance.
- (T) The Board erred by finding and concluding that it did not have to have the draft of the Development Agreement reviewed by the County Prosecutor prior to the submission to the Commission.
- (U) The Board erred by finding and concluding that the removal of the water diversion and delivery from the Development Agreement was proper and does not materially change the Application.
- (V) The Board erred by finding and concluding that it could hear and consider new additional evidence at the November 16, 2016 Board of County Commissioners Appeal Hearing on the applications for the CUPs, without proper notice given to the affected parties, in violation of the affected parties due process rights to know what actions were being considered at such public hearing as required by Idaho Code 67-6512(e) when the Board accepted a new master site plan from Applicant.
- (W) Were the Board's actions in violation of Idaho state constitutional or statutory provisions?

- (X) Were the Board's actions in violation of Federal constitutional or statutory provisions?
- (Y) Were the Board's actions taken upon unlawful procedure?
- (Z) Were the Board's actions unsupported by substantial evidence on the record as a whole?
- (AA) Were the Board's actions arbitrary or capricious or did they constitute an abuse of discretion?
- (BB) Were the Board's actions based upon conclusory findings and conclusions?
- (CC) Did the Board act without a reasonable basis in fact or law?
- (DD) Did the Board's actions violate S Bar Ranch's right to due process or right to equal protection of the law?
- (EE) Did the Board's actions result in a taking of property right S Bar Ranch without just compensation?

Petitioner reserves the right to assert additional bases for judicial review.

31. Petitioner requests the transcript of all hearings before the Board on the Matter be prepared.

32. The undersigned counsel does hereby certify that:

- (A) Service of this petition has been made upon the County and Board;
- (B) The Elmore County Clerk has been paid \$100 toward the estimated fee for the transcript and upon receipt of a final estimation by the Clerk, which was requested on April 23, 2018, such fee will be paid to the Clerk; and
- (C) The Elmore County Clerk has been paid \$100 toward the estimated fee for the preparation of a record and upon receipt of a final estimation by the Clerk, which was requested on April 23, 2018, such fee will be paid to the Clerk.

33. The Petitioner also prays for an award of reasonable costs and attorney fees pursuant to applicable Idaho law, including without limitation, Idaho Code 12-117, 12-121, and 12-120(3) and the Idaho Rules of Civil Procedure, Rule 54.

34. Petitioner also requests, pursuant to Idaho Rule of Civil procedure 84(m), that the Court enter an order staying the Matter while the Court considers this Petition and Complaint. Such stay is necessary to preserve the status quo of the parties and to prevent irreversible harm while the Court determines the rights of the parties as they pertain to the Matter.

IV. COUNT TWO DECLARATORY RELIEF

35. S Bar Ranch incorporates herein by reference paragraphs 1-34.

36. S Bar Ranch is entitled to declaratory relief, pursuant to Idaho Code § 10-1201, et seq., and I.R.C.P. 57, declaring invalid the County's approval of the CUPs and the Development Agreement for having failed to provide S Bar Ranch with notice and the opportunity to properly object to such approvals.

37. S Bar Ranch is entitled to declaratory relief relative to their rights and status as to the CUPs the Development Agreement and for a determination that the County's action in approving the CUPs and the Development Agreement was arbitrary, capricious and constituted an abuse of discretion.

V. COUNT THREE UNLAWFUL TAKING

38. S Bar Ranch incorporates herein by reference paragraphs 1-37.

39. The value of S Bar Ranch's property has been substantially diminished by the County's approval of the CUPs and the Development Agreement.

40. As a result of the County's action, S Bar Ranch has been forced to bear a public burden, the cause of which was not the responsibility of S Bar Ranch.

41. S Bar Ranch brings this action pursuant to Idaho Code § 67-6521(2)(b). S Bar Ranch is owed just compensation in conformance with provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code. The County's action

constitutes an unlawful and uncompensated taking of the value of S Bar Ranch's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. S Bar Ranch is entitled to recover damages in an amount sufficient to fully and fairly compensate the S Bar Ranch for the taking of their property, together with costs and attorney fees, all in an amount to be proven at trial. S Bar Ranch will continue to incur additional costs.

VI. COUNT FOUR
42 U.S.C. § 1983

42. S Bar Ranch incorporates herein by reference paragraphs 1–41.

43. The County's action has deprived S Bar Ranch of all economic benefit of their property, without the payment of just compensation as required by the Fifth and Fourteenth Amendments of the United States Constitution.

44. The County's failure to provide proper notice and an opportunity to be heard regarding the approval of the CUPs and the Development Agreement violated S Bar Ranch's right of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 as S Bar Ranch was not afforded proper notice or an opportunity to object to the County's actions.

45. The County's action was discriminatory and violated S Bar Ranch's rights of substantive due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

46. The County's actions regarding the CUPs and the Development Agreement are actions made by the County acting under the color of state law and in its capacity as a state governmental sovereign.

47. The motives of the County in taking the actions that they have were not premised on the advancement of a legitimate governmental interest, and the means chosen by the County

were not likely to advance the goal of preserving and protecting a legitimate governmental interest. As such, the County's actions in approving the CUPs and the Development Agreement are void as applied to S Bar Ranch in that the actions violated S Bar Ranch's right of substantive due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

48. The County's action was intentional and deliberate, was committed with an appreciation for its wrongfulness and injurious effects, and was perpetrated with callous disregard and reckless indifference toward S Bar Ranch's federally protected constitutional rights. As a result, S Bar Ranch is entitled to recover a money judgment against the County for the violation of its federally secured constitutional rights in a sum sufficient to fully and fairly compensate S Bar Ranch, together with interest, costs and attorney fees in a sum to be proven at trial.

DEMAND FOR JURY TRIAL

The Plaintiffs demand a jury trial on all issues that may be heard by a jury.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for relief as follows:

1. For an order reversing and vacating the decision of the County's approval of the CUPs and the Development Agreement.
2. For declaratory relief pertaining to the County's actions as alleged herein.
3. For a money judgment against the County in an amount sufficient to fully and fairly compensate S Bar Ranch for the uncompensated taking of their property and property rights, the violation of their constitutional rights, and the deprivation of their federally protected civil rights.

4. For an award of reasonable costs and attorney fees pursuant to Idaho Code §§ 12-117, 12-121, and 12-120(3), 42 U.S.C. § 1988, I.R.C.P. 54 and any other applicable rule set forth in the Idaho Rules of Civil Procedure.

5. For such other and further relief as this Court deems just and equitable.

DATED THIS 1st day of May, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Meryn W. Clark, ISB No. 1026
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May, 2018, I caused to be served a true copy of the foregoing PETITION FOR JUDICIAL REVIEW / COMPLAINT by the method indicated below, and addressed to each of the following:

Board of County Commissioners
Barbara Steele, Clerk
Elmore County, Idaho
Elmore County Courthouse
Mountain Home, Idaho 83647

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail:
- Telecopy: 208.528.2134
- iCourt e-serve

Daniel R. Page
Prosecuting Attorney, Elmore County
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Merlyn W. Clark