

IN THE CIRCUIT COURT  
COLE COUNTY, MISSOURI

JAMES BABB et al.	)	
	)	
PETITIONERS,	)	
	)	
V.	)	Case No. 12AC-CC00225
	)	
MISSOURI PUBLIC SERVICE	)	
COMMISSION, et al.,	)	
	)	
RESPONDENTS	)	

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
JUDGMENT AND ORDER

Having read the motions and briefs submitted by the parties, and being fully advised in these premises, the Court enters this Judgment in favor of Petitioners and against the Respondents in accordance with the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On November 4, 2008, Missouri voters approved Proposition C, the “Renewable Energy Standard Act,” which is codified at §§ 393.1020 – 393.1030, RSMo.
2. The Missouri Public Service Commission (“Commission”) promulgated 4 CSR 240-20.100, in part, under the authority in § 393.1030, RSMo.
3. 4 CSR 240-20.100 enacts a comprehensive regulatory scheme which imposes requirements on electric utilities in order to comply with the renewable energy portfolio standards in §§ 393.1020 – 393.1030, RSMo.
4. 4 CSR 240-20.100(4) imposes a comprehensive regulatory scheme that requires, *inter alia*, an electric utility to provide for retail account holders to enter into a contract to install a residential solar electric systems to participate in a solar rebate program. The rule states,

“These rebates shall be available to Missouri electric utility retail account holders who install new or expanded solar electric systems that become operational after December 31, 2009.”

5. 10 CSR 240-20.100(4) imposes significant design, operational, safety and technological requirements on such solar energy generating systems.

6. On September 9, 2011, James and Frances Babb (“the Babbs”) submitted an Interconnection Application/Agreement for Net Metering System, along with the design of a residential solar energy system, to Ameren Missouri.

7. On October 12, 2011, Ameren Missouri notified the Babbs that it approved their proposed plans and specifications for the proposed solar energy system to be installed at their property at 2001 Kehrsdale Court, Clarkson Valley, Missouri.

8. On November 1, 2011, the Babbs submitted an application for a Building Permit to the City of Clarkson Valley, Missouri (“the City”) for the installation of the Ameren Missouri-approved solar generating equipment on the Babbs’ property.

9. The Babbs’ November 1, 2011 Building Permit application was approved by their homeowners’ association.

10. As of November 1, 2011, the City’s Municipal Code did not contain any provisions to require a person to apply for and obtain a Special Use Permit prior to the installation of residential solar energy generating equipment.

11. As of November 1, 2011, the City’s Municipal Code did not contain any provisions which imposed any requirements on the installation or operation of solar energy systems at residential one-family dwellings.

12. The City delayed action on the Babb’s application, and on January 3, 2012, the City amended its Municipal Code by adopting Section M2300 and § 405.120.B.15.

13. On January 5, 2012, without withdrawing their November 1, 2011 application for a Building Permit, the Babbs submitted an application for a Special Use Permit pursuant to § 405.120.B.15.

14. On January 31, 2012, the Monarch Fire Protection District advised the Babbs that the Monarch Fire Protection District had no objections or concerns with the installation of their proposed solar generating equipment as long as the Babbs complied with §§ 605.11 to 605.11.4 of the 2012 International Fire Code.

15. On February 3, 2012, the City's Planning and Zoning Commission met to review the Babb's application for a Special Use Permit, and voted to recommend approval of the Babb's application for a Special Use Permit.

16. On February 9, 2012, the Babbs entered into a contract with Ameren Missouri for the sale of Solar Renewable Energy Credits for a five-year period from the customer-owned solar energy equipment on their property. The contract obligates the Babbs to have their solar system operation by August 7, 2012.

17. On March 6, 2012, the City's Board of Aldermen denied the Babbs' application for a Special Use Permit.

18. The City has not taken any action on the Babbs' November 1, 2011 application for a building permit.

#### CONCLUSIONS OF LAW

19. In accordance with §§ 536.050 and 536.150, RSMo., *McCracken v. Wal-Mart Stores East, Lp*, 298 S.W.3d 473 (Mo. banc 2009) and *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. 2009), the Court has subject matter jurisdiction over this matter, and the Petitioners are not required to first present their claims to the Commission.

20. This action is timely filed in a reasonable time in accordance with § 536.150, RSMo because it is a noncontested case and there is no statute or rule which imposes any time limit on filing such an action.

21. Although § 405.160 of the City's Municipal Code addresses appeals to the Board of Adjustment from decisions of the building commissioner, that ordinance does ~~not~~ apply here because the decision denying the Special Use Permit was made by the Board of Aldermen and not the building commissioner.

22. Complete relief can be afforded those already parties to this action, and there are no necessary or indispensable parties who are not present in this action who have any legally protectable interest that is impaired or impeded in their absence.

23. The provisions in the City's Section M2300 ordinance impose requirements that are more restrictive than, inconsistent with, and in conflict with the requirements in 4 CSR 240-20.100.

24. 4 CSR 240-20.100 does not contain any provision requiring any pre-approval by a local government prior to installing a solar energy system subject to 4 CSR 240-20.100.

25. The pre-approval requirement in § 405.120.B.15 in which persons seeking to install a solar energy system at a residential one-family dwelling must obtain a Special Use Permit from the City's Board of Aldermen creates an unlawful condition precedent that is inconsistent and in conflict with 4 CSR 240-20.100.

26. The operative effect of Section M2300 and § 405.120.B.15 on the Babbs, who have a contract with Ameren Missouri to install a solar energy generating system in order to participate in the solar rebate program, is to prohibit an activity that is authorized by 4 CSR 240-20.100.

27. Section M2300 and § 405.120.B.15 are preempted by 4 CSR 240-20.100 with respect to the Babbs because they are persons having a contract with an electric utility to install a solar energy system in order to participate in the solar rebate program. *See Page Western, Inc. v. Community Fire Protection District*, 636 S.W.2d 65, 67 (Mo. banc 1982), *City of Dellwood v. Twyford*, 912 S.W.2d 58 (Mo. banc 1995), or *St. Charles County Ambulance District v. Town of Dardenne Prairie*, 39 S.W.3d 67 (Mo. App. E.D. 2001).

28. The City cannot lawfully impose the requirements in Section M2300 and § 405.120.B.15 on the Babbs' application and their solar energy system.

29. Section M2300.C.3 does not provide a basis to deny the Babbs' permit applications because that ordinance is preempted and unenforceable against the Babbs.

30. Section 1505.1, including Table 1505.1, footnote (b) in the International Building Code, 2009, is not applicable and does not serve as a basis to deny the Babbs' permit applications.

31. The City's March 6, 2012 decision denying the Babbs' application for a special use permit effectively serves to prohibit the Babbs from conducting an activity that is otherwise authorized by 4 CSR 240-20.100.

32. The City's March 6, 2012 decision denying the Babbs' application for a special use permit was in disregard of the relevant facts and circumstances including, but not limited to, the review and approval by Ameren Missouri for the plans and specifications of the Babbs' solar energy system in accord with 4 CSR 240-20.100, the favorable statement by the Monarch Fire Protection District, and the Planning & Zoning Commission's recommended approval.

33. There is no reasonable basis to deny the Babbs' application for a Special Use Permit, and the City's denial was arbitrary, capricious, unreasonable and an abuse of discretion.

34. Section 442.012.1, RSMo confers a legally protectable right to the Babbs to use solar energy at their property, and they have a legally protectable right to participate in the solar rebate program authorized by 4 CSR 240-20.100(4).

35. The City's refusal, without any legal justification, to issue permits is preventing the Babbs from using the solar energy at their property and from participating in the solar rebate program.

36. Other than Table 1505.1, footnote (b) of the International Building Code, 2009, (which is not applicable) and the 6 inch limitation in Section M2300.C.2 (which is preempted), the City has not shown any other regulatory or Code provision with which the Babb's permit applications do not comply; therefore, the Court concludes the Babbs' solar project complies with all applicable regulatory and Code requirements.

37. The City has a ministerial duty to issue the permits and the City has failed to perform its ministerial duty.

38. The Court has inherent equitable powers, including equitable power under § 527.080, RSMo., and Rule 87.10, to grant "further relief ... whenever necessary or proper" to ensure justice is properly administered.

39. Because the Trustees of the Kehrs Mill Estates Residents Association are not parties to this case, they have no standing to file an affidavit in the case.

#### JUDGMENT AND ORDER

For the foregoing reasons, the Court sustains Petitioners' motion for summary judgment on Count I and Count III; sustains Petitioners' motion to strike the affidavit proffered by the Trustees of the Kehrs Mill Estates Residents Association; and denies all other pending motions.

The Court hereby enters JUDGMENT in favor of Petitioners on Counts I and III. Respondent-City of Clarkson Valley is ordered to issue to Petitioners-James Babb and Frances

Babb a building permit and special use permit in accordance with their applications for same. Further, based on the equitable considerations, in the event Respondent-City of Clarkson Valley fails to issue said permits within one (1) business day of the entry of this Judgment and Order, Petitioners-James and Frances Babb are authorized to construct the solar energy system at their property in accordance with all applicable regulatory requirements as if such permits were issued.

JUDGMENT SO ENTERED this 29 day of June 2012.

A handwritten signature in black ink, appearing to read 'D. Green', written over a horizontal line.

Daniel Green  
Circuit Judge

Copy to: Counsel of Record