

SHERRIE MITCHELL and
BENJAMIN L. MITCHELL,
Petitioners,

V.

FILED

MAY 1970

Edgar L. Smith
CLERK GROWN CIRCUIT COURT

BROWN COUNTY INDIANA
BOARD OF ZONING APPEALS and
CHRISTINA BUCCOS,
Respondents.

**ORDER DENYING MOTION TO DISMISS
VERIFIED PETITION FOR JUDICIAL REVIEW**

On April 21, 2020, the Court conducted a telephonic hearing on the Motion to Dismiss Verified Petition for Judicial Review filed by the Respondent Brown County Board of Zoning Appeals. The Petitioners appeared by counsel, Michael L. Carmin. Respondent Brown County Board of Zoning Appeals appeared by counsel, David B. Schilling. Respondent Christina Buccos appeared by counsel, Joseph Maguire and Katelyn Juerling. Christine Ritzmann, Director of the Plan Commission appeared.

The Motion to Dismiss Verified Petition for Judicial Review alleges that the Petitioners lack standing to bring this action pursuant to Indiana Code §36-7-4-1603. The Court, therefore, must determine if the allegations contained in the Verified Petition for Judicial Review are sufficient for the Court to find that the Petitioners are “aggrieved” by the decision of the Brown County Indiana Board of Zoning Appeals which granted Christina Buccos’ request for a special exception for general industrial use for property located at 7735 Gartner Drive.

Bloombank v. United Fid. Bank F.S.B., 113 N.E.3d 708, 720 (Ind. Ct. App. 2018) provides a summary regarding how a court should evaluate a challenge to a petitioner's standing to bring an action:

A Rule 12(B)(6) motion to dismiss for failure to state a claim tests the legal

sufficiency of the plaintiff's claim, not the facts supporting that claim. *Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 466 (Ind. 2017). We review a Rule 12(B)(6) dismissal *de novo*, *id.*, and we accept as true the facts alleged in the complaint, viewing the pleadings in the light most favorable to the

nonmoving party, with "every reasonable inference construed in the nonmovant's favor," *Birge v. Town of Linden*, 57 N.E.3d 839, 843 (Ind. Ct. App. 2016). If a complaint "recounts sufficient facts that, if proved, would entitle the plaintiff to obtain relief from the defendant," it states a claim upon which relief may be granted. *Bellwether*, 87 N.E.3d at 466; *see also Chenore v. Plantz*, 56 N.E.3d 123, 126 (Ind. Ct. App. 2016) (citation omitted) ("A complaint is sufficient and should not be dismissed so long as it states any set of allegations, no matter how unartfully pleaded, upon which the plaintiff could be granted relief."). And, a "complaint does not fail to state a claim merely because a meritorious defense may be available." *Bellwether*, 87 N.E.3d at 466.

A dismissal of a complaint under Rule 12(B)(6) "is seldom appropriate." *McGee v. Kennedy*, 62 N.E.3d 467, 471 (Ind. Ct. App. 2016). We review such motions "with disfavor because [they] undermine the policy of deciding causes of action on their merits." *Wertz v. Asset Acceptance, LLC*, 5 N.E.3d 1175, 1178 (Ind. Ct. App. 2014) (citation omitted), *trans. denied; see also* Ind. Trial Rule 8(F) ("All pleadings shall be so construed as to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points."

The Petitioners' Verified Petition for Judicial Review alleges the following in support of their status as aggrieved persons:

¶8 Mitchell is an aggrieved party to the BZA approval of the special exception for general industrial use. Mitchell is the owner of property adjacent to the Buccos Property. The Michell property is located on West Robertson Road at the intersection of Gartner Lane. Mitchell's property is subject to industrial grade traffic and heavy equipment and vehicles used to transport logs to and off the Buccos' property.

¶13 The evidence heard by the BZA pertaining to the location of the Buccos Property, the nature of the existing road network, the size of vehicles and equipment required for the logging yard operation and the traffic conflicts presented by the heavy equipment and vehicles on the substandard road are unrefuted evidence of harm, are unrefuted evidence of traffic conditions and conflicts on West Robertson Road and are unrefuted evidence of the high risk and danger to Mitchell and other users of West Robertson Road. The proximity of Mitchell's property to Gartner Road and the logging operation creates specific risk and danger to Mitchell arising out of the logging operation, the general industrial use on the Buccos property. The approval of the special exception is unsupported by substantial evidence.

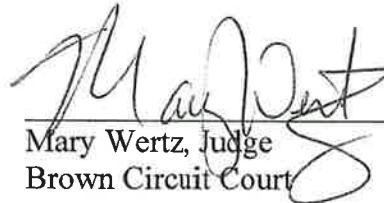
¶14 Granting the special exception subverts the general purposes served by the zoning ordinance and materially and permanently injures the

Mitchell Property and other properties in the same district or in the vicinity of the Buccos Property.

After a careful review of the statute and case law, including *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782 (Ind. 2000) *Pflugh v. Indianapolis Historic Pres. Comm'n*, 108 N.E.3d 904 (Ind.Ct.App. 2018), *Sexton v. Jackson County Bd. of Zoning Appeals*, 884 N.E.2d 889 (Ind.2008), *Thomas v. Blackford County Area Bd. of Zoning Appeals*, 907 N.E.2d 988 (Ind. 2009); *Reed v. Plan Comm'n & Town Council of Munster*, 810 N.E.2d 1126 (Ind.Ct.App 2004). *MacFadyen v. City of Angola*, 51 N.E.3d 322 (Ind.Ct.App. 2016), the Court finds that the Petitioners have standing to bring this action.

IT IS THEREFORE ORDERED that the Motion to Dismiss Verified Petition for Judicial Review is denied.

So Ordered this 6th day of May 2020.



Mary Wertz
Mary Wertz, Judge
Brown Circuit Court

Distribution:

Michael L. Carmin
David B. Schilling
Joseph Maguire and Katelyn Juerling.