

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

THOMAS DOWNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:23-cv-00719-JAR
	)	
THE CITY OF WILDWOOD, a municipal	)	
corporation,	)	
	)	
Serve: John Young, City Attorney	)	
City of Wildwood	)	
16860 Main Street	)	
Wildwood, Missouri 63040-1242	)	
	)	
Defendant.	)	

AMENDED COMPLAINT

Plaintiff Thomas Downey alleges as follows:

INTRODUCTION

In this action for Regulatory Taking, Temporary Regulatory Taking, Inverse Condemnation, Abuse of Discretion, and Injunctive and Declaratory Relief brought pursuant to § 442.404 RSMo., Mo. Const. art. I, § 10, the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C.A. § 1983, Plaintiff Thomas Downey (“Plaintiff” or “Downey”) is suing the City of Wildwood (“Defendant” or the “City”) for declaratory judgment under § 536.050 RSMo., seeking injunctive relief and monetary damages. Downey brings this legal action because the City prevents him from installing a solar energy system (hereinafter “solar panels”) on his privately-owned, owner-occupied residence, without offering just compensation.

PARTIES

1. Plaintiff is an individual of majority age and a citizen of Wildwood, Missouri.
2. Defendant is an incorporated city in the County of St. Louis, State of Missouri

organized in accordance with Chapter 79, RSMo.

JURISDICTION AND VENUE

3. Plaintiff brings this claim pursuant to Mo. Const. art. I, § 10, the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C.A. § 1983, incorporated as against States and their municipal divisions.

4. The jurisdiction of this Court is proper pursuant to 28 U.S.C.A. § 1331, because Plaintiff's action arises under the Constitution of the United States, and § 1343(a)(3) to redress the deprivation of a right secured by the Constitution of the United States.

5. Venue is proper in the United States District Court for the Eastern District of Missouri pursuant to 28 U.S.C.A. § 1391(b)(2) because a substantial part of the events giving rise to this claim occurred in Saint Louis County, Missouri.

6. Divisional venue is proper in the Eastern Division because the events leading to the claim for relief arose in Saint Louis County and Defendant is located in Saint Louis County. E.D. Mo. L.R. 2.07(A)(1), (B)(1).

Facts

7. Downey is the owner of his home at 2638 Wynncrest Falls Drive within the City of Wildwood, Missouri.

8. On or about August 1, 2022, Downey applied for a Conditional Use Permit (hereinafter, "Permit") from the City of Wildwood to install solar panels on the roof of his home, as others in the City have successfully done in the City in the past.

9. To prepare for solar panels on his roof, Downey paid to get a certification from a licensed, professional engineer on July 19, 2022.

10. Downey also secured a Smart Energy Plan (SB564) incentive from Ameren Missouri valued at approximately \$6,250. This incentive program will expire on December 31, 2023.

11. If the Permit is not approved by July 7, 2023, Downey will likely lose the aforementioned rebate from Ameren.

12. The City delayed Downey's Permit for almost a year and, upon information and belief, will ultimately deny his Permit under City of Wildwood Code 415.090 *et seq.* or the newly proposed Code 415.630, Ordinance #2799 (2023).

13. Solar panels are widely held to be safe and reliable sources of energy and can even help protect roofs by providing shade and reducing exposure to the elements¹. Solar panels can significantly increase property value², reduce Missouri's carbon footprint, and reduce Missouri's reliance on non-renewable energy³.

14. Moreover, Missouri's permissive regulations on renewable energy, specifically the "Electric Utility Renewable Energy Standard Requirements (20 CSR 4240-20.100), preempt the City's ordinance.

15. Without injunctive relief, the City's unlawful restraint of Downey's property rights will result in immediate and irreparable injury, loss, and damage to Downey.

Count I – Regulatory Taking

16. Plaintiff incorporates herein all preceding paragraphs as if fully set forth herein.

17. Mo. Const. art. I, § 26 provides, "private property shall not be taken or damaged for public use without just compensation." In determining whether a taking has occurred under Mo. Const. art. I, § 26, Missouri evaluates the same factors considered by the United States

¹ <https://www.architecturaldigest.com/reviews/en-gb/solar-panels/rooftop-solar-panels#protect>

² National Renewable Energy Laboratory (NREL), The National Association of Realtors, U.S. Department of Energy's Lawrence Berkeley National Laboratory

³ U.S. Department of Energy's Lawrence Berkeley National Laboratory

Supreme Court, as outlined below. *Harris v. Missouri Dept. of Conservation*, 755 S.W.2d 726, 729 (Mo.App. W.D. 1988).

18. A regulatory taking occurs when a regulation enacted under the police power of the government goes too far. *Clay Cnty. ex rel. Cnty. Comm'n of Clay Cnty. v. Harley & Susie Bogue, Inc.*, 988 S.W.2d 102, 106 (Mo.App. W.D. 1999).

19. The United States Supreme Court has indicated that three factors are of particular importance in determining whether a government regulation constitutes a taking of property. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). These factors are (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Id.*

20. When a court finds a regulation has gone too far and constitutes a taking, it is essentially finding that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. *Id.*

21. Downey has a protected property right to capture and utilize solar energy on his private property.

22. The City, under state power, has delayed a response to Downey's requested Permit application for almost a year, effectively denying the Permit.

23. Worse, the City proposed a new ordinance to restrict the use of solar panels within the municipality; to wit, City of Wildwood, Mo., Code 415.630, Ordinance #2799 (2023). This new ordinance would severely impinge upon Downey's solar panel installation – reducing the number of panels to roughly half of Downey's planned use.

24. According to § 442.404 RSMo., no deed restrictions, covenants, or similar binding agreements can limit or prohibit the installation of solar panels on the rooftop of any property or

structure.

25. By contrast, the City's proposed ordinance limits or prohibits installing solar panels and states as its purpose a concern about the impact of solar panels on property values, concerns about visibility and aesthetics, and concerns about tree removal.

26. The City's proposed ordinance completely restricts front-facing, roof-mounted solar panels unless they are "...completely and totally screened from public view...". § 415.630.

27. § 415.630 also completely restricts ground-mounted solar panels, without exception. Such an effective outright ban violates the law, as per *Babb v. Missouri Pub. Serv. Comm'n*, 414 S.W.3d 64 (Mo.App. W.D. 2013).

28. As a direct and proximate result of the unreasonable, arbitrary, and capricious acts of the City, the Mayor and the Council in failing to perform the ministerial duty to issue a Permit, as herein alleged, the property rights of Downey have been taken for the period of time from when the Permit should have been issued and the project constructed until the current day.

29. Downey requested that the City grant his Permit or justly compensate him for the taking of his property rights in accordance with Mo. Const. art. I, § 10, but the City has refused.

30. If permitted to install the solar panels, Downey would gain the \$6,250 Ameren Missouri incentive, save considerable money on his electric bill, extend the life of his roof, and increase his home's value.

31. As a direct and proximate result of the unreasonable, arbitrary and capricious acts of the City, through the acts of the Mayor and the Council, Downey has been damaged in an amount as yet unascertained, but estimated to be more than \$75,000. Downey will seek leave of Court to amend this Complaint to conform to proof of such damages at trial.

32. As a direct and proximate result of the taking of his property rights without just compensation, Downey retained the services of counsel to prosecute this action. Downey has

incurred, and will continue to incur, attorneys' fees, expert witness fees, and costs and expenses of litigation in an amount as yet unascertained. Downey will seek leave of Court to amend this Complaint to conform to proof of such amounts at trial.

Wherefore, Downey prays the Court:

- A. Find that Downey's protected property right to capture and use solar energy at his property was taken as a result of the City's refusal to issue a Permit;
- B. Find that such taking is compensable under Mo. Const. art. I, § 10;
- C. Award and order the City to pay to Downey just and reasonable compensation for the unlawful taking of his property rights;
- D. Award and order the City to pay to Downey his attorneys' fees, costs and expenses in prosecuting this action; and
- E. Award all further relief the Court deems just and appropriate.

Count II – Temporary Regulatory Taking

33. Plaintiff incorporates herein all preceding paragraphs.

34. The City's refusal to issue a Permit to Downey to capture and use solar energy at his property deprived him of all of the anticipated and expected economic benefits and productive use of solar on his property.

35. Additionally, the City's prolonged delay in granting Downey's Permit has forced Downey to leave his roof economically idle for a period of time.

36. Furthermore, even if the City ultimately grants Downey's Permit to install the solar panels but grants that permit in accordance with the proposed ordinance, the City's actions will still prevent him from installing panels on the sides of his house that face the street. Restricting the installation to only the back sides is economically unviable since those panels cannot generate sufficient electricity to offset their cost. This unreasonable limitation effectively amounts to the

City taking away half of the productive area of Downey's roof through regulatory measures, highlighting the City's unreasonable, arbitrary, and capricious actions.

37. The City, however, is expected to deny Downey's Permit either under the current or the new ordinance.

38. As a direct and proximate result of the unreasonable, arbitrary, and capricious acts of the City, the City's Mayor and the City's Council in failing to perform the ministerial duty to issue a Permit, as herein alleged, the property rights of Downey have been taken for the period of time from when a Permit should have been issued and the project constructed until the current day, unless his Permit is hereafter granted, and then until such time as the project is constructed.

39. Downey requested that the City grant his Permit or pay him just compensation for the taking of his property rights in accordance with Mo. Const. art. I, § 10, but the City has refused.

40. Downey, in addition to the \$6,250 Ameren Missouri incentive, would save considerable money on his electric bill, extend life to his roof, and increase in the value of his home.

41. As a direct and proximate result of the unreasonable, arbitrary and capricious acts of the City, through the acts of the Mayor and the Council, Downey has been damaged in an amount as yet unascertained, but estimated to be more than \$75,000. Downey will seek leave of Court to amend this Complaint to conform to proof of such damages at trial.

42. As a direct and proximate result of the taking of his property rights without just compensation, Downey retained the services of counsel to prosecute this action. Downey has incurred, and will continue to incur, attorney's fees, expert witness fees, and costs and expenses of litigation in an amount as yet unascertained. Downey will seek leave of Court to amend this Complaint to conform to proof of such amounts at trial.

Wherefore, Downey prays the Court:

- A. Find that Downey’s protected property right to capture and use solar energy at his property was taken as a result of the City’s refusal to issue a Permit;
- B. Find that such taking is compensable under Mo. Const. art. I, § 10;
- C. Award and order the City to pay to Downey just and reasonable compensation for the unlawful temporary taking of his property rights;
- D. Award and order the City to pay to Downey his attorneys’ fees, costs and expenses in prosecuting this action; and
- E. Award all further relief the Court deems just and appropriate.

Count III – Inverse Condemnation

43. Plaintiff incorporates herein all preceding paragraphs.

44. Inverse condemnation under Missouri law arises from Mo. Const. art. I, § 26, which provides, “private property shall not be taken or damaged for public use without just compensation.”

45. In Missouri, the elements of inverse condemnation include: (1) an authority with the power of eminent domain appropriates or damages property without a formal exercise of the power of eminent domain, (2) the landowner is not compensated for the taking or damage, and (3) the landowner files an inverse condemnation action to obtain compensation.

46. In an inverse condemnation action, a plaintiff may recover compensation even when his or her property has not been formally taken by a governmental entity. See *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163, 167 (Mo.App. E.D. 1995).

47. This relief is available when a plaintiff shows “an invasion or appropriation of some valuable property right which the landowner has to the legal and proper use of his property, which invasion or appropriation directly and specially affects the landowner to his injury.” *Heuer v. City of Cape Girardeau*, 370 S.W.3d 903, 913–14 (Mo.App. E.D. 2012).

48. Here, the City has the power of eminent domain and appropriated Downey's property rights when it delayed and/or denied his Permit to install solar panels on his private residence, without just compensation to Downey.

Wherefore, Downey prays the Court:

- A. Find that Downey's protected property right to capture and use solar energy at his property was taken as a result of the City's refusal to issue a Permit;
- B. Find that such taking is compensable under Mo. Const. art. I, § 10;
- C. Award and order the City to pay to Downey just and reasonable compensation for the unlawful taking of his property rights;
- D. Award and order the City to pay to Downey his attorneys' fees, prejudgment interest, costs, and expenses in prosecuting this action; and
- E. Award all further relief the Court deems just and appropriate.

Count IV - Abuse of Discretion

49. Plaintiff incorporates herein all preceding paragraphs.

50. A professional, licensed engineer and Ameren Missouri approved Downey's proposed solar generating equipment.

51. Downey's proposed solar generating equipment complies with the design, safety, and technical requirements set forth in 20 CSR 4240-20.100.

52. The action of the City's Council in delaying and/or effectively denying Downey's application for a Permit, in disregard of the approval by a professional, licensed engineer and the approval by Ameren Missouri, and the compliance with the design, safety, and technical requirements in 20 CSR 4240-20.100, was not based on competent and substantial evidence, was arbitrary, capricious and unreasonable, and was an unlawful abuse of discretion.

53. Downey is adversely affected and aggrieved by the City's denial of his application

for a Permit.

54. Section 536.150, RSMo authorizes Downey to seek judicial review of the City's decision.

Wherefore, Downey prays the Court:

A. Declare that the action of the City's Council in effectively denying Downey's application for a Permit, in disregard of the approval by Ameren Missouri and the engineer, and the compliance with the design, safety, and technical requirements in 20 CSR 4240-20.100, was not based on competent and substantial evidence, was arbitrary, capricious and unreasonable, and was an unlawful abuse of discretion;

B. Declare that the City's action in effectively denying Downey's application for a Permit is void and without legal force or effect;

C. Order the City to process Downey's application for a Permit under the City's municipal ordinance as it exists/existed on August 1, 2022; and

D. Award such further relief the Court deems just and appropriate.

Count V – Declaratory Relief

55. Plaintiff incorporates herein all preceding paragraphs.

56. The City of Wildwood's ordinance and proposed ordinance are ripe for judicial resolution because unless they are challenged, Downey, and others similarly situated, will suffer immediate concrete effects.

57. Downey's case is justiciable because, as discussed at length above, he has a legally protected property right at issue, the City is preventing the free exercise of that right, and the facts of this case are sufficient for the court to resolve this conflict and grant the relief Downey seeks.

58. Downey has a strong desire to install solar panels on his home, as many others in the City have done under the existing ordinance, City of Wildwood Code 415.090 et seq., which

was in effect when Downey applied to place solar panels on his home in the City of Wildwood.

59. The City appears to be trying to apply a new law to Downey and others that, as of the date of this filing, has not yet even been passed, but even if it were, would be unconstitutional.

60. Under the existing law, Downey has a right to install solar panels on his home in the City o in the lawful manner that he proposes, as is exemplified by others installing solar panels in a very similar manner under the existing law prior to Downey's Permit application.

61. Each day that passes that Downey is not able to make productive use of the sunlight that reaches his own home, Downey is being denied the benefits of homeownership.

62. This very personal and real invasion of Downey's personal property rights is akin to denying Downey the right to plant vegetation at his home and reap the fruits of nature.

63. This very personal and real invasion of Downey's personal property rights is also akin to prohibiting someone from putting a deck at their house because the City's Mayor does not like the color of the deck.

Wherefore, Downey prays the Court:

A. Declare that the action of the City's Council in effectively denying Downey's application for a Permit, in disregard of the approval by Ameren Missouri and the engineer, and the compliance with the design, safety, and technical requirements in 20 CSR 4240-20.100, was not based on competent and substantial evidence, was arbitrary, capricious and unreasonable, and was an unlawful abuse of discretion;

B. Declare that the City's action in denying Downey's application for a Permit is void and without legal force or effect;

C. Order the City to process Downey's application for a Permit under the City's municipal ordinance as it exists/existed on August 1, 2022; and

D. Award such further relief the Court deems just and appropriate.

Count VI – Injunctive Relief

64. Plaintiff incorporates herein all preceding paragraphs.

65. Downey will be irreparably injured if he is not allowed to install solar panels on his own home due to the City's actions, and he lacks an adequate remedy at law without injunctive relief.

66. Downey has a strong desire to install solar panels on his home, as many others in the City have done under the existing ordinance, City of Wildwood Code 415.090 *et seq.*, which was in effect when Downey applied to place solar panels on his home in the City of Wildwood.

67. Each day that passes that Downey is not able to make productive use of the sunlight that reaches his own home, Downey is being denied the benefits of homeownership.

68. This very personal and real invasion of Downey's personal property rights is akin to denying Downey the right to plant vegetation at his home and reap the fruits of nature.

69. This very personal and real invasion of Downey's personal property rights is also akin to prohibiting someone from putting a deck at their house because the City's Mayor does not like the color of the deck.

70. Monetary compensation is insufficient to compensate Downey for the present inability to use his home in a way that other of the City's residents are already permitted to use their homes.

71. Downey's desire to install solar panels is driven not only by the economic benefits outlined earlier but also by his commitment to reducing his carbon footprint and creating a cleaner environment in the City, both for present and future generations. The longer Downey's home relies on non-renewable energy sources, the more he contributes to Missouri's carbon emissions.

72. Monetary compensation alone cannot adequately address the City's unlawful

infringement on his personal property rights. Only an injunction can begin to remedy the harm already inflicted and prevent further damage from occurring in the future.

Wherefore, Downey prays the Court:

- A. Enjoin the City of Wildwood from preventing him from installing or causing to be installed solar panels on the roof of his home;
- B. Order the City to process Downey's application for a Permit under the City's municipal ordinance as it exists/existed on August 1, 2022; and
- C. Award such further relief the Court deems just and appropriate.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES SO TRIABLE.

Respectfully submitted,

**DONNER APPLEWHITE
ATTORNEYS AT LAW**

By: /s/ Thomas R. Applewhite
Thomas R. Applewhite, #64437MO
Christian T. Misner, #65572MO
906 Olive Street, Suite 1110
St. Louis, Missouri 63101
Phone: (314) 293-3526
Facsimile: (888) 785-4461
Email: tom.applewhite@da-lawfirm.com
christian.misner@da-lawfirm.com

Co-Counsel for Plaintiff

THE BAUMSTARK FIRM, LLC

By: /s/ Luke A. Baumstark
Luke A. Baumstark, #56344
815 Geyer Avenue
St. Louis, Missouri 63104-4047
Phone: (314) 492-6290
Facsimile: (314) 492-6348
Email: luke@baumstarkfirm.com

Co-Counsel for Plaintiff