

STATE OF INDIANA)
) SS:
COUNTY OF SPENCER)

IN THE SPENCER CIRCUIT COURT
CAUSE NO.: 74C01-2309-PL-000469

GRANDVIEW SOLAR PROJECT LLC,)
)
Plaintiff,)
)
vs.)
)
TOWN OF GRANDVIEW, INDIANA,)
TOWN OF GRANDVIEW, INDIANA BOARD)
OF ZONING APPEALS, TOWN OF)
GRANDVIEW, INDIANA TOWN COUNCIL,)
and TOWN OF GRANDVIEW, INDIANA)
ZONING ADMINISTRATOR,)
)
Defendants.)

**SPECIAL JUDGE
AMY STEINKAMP MISKIMEN
WARRICK SUPERIOR COURT**

**SPECIAL FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ENTRY OF PRELIMINARY INJUNCTION**

Plaintiff Grandview Solar Project LLC (“Grandview Solar”), by counsel and pursuant to Rule 65(A) of the Indiana Rules of Trial Procedure, moved the Court to enjoin Defendants Town of Grandview, Indiana (the “Town”), Town of Grandview, Indiana Board of Zoning Appeals (“Town BZA”), Town of Grandview, Indiana Town Council (“Town Council”), and Town of Grandview, Indiana Zoning Administrator (“Town Zoning Administrator”) (collectively, “Defendants”) from all further attempts to stop construction of the Grandview Solar Project (the “Project”), as further defined herein.

The Court heard evidence and argument from the parties at a hearing on September 26, 2023, commencing at 1:00 p.m. Central time. Counsel for Grandview Solar and counsel for Defendants were present at the hearing, as were representatives of all parties. The Court received stipulated exhibits, a stipulation by the parties as to certain facts, and heard testimony on behalf of Grandview Solar by Mark Brill. Having heard the evidence, legal argument, and reviewed the



parties' submitted Briefs, and being duly advised, the Court finds that Grandview Solar's Motion for a Preliminary Injunction should be **GRANTED**. As required by Indiana Trial Rule 65(D), the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

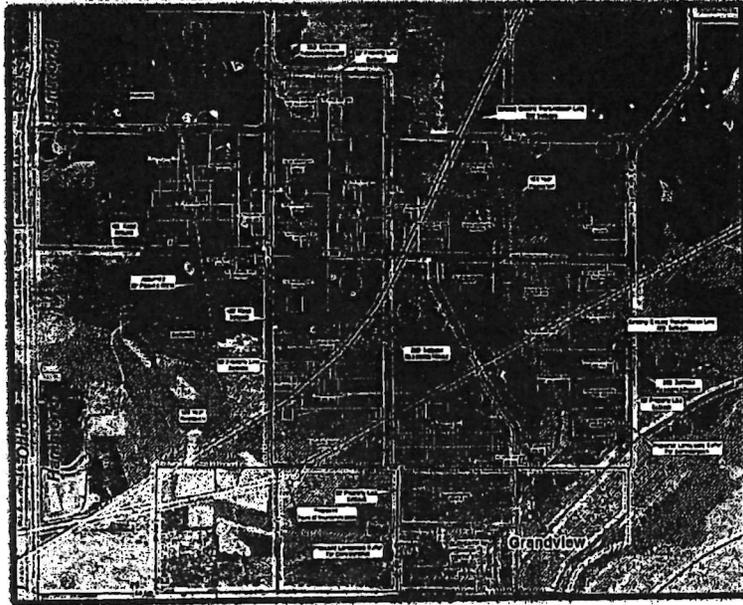
1. Grandview Solar was formed for the purpose of owning and developing the Project.
2. The planned Project is a 69.9 MW-AC (megawatts of alternating current) / 91 MW-DC (megawatts of direct current) solar farm to be situated on multiple parcels of real estate in Spencer County and the Town.
3. In November 2019, Grandview Solar applied to the Town BZA for a Special Exception zoning approval for the Project.¹ The application Grandview Solar submitted included Findings of Fact specifically referencing "the 2-mile jurisdictional fringe of the Town of Grandview."

Since solar facilities are permitted in agricultural zones within the 2-mile jurisdictional fringe of the Town of Grandview, the Project area does not need to be rezoned, but rather remains zoned as agricultural. This is important as once the Project is decommissioned and the property

(Stip. Hearing Ex. B) (highlighting added).

4. The application also contained a "Site Plan" which identified the proposed Project area, as depicted below.

¹ "Special use designations are instruments of municipal planning that allow city officials to retain power over land uses that, although presumptively allowed, may pose special problems or hazards to a neighborhood." *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 741 (7th Cir. 2006) (citations omitted). Pursuant to the Town's Ordinances, § 10.06.020.101, special exceptions, "while requiring special consideration by the Board of Zoning Appeals, shall be deemed permitted uses in the district in which they are provided." Ord. § 10.06.020.101.



(Stip. Hearing Ex. C, p. 5).

5. On December 12, 2019, following public comment and discussion, the Town BZA unanimously voted to approve the application for Special Exception, and issued and approved Minutes reflecting the Special Exception Approval (the "Special Exception Approval").

3) Justin had his power point presentation for viewing, explaining that approximately 500 acres of land had a lease option, with approximately 1/3 or 165 acres for solar panels would be used. This solar energy would be used to help power the Town of Grandview, with Grandview netting approximately \$1,000, 000 in tax revenue over the life of the project.

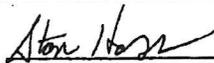
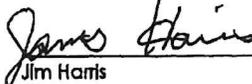
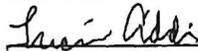
4) Attorney Mary Solada, attorney for Orion Renewable Energy, was also present to discuss the project. She stated that the project must begin no later than 2024, that property values are not expected to devaluè and presented a list of "proposed conditions". (see att.)

Stan then opened the meeting up to public comments. After several residents of Hammond Township volced their comments either for or against the project or for clarification of certain details, Stan called for discussion among the Board members and called for a motion.

Jim Harris made a motion to grant the Special Exception permit for the Grandview Solar Farm Project. Second by Kevin Myers. With all in favor, the motion carried.

(Stip. Hearing Ex. D, p. 1).

6. The Town's Zoning Administrator, Keith Nix, signed and attested the Town BZA's Special Exception Approval.

 Stan Hoss, Chair	 Jim Harris
 Tricia Addis	 Kevin Myers
 Matt Conen	 ATTEST: Kellth Nlx, Administrator

(Stip. Hearing Ex. D, p. 1).

7. Neither the Defendants, nor any other opponent or remonstrator appealed or sought judicial review of the Special Exception Approval.

8. In 2020, as part of expanding the footprint of the Project, Grandview Solar applied to the Spencer County Board of Zoning Appeals (“Spencer County BZA”) for a Contingent Use Permit covering 19 parcels of land under Spencer County’s jurisdiction. (Stip. Hearing Ex. E). Spencer County acknowledged in various e-mails dated November 12, 2019 and July 7, 2020 that certain parcels fell “out of Grandview’s Buffer zone” but that for those parcels within “Grandview’s buffer zone they [the Town] would issue the Improvement Location Permits.” (Stip. Hearing Ex. F, p. 3).

9. On September 24, 2020, the Spencer County BZA approved the application and issued a contingent use permit (“Contingent Use Permit”) for 19 parcels under Spencer County’s jurisdiction. (Stip. Hearing Ex. G). Consistent with Spencer County’s prior emails, the Contingent Use Permit issued by Spencer County did not include the 37 parcels covered by the Town BZA’s Special Exception Approval. (Stip. Hearing Ex. G).

10. Years later, on July 5, 2022, the Town Zoning Administrator signed a letter indicating as follows with regard to the Project:

Town of Grandview Zoning Approval

On December 12, 2019, the Town of Grandview Board of Zoning Appeals considered an application for special exception approval of Grandview Solar. After public hearing, the Board unanimously approved the special exception application and granted the permit. Board approval of the special exception application marks the end of the public participation process, and the project is eligible to file for improvement location permits (ILPs), building permits, and other construction-related permits, which is an administrative process.

(Stip. Hearing Ex. H).

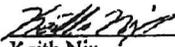
11. Spencer County's Plan Commission Administrator also signed the letter on June 30, 2022 as to the Contingent Use Permit approved by the Spencer County BZA. (Stip. Hearing Ex. H).

12. Together, the Town Zoning Administrator and the Spencer County Plan Commission Administrator confirmed, in writing, as follows:

Grandview Solar has all local zoning approvals that are required from the Town of Grandview and from Spencer County, and Grandview Solar is authorized to commence with the ILP, building permit or other construction-related permit application process.

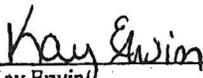
On behalf of Town of Grandview:

Date: 07-05-2022

By: 
Keith Nix
Town Manager/Zoning Administrator

On behalf of Spencer County:

Date: 6/30/22

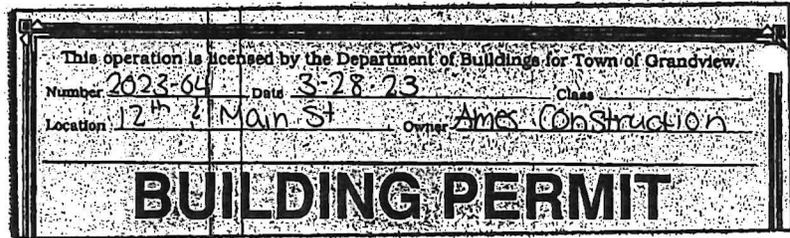
By: 
Kay Erwin
Plan Commission Administrator

(Stip. Hearing Ex. H).

13. On February 28, 2023, at Grandview Solar's direction, the Project's general contractor, Ames Construction, submitted an Application for an Improvement Location Permit ("Initial ILP Application") to the Town's Zoning Administrator. (Plaintiff's Hearing Ex. I). The

Initial ILP Application covered one parcel of land within the corporate limits of the Town. (Stip. Hearing Exhibit I).

14. The Town Zoning Administrator approved the Initial ILP Application on March 28, 2023 and issued the requested ILP (“Initial ILP”), which is reproduced in pertinent part below:



(Stip. Hearing Ex. J).

15. In issuing the Initial ILP, the Zoning Administrator found no deficiencies in the Initial ILP Application.

16. Moreover, during the issuance of the Initial ILP, Defendants (including the Town Council and the Town BZA) did not notice or hold any public meetings, any joint public meetings of the Town Council and the Town BZA or undertake any other actions concerning the Initial ILP Application.

17. Neither Defendants, nor any other opponent or remonstrator appealed or sought judicial review of the Initial ILP.

18. On June 23, 2023, at Grandview Solar’s direction, Ames Construction submitted an amended ILP application (the “Amended ILP Application”) to the Town’s Zoning Administrator, covering all 37 parcels identified in the Town BZA’s 2019 Special Exception Approval. (Stip. Hearing Ex. M). Other than including the additional parcels, the Amended ILP Application was identical to the Initial ILP Application. (Stip. Hearing Ex. I, M).

19. On July 12, 2023, the Town Council and the Town BZA convened a joint meeting to deliberate on the Amended ILP Application. The agenda for the joint meeting included the following items:

Adopt Agenda
Attorney presentation on legality of zoning permits for the Grandview Solar project
Question and Answer session with public on legality of zoning permits
Entertain non-binding resolution from Town Council concerning Improvement Location Permit
Entertain non-binding resolution from Board of Zoning Appeals concerning Improvement Location Permit

(Stip. Hearing Ex. N).

20. The Town of Grandview's Code of Ordinances ("Ordinance") does not contemplate, authorize, or permit a joint meeting of the Town Council and Town BZA, nor is either body authorized to convene or conduct *ad hoc* public meetings to consider whether or not to support an ILP. (See Stip. Hearing Ex. S).

21. During the July 12, 2023 joint meeting, Defendants' legal counsel, Andrew Foster, specifically advised the Town BZA and Town Council that the Town Zoning Administrator was required to issue the ILP. (Stip. Hearing Ex. Q, p. 17, ll. 1 – 4). As Mr. Foster made clear, because no opponents timely challenged or sought judicial review of the Special Exception Approval at the time it was issued in 2019, any arguments attacking the validity of the Special Exception Approval had been waived. (Stip. Hearing Ex. Q, p. 14, ll. 14 – 19). Accordingly, Mr. Foster advised that the requested ILP "should be issued." (Stip. Hearing Ex. Q, p. 17, ll. 1 – 4).

22. Contrary to Mr. Foster's legal advice, the Town Council and the Town BZA each moved for and unanimously voted to "support" the Town Administrator in disapproving the Amended ILP Application. (Stip. Hearing Ex. Q, p. 35, l. 7 – p. 36, l. 25).

23. To date, despite the Town Council's and Town BZA's vote to "support" disapproval of the Amended ILP Application, the Town Zoning Administrator has not issued a written denial of the Amended ILP Application or findings indicating the reasons for any such denial.

24. Based on the Town BZA's Special Exception Approval and Spencer County's Contingent Use Approval (and the Town and County's Zoning Affirmation and other affirmations regarding same) Grandview spent millions of dollars in equipment orders, design services, permitting, and other capital-intensive development activities.

25. To date, Grandview Solar's total investment in the Project is approaching \$30 million. In order to minimize risk caused by not having an ILP, Grandview Solar and Ames Construction have elected to delay, and in some instances cancel, equipment orders.

26. Grandview Solar is a party to an Amended and Restated Generator Interconnection Agreement (the "Interconnection Agreement") between Grandview Solar, CenterPoint Energy and Midcontinent Independent System Operator, Inc. ("MISO"). The Interconnection Agreement contains strict deadlines and commercial and operational milestones for the Project – in particular, the Project's in-service deadline to reach commercial operation is September 1, 2024. If the Zoning Administrator does not approve the Amended ILP Application and refuses to issue the requested ILP, the Project faces imminent risk of losing its offtaker, the entity that provides primary financial backing for the Project and that will purchase the energy from the Project once it is operational. Without a valid and complete ILP for the Project, it is a near certainty that Grandview Solar's

offtaker will back out of the Project. Given the extremely tight deadlines for interconnection and the lead times needed to build the Project, construction must begin immediately.

27. There is no dispute regarding 20 parcels (19 County parcels and 1 Town parcel) and approximately 40 MW of the planned 70 MW can be built there. Thus, Grandview Solar is only requesting relief as to the 36 “disputed” parcels situated within the ETJ, representing approximately 30 MW of the Project (which overall was included in the 37 parcels approved in the Special Exception Approval). Should the Project lose 30 MW, the estimated impact to the Project would be in excess of \$50 million.

28. As referenced earlier, during the September 26, 2023 hearing, the parties tendered stipulated facts and exhibits, and Grandview Solar presented testimony, via Mark Brill.

29. Defendants presented no testimony.

CONCLUSIONS OF LAW

1. A “mandatory injunction” is “[a]n injunction that orders an affirmative act or mandates a specified course of conduct.” *City of Gary, Indiana v. Majestic Star Casino, LLC*, 905 N.E.2d 1076, 1082 (Ind. Ct. App. 2009) (quoting Black’s Law Dictionary (8th ed. 2004)).

2. “A mandatory injunction is an extraordinary equitable remedy which should be granted with caution.” *Dible v. City of Lafayette*, 713 N.E.2d 269, 272 (Ind. 1999) (citations omitted). “The plaintiff carries the burden of demonstrating injury which is certain and irreparable if the injunction is denied.” *Id.* “In making its decision, the trial court must weigh whether the plaintiff has an adequate remedy at law and the court must consider whether an injunction is in the public interest.” *Id.*

3. To obtain a preliminary injunction, Grandview Solar has the burden to show by a preponderance of the evidence: (1) a reasonable likelihood of success at trial; (2) the remedies at

law are inadequate; (3) the threatened injury to the movant outweighs the potential harm to the nonmoving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction. *Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d 484, 487 (Ind. 2003).

4. When considering whether to grant a preliminary injunction, the trial court is required to make special findings of fact and conclusions of law. *Pathfinder Commc'ns Corp. v. Macy*, 795 N.E.2d 1103, 1109 (Ind. Ct. App. 2003); Ind. Trial Rule 65(D).

Preliminary Injunction Element #1
Reasonable Likelihood of Success on the Merits

Action for Mandate

5. Mandamus will lie where “the petitioner has a clear and unquestioned right to relief and the respondent has failed to perform a clear, absolute, and imperative duty imposed by law. *Belork v. Latimer*, 54 N.E.3d 388, 395 (Ind. Ct. App. 2016).

6. “Public officials, boards, and commissions may be mandated to perform ministerial acts when under a clear legal duty to perform such acts.” *Id.*

7. “[M]andate is appropriate only when two elements are present: (1) the defendant bears an imperative legal duty to perform the ministerial act or function demanded and (2) the plaintiff ‘has a clear legal right to compel the performance of [that] specific duty.’” *Price v. Indiana Dep’t of Child Servs.*, 80 N.E.3d 170, 175 (Ind. 2017).

8. “When there is a clear legal duty to perform a specific act, the act must also be ministerial.” *Id.*; see also *Knutson v. State ex rel. Seberger*, 239 Ind. 656, 658, 157 N.E.2d 469, 471 (1959) (“[T]he law is also well established by a long line of decisions that public officials, boards and commissions may be mandated to perform ministerial acts where there is a clear legal duty to perform such acts.”).

9. “Because ministerial acts are those done only pursuant to law, in a fixed manner, in specific circumstances, and without discretion, they necessarily cannot be elaborated upon.” *Price*, 80 N.E.3d at 176.

10. Issuing a ruling upon a permit application is an example of a ministerial act that a court can lawfully mandate. *Price v. Indiana Dep’t of Child Servs.*, 80 N.E.3d 170, 176 (Ind. 2017) (“Examples of ministerial acts that a court can lawfully mandate include: rule upon a permit application[.]” (citing *Indiana Alcoholic Beverage Comm’n v. State ex rel. Harmon*, 269 Ind. 48, 50, 379 N.E.2d 140, 142 (1978))).

11. A “special exception is a use permitted under the zoning ordinance upon the showing of certain statutory criteria and the granting of a special exception is mandatory once the petitioner shows compliance with the relevant statutory criteria.” *Porter Cnty. Bd. of Zoning Appeals v. SBA Towers II, LLC*, 927 N.E.2d 915, 921 (Ind. Ct. App. 2010).

12. The Town BZA issued a Special Exception Approval for the Project on December 12, 2019. As a matter of law, by virtue of the Town BZA’s issuance of the Special Exception Approval for the Project, the Project “shall be deemed [a] permitted us[e] in the district in which [the Special Exception Approval is] provided.” Ord. § 10.6.020.101. As such, the Town BZA has already expressly determined that the Project complies with the Ordinance.

13. The Grandview Code of Ordinances (“Ordinance”) requires an Improvement Location Permit before any development or change in land use can occur. Ord. § 10.06.020.010 (“No building or structure ... nor shall any other development commence or change in land use occur until an improvement location permit shall have been applied for in writing and issued by the zoning administrator.”).

14. Pursuant to Section 10.06.020.051 of the Ordinance, the Town Zoning Administrator's duties "shall include the issuance of and action on improvement location permits and certificates of occupancy and such other administrative duties as are permissible under the law." Ord. § 10.06.020.051.

15. Section 10.06.020.011 provides as follows with regard to the contents required for an ILP application:

The application for an improvement location permit shall be made in triplicate and signed by the owner or applicant attesting to the accuracy of all information supplied by the application. Each application shall clearly state that the permit shall expire and be revoked if work has not begun within one year or been substantially completed within two and a half (2 1/2) years. The following information is the minimum required:

- (1) Name, address, and phone number(s) of applicant.
- (2) Legal description of property.
- (3) Existing and/or proposed use.
- (4) Zoning District.
- (5) A site plan, drawn to scale, showing the lot and the building site and the location of existing buildings on the lot, accurate dimension of the lot, yards and building or buildings, together with locations, size and use of any land and all buildings not only, on the lot but within fifty (50) feet from the boundaries thereof, unless separated therefrom by a street, together with such other information as may be necessary to the enforcement of this ordinance.
- (6) Building heights.
- (7) Number of off-street parking spaces and/or loading berths, if applicable.
- (8) Number of dwelling units, if applicable.

- (9) Any other matters which may be necessary to determine conformance with, and provide for the enforcement of this ordinance.

Ord. § 10.06.020.011.

16. Grandview Solar's Amended ILP Application complied in all material respects with Ordinance § 10.06.020.011 as it pertains to the contents required for an ILP application.

17. Pursuant to Section 10.06.020.012 of the Ordinance,

Within thirty (30) days after the receipt of an application, the zoning administrator shall either approve or disapprove the application ... If the application is approved, the zoning administrator shall issue a placard to the applicant. It is to be posted in a conspicuous place on the property in question, and will attest to the fact that the plans for construction or alteration are in compliance with the provisions of the state building rules and regulations. If disapproved, the zoning administrator shall indicate the reasons on a typewritten letter.

Ord. § 10.06.020.012.

18. Given the language of Section 10.06.020.012 of the Ordinance, the Court finds the Town Zoning Administrator has an imperative legal duty to perform the ministerial act of issuing the ILP for the Project. The Amended ILP Application complied in all material respects with the requirements set forth in Section 10.06.020.011 of the Ordinance. Indeed, the Zoning Administrator has already issued an ILP with regard to one parcel of the Project, and the Amended ILP Application is identical in all technical respects as the initial application. Accordingly, the Town Zoning Administrator has no discretion to withhold the ILP for the remaining parcels, and issuance of the ILP is a ministerial function that the Zoning Administrator must perform. *See Price*, 80 N.E.3d at 176.

19. Moreover, Grandview Solar has a clear legal right to compel the Zoning Administrator to issue the ILP for the Project. The Town Zoning Administrator's duties expressly "include the issuance of and action on improvement location permits[.]" Ord. § 10.06.020.051.

The Ordinance further provides that “within thirty (30) days after the receipt of an [ILP] application, the zoning administrator shall either approve or disapprove the application”, and if “disapproved, the zoning administrator shall indicate the reasons on a typewritten letter.” Ord. § 10.06.020.012. Given that the Town Zoning Administrator has failed to timely perform these express duties, Grandview Solar has a clear legal right to compel issuance of the requested ILP as a matter of law.

20. Even if the Amended ILP Application had failed in some respect to comply with the technical requirements of the Ordinance (which it did not), the time period for issuing written findings outlining the reasons for any such disapproval expired on July 23, 2023, thirty days after the Zoning Administrator received the Amended ILP Application. It follows that Grandview Solar has a clear legal right to compel issuance of the ILP.

21. Defendants’ claim that the Town BZA lacked jurisdiction over the 36 parcels of land covered by the Amended ILP Application lacks merit. The Town BZA knowingly asserted its authority over the ETJ land four years ago when it issued the Special Exception Approval over all 37 parcels at issue. Thus, the Town BZA has already expressly approved zoning for the Project and determined that the Project complies with the Ordinance. *See* Ord. § 10.6.020.101 (once granted, special use exceptions “shall be deemed permitted uses in the district in which they are provided.”).

22. The parties presented argument during this Court’s hearing concerning the decision in *Georgetown Bd. of Zoning Appeals v. Keele*, 743 N.E.2d 301, 302 (Ind. Ct. App. 2001).

23. In *Keele*, a disgruntled landowner challenged the Georgetown BZA’s zoning approval, which concerned property outside of the city limits (i.e. in the City’s ETJ). *Id.* at 302.

24. That landowner claimed, among other things, that because the City failed to comply with Ind. Code § 36-7-4-205 (regarding setting up an ETJ via a comprehensive plan) the ETJ was invalid and accordingly that Georgetown BZA did not have zoning authority to issue the zoning approval in question. *Id.* at 303-04.

25. The Indiana Court of Appeals rejected this argument. Regardless of whether there was a valid ETJ, the Indiana Court of Appeals upheld the zoning approval on the basis that the BZA had asserted jurisdiction over the zoning matter at hand, and no one timely challenged the BZA's jurisdiction. *Id.* at 305.

26. *Keele* is squarely applicable to the facts of this case, as the Defendants' legal counsel advised Defendants during their July 12, 2023 meeting.

27. During this matter's September 26, 2023 hearing, counsel for Defendants attempted to raise the same argument the disgruntled landowner made in *Keele*. Specifically, Defendants' counsel argued that since Spencer County had certain zoning jurisdiction, and nothing in the Town Ordinance created an ETJ, any Town BZA action (such as the Special Exception Approval or any pending issuance of the ILP) was contrary to Ind. Code § 36-7-4-205 (which Defendants' counsel handed out in hardcopy during the hearing).

28. The *Keele* Court rejected this claim. Instead, because no one timely challenged the City's purported jurisdiction, the argument was waived and the zoning decision in the ETJ area was upheld. *Keele*, 743 N.E.2d at 303-04.

29. Defendants also purported to tender a copy of a certain Georgetown Ordinance during this matter's September 26 hearing. However, that Ordinance was not raised or addressed in the Indiana Court of Appeals' decision in *Keele*. Therefore, it does not change the direct

applicability of *Keele* to this case. *Keele* controls—and entitles Grandview Solar to injunctive relief.

30. Defendants also argued that *Campbell v. Eckman/Freeman & Assocs.*, 670 N.E.2d 925 (Ind. Ct. App. 1996) stands for the proposition that subject matter jurisdiction cannot be waived. However, *Campbell* was a worker's compensation case (not zoning) and was directly refuted by the zoning decision in *Keele*, in which the Court found that when it comes to zoning decisions, any objection has to be raised with the BZA or it is waived. *Keele*, 743 N.E.2d at 305.

31. More importantly, however, the entire basis of *Keele* is the distinction between "subject matter jurisdiction" and "jurisdiction of the case." The Indiana Court of Appeals directly held that *Keele* involved "jurisdiction of the case" not "subject-matter jurisdiction." *Keele* therefore controls; not *Campbell*.

32. In *Keele*, "the threshold issue is whether the Board's authority over [the applicant's] land is an issue of subject matter jurisdiction or an issue of jurisdiction over the case." *Id.* at 303. "[U]nlike subject matter jurisdiction, a party waives the issue of jurisdiction over a specific case by not raising that issue in a timely manner." *Id.*

33. In *Keele*, the Indiana Court of Appeals held that a Board of Zoning Appeals has subject matter jurisdiction over an applicant's zoning petition because "the claim falls within the general scope of authority conferred upon such court by the constitution or by statute." *Id.* (citations omitted).

34. Accordingly, the Indiana Court of Appeals held as follows:

[T]he GBZA had subject matter jurisdiction over variance petitions generally; therefore, the GBZA had subject matter jurisdiction over Romeo's petition. . . . In order for *Keele* to challenge the jurisdiction of the GBZA over Romeo's petition on the basis that the statutory requirements had not been met, *Keele* would have had to raise the objection initially with the GBZA. The record reveals no such

objection was made to the GBZA . . . Therefore, the Keele's objection to the GBZA's jurisdiction over Romeo's petition was waived.

Id. at 305 (citations omitted).

35. This holding applies to this case: the Town BZA had subject matter jurisdiction over zoning petitions generally; therefore Town BZA had subject matter jurisdiction over Grandview Solar's zoning petition. In order to challenge the jurisdiction of the Town BZA over Grandview Solar's petition, that issue had to be raised with the Town BZA in 2019. No such objection was made, and therefore any objection to the Town BZA's jurisdiction over Grandview Solar's petition was waived.

36. Finally, Defendants contended at the hearing that *Howell v. Indiana-Am. Water Co.*, 668 N.E.2d 1272, 1273 (Ind. Ct. App. 1996) undercut the holding in *Keele*.

37. The Indiana Court of Appeals in *Keele* discussed and rejected the *Howell* decision in Footnote 5: "Keele cites *Howell* in support of his argument that the GBZA did not have subject matter jurisdiction over Romeo's petition for a use variance." *Id.* at 305 n.5. "**We find *Howell* inapposite to the situation here.**" *Id.* (emphasis added).

38. Ultimately, for the reasons set forth in *Keele*, any argument concerning the Town BZA's jurisdiction was waived years ago (in 2019).

39. The Town BZA's 2019 Special Exception Approval also bars Defendants from relitigating any alleged jurisdictional issue based on *res judicata* principles. Under Indiana law, "[t]he function of a board of zoning appeals is quasi-judicial. Thus, it generally has no inherent power to review and vacate, rescind or alter its decision after it has been made." *Burton v. Bd. of Zoning Appeals of Madison Cnty.*, 174 N.E.3d 202, 211 (Ind. Ct. App.), *trans. denied*, 176 N.E.3d 443 (Ind. 2021) (citations and quotations omitted). Yet that is precisely what Defendants seek to

do here – effectively rescinding the Town BZA’s Special Exception Approval granted four years ago by refusing to issue the ILP. The Town BZA is bound to the findings it made in 2019 when it granted the Special Exception Approval and cannot rescind them now.

40. Given the Zoning Administrator’s imperative legal duty to perform the ministerial act of issuing the ILP for the Project and Grandview Solar’s clear legal right to compel same, Grandview Solar therefore has shown a reasonable likelihood of success on its Action for Mandate.

Declaratory Judgment Action

41. For the same reasons, Grandview Solar has also demonstrated a reasonable likelihood of prevailing on its action for a declaratory judgment.

42. Indiana’s declaratory judgment statute provides that any person whose rights, status, or other legal relations are affected by a municipal ordinance may have determined any question of construction or validity arising under the ordinance, and obtain a declaration of rights, status, or other legal relations thereunder. Ind. Code § 34-14-1-2. Declaratory relief should be issued if it will effectively solve the problem, serve a useful purpose, and after determining whether or not another remedy is more effective or efficient. *Saylor v. State*, 81 N.E.3d 228, 232 (Ind. Ct. App. 2017).

43. As detailed previously, Grandview Solar’s Amended ILP Application complied in all technical respects with Section 10.06.020.011 of the Ordinance. Despite having a clear legal duty to issue the ILP (or issue written findings supporting a denial within 30 days), the Town Zoning Administrator has not done so. *See* Ord. § 10.06.020.051 (the Zoning Administrator “shall” take action on improvement location permits); Ord. § 10.06.020.012 (the Zoning Administrator “shall” take said action within thirty (30) days).

44. It follows that Grandview Solar has demonstrated a reasonable likelihood of success on the merits of its claim for declaratory judgment.

Action for Judicial Review of the ILP Denial

45. To prevail on its petition for judicial review, Grandview Solar must demonstrate that the Town BZA's decision was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Indiana Code § 36-7-4-1614.

46. The Town Zoning Administrator's refusal to issue the ILP – an action ratified and “supported” by the Town BZA and Town Council – is arbitrary, capricious, an abuse of discretion, and clearly not in accordance with law.

47. As detailed previously, once the Town BZA issued the Special Exception Approval covering the 37 parcels, the Project became a permitted use as a matter of right. *See* Ord. § 10.06.020.101. Yet the town Zoning Administrator continues his refusal to perform his duties as expressly required by the Ordinance. *See* Ord. § 10.06.020.051. The Town BZA and Town Council are complicit in the Zoning Administrator's improper refusal to issue the ILP based on their wrongful conduct at the July 12, 2023 meeting – a proceeding wholly unauthorized under the Ordinance.

48. Accordingly, Grandview Solar has more than demonstrated that Defendants' actions were arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory jurisdiction, without observance of procedure required by law, and unsupported by substantial evidence.

49. Grandview Solar therefore has reasonable likelihood of success on the merits on its action for judicial review.

50. Grandview Solar has demonstrated it has a reasonable likelihood of success on the merits for each of its mandate, declaratory judgment, and judicial review claims.²

51. Even though Defendants' counsel conceded during the September 26, 2023 hearing that the dispute between the parties concerned injunction Element 1, addressed above (likelihood of success on the merits), the Court still expressly finds Grandview Solar has shown it meets Elements 2-4 in its request for injunctive relief.

Preliminary Injunction Element #2
Grandview Solar Has No Adequate Legal Remedy

52. "In determining whether an adequate legal remedy exists, a trial court must assess whether the legal remedy is as full and adequate as the equitable remedy." *Westwood One Radio Networks, LLC v. Nat'l Collegiate Athletic Ass'n*, 172 N.E.3d 294, 303 (Ind. Ct. App. 2021). "A legal remedy will not be deemed adequate merely because it exists." *Bonowitz v. Parker*, 912 N.E.2d 378, 384 (Ind. Ct. App. 2009). "Injunctive relief may be granted if it is more practicable, efficient, or adequate than the remedy offered at law." *Id.*

53. A plaintiff's remedies at law are inadequate "where certain and irreparable harm would be caused if the injunction is denied." *Centennial Park, LLC v. Highland Park Estates, LLC*, 117 N.E.3d 565, 572 (Ind. Ct. App. 2018). "However, when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardship in his favor." *Ferrell v. Dunescape Beach Club Condominiums Phase I, Inc.*, 751 N.E.2d 702, 713 (Ind. Ct. App. 2001).

² The Court notes Defendants claim they cannot be estopped, but as counsel for Grandview Solar indicated during the hearing, Grandview Solar is not moving for injunctive relief on its entire Complaint (including its count for estoppel) – and is instead moving for relief based on its claims for mandate, declaratory judgment, and judicial review.

54. Defendants' concerted attempts to stop construction of the Project by withholding issuance of the ILP are unlawful and in violation of the Town's own Ordinances. Despite issuing a Special Exception Approval for the Project four years prior and affirming that "Grandview Solar has all local zoning approvals that are required from the Town of Grandview", (Stip. Hearing Ex. H), Defendants have engaged in an impermissible collateral attack on the Special Exception Approval by causing Zoning Administrator to withhold issuance of the ILP without any legal basis to do so.

55. Specifically, the July 12, 2023 joint meeting of the Town BZA and the Town Council – purportedly convened for the purpose of "supporting" the Zoning Administrator in his ministerial function of issuing the ILP for the Project – was unlawful and procedurally improper. The Ordinance does not authorize, permit or even contemplate a joint meeting of the Town BZA and Town Council. Nor does the Ordinance permit the Town BZA or the Town Council to convene or conduct *ad hoc* public meetings to consider whether or not to support an ILP. Indeed, nowhere does the Ordinance authorize the Town Council to involve itself in the ministerial function of issuing an ILP, as the Town Council did here.

56. Given that Defendants' actions were contrary to Indiana law, Grandview Solar is not required to establish irreparable harm.

57. Nevertheless, Grandview Solar has established that it will indeed suffer irreparable harm if the requested injunction is not issued. To date, Grandview Solar's total investment in the Project is approaching \$30 million, an amount Grandview Solar cannot possibly anticipate recovering from Defendants on the merits of its claims.

58. Defendants' refusal to issue the ILP for the Project also puts at risk Grandview Solar's contractual relationship with the Project's primary contractor, Ames Construction. If

Defendants' unlawful attempts to stop the project continue unabated, Ames Construction will likely back out of the Project, such that Grandview Solar will be unable to timely engage a replacement contractor.

59. Moreover, Defendants' unlawful actions are jeopardizing Grandview Solar's ability to meet the critical deadlines to "tie in" the Project to the power grid, a crucial and integral step in the interconnection process. The Project's Interconnection Agreement with CenterPoint Energy and MISO requires strict adherence to deadlines, particularly the September 1, 2024 in-service deadline to reach commercial operation. If construction does not get underway immediately, the entire Project is at risk.

60. Finally, while Grandview Solar is seeking judicial review of the Town BZA's implicit denial of the Amended ILP Application, that legal remedy is clearly inadequate given the urgency of the situation. Given that construction must begin immediately, there is simply not enough time for the parties to obtain the certified record and brief and argue the legal issues, or for the Court to issue a ruling. Accordingly, even if Grandview Solar were to prevail on judicial review, it would offer no real remedy.

61. The Court therefore finds that Grandview Solar stands to suffer "certain and irreparable harm" if the Defendants continue to wrongfully withhold issuance of the ILP. *See Centennial Park*, 117 N.E.3d at 572. Granting the injunctive relief Grandview Solar requests is clearly more practicable, efficient, and adequate than the remedy offered at law. *Bonewitz*, 912 N.E.2d at 384. It follows that Grandview Solar has met its burden of establishing this element.

Preliminary Injunction Element #3
The Balance of Harms Favors Grandview Solar

62. Because Defendants' actions that Grandview Solar seeks to enjoin are unlawful, Grandview Solar "need not make a showing of irreparable harm or a balance of the hardship in [its] favor." *Combs v. Daniels*, 853 N.E.2d 156, 160 (Ind. Ct. App. 2006).

63. Even so, the balance of harms clearly tips in favor of Grandview Solar. Defendants will suffer no quantifiable harm if the Court enjoins their continued wrongful withholding of the ILP. Indeed, Defendants issued a Special Exception Approval for the Project some four years ago, such that the Project is a permitted use based on the Town's own Ordinances. See Ord. § 10.6.020.101. No remonstrators or opponents objected to the Special Exception Approval at the time the Town BZA issued it (2019), and any available objections that could have been raised have long since been waived as a matter of Indiana law. Defendants do not stand to suffer harm by issuing an ILP for a Project they already duly approved.

64. In contrast (and as previously discussed), if the Court does not enjoin Defendants' unlawful conduct, the harm to Grandview Solar will be substantial, immediate, and irreparable.

Preliminary Injunction Element #4
**The Public Interest Will Not Be Disserved
By Enjoining Defendants' Unlawful Actions**

65. As to the final required element, issuing the requested injunction in this case will not disserve the public interest. To the contrary, enjoining Defendants' unlawful collateral attack of the Special Exception Approval for the Project will greatly serve the public interest. Municipal bodies cannot arbitrarily disregard their own Ordinances to revoke zoning approvals they previously granted. *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 955-56 (Ind. Ct. App. 2004) ("[T]he public interest is not disserved 'by the issuance of an injunction that requires only that the [Appellants] comply with the clear dictates of law.'").

66. Grandview Solar has met its burden of establishing the elements required for issuance of a preliminary injunction, and the Court will grant injunctive relief on Grandview Solar's causes of action for mandate, declaratory judgment, and judicial review of the ILP denial.

ORDER

IT IS THEREFORE ORDERED as follows:

1. Pursuant to Indiana Code § 34-27-3-1, the Court finds in favor of Grandview Solar on Grandview Solar's Action for Mandate, and hereby issues a Mandate to the Town Zoning Administrator compelling the Town Zoning Administrator to promptly issue the ILP for the Project, including all 37 parcels underlying the Special Exception Approval, without further delay, and for the duration of the Project through project completion.

2. The Court finds that Grandview Solar is entitled to a mandatory preliminary injunction on its action for declaratory judgment and, pursuant to Indiana Code § 34-14-1-2, hereby Orders the Town Zoning Administrator to promptly issue the ILP for the Project, including all 37 parcels underlying the Special Exception Approval, without further delay, and for the duration of the Project through project completion.

3. The Court finds that Grandview Solar is entitled to a mandatory preliminary injunction on its petition for judicial review of the Town BZA's denial of Grandview Solar's Amended ILP Application and, pursuant to Indiana Code § 36-7-4-1615(2), hereby Orders the Town Zoning Administrator to promptly issue the ILP for the Project, including all 37 parcels underlying the Special Exception Approval, without further delay, and for the duration of the Project through project completion.

4. All Defendants are further enjoined from any further attempts to stop, cease, hinder, delay, obstruct, or collaterally attack construction of the Grandview Solar Project.

Date: Sept. 28, 2023



The Honorable Amy Steinkamp Miskimen
Special Judge, Warrick County Superior Court 2

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