

STATE OF INDIANA)
) SS:
COUNTY OF SPENCER) CAUSE NO. 74C01-2402-PL-000055

FRANKLIN T. WIKE, et al.,

Plaintiffs,

VS.

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs, by counsel, for their Memorandum in Opposition to Motions for Summary Judgment (this “Memorandum”), state as follows:

I. INTRODUCTION

This case was filed by Plaintiffs in an attempt to have their interests heard and protected by the Courts in response to an attempt by Grandview Solar Project LLC (“Grandview Solar”) to develop an industrial solar project (the “Solar Project”) near their properties, and to stave off the associated negative impacts of the Solar Project. The Town of Grandview (the “Town”) initially declined to issue an Improvement Location Permit (“ILP”) for the Solar Project because a portion of the Solar Project was located outside its 2-mile extra-territorial jurisdiction (the “ETJ”). Grandview Solar initiated legal proceedings challenging the Town’s refusal to issue the ILP and, initially, secured a reversal from the Spencer Circuit Court. Following the reversal, Plaintiffs filed a Motion to Intervene, seeking to intervene in Grandview Solar’s legal challenge, and to ensure an

appropriate appeal was filed because the Town's initial actions in refusing to issue the permit was proper.

After the Motion to Intervene was fully briefed by all parties, a notice was issued by the Court stating that the presiding Judge was granted an indefinite leave of absence and that the parties may wish to secure the appointment of a special judge. After the issuance of the notice, and before the Motion to Intervene was ruled upon, the City and the Solar Company filed a Stipulation of Dismissal in light of a purported settlement. Plaintiffs were not a party to the settlement, and they did not sign the Stipulation of Dismissal. Without a ruling on the Motion to Intervene, Plaintiffs were left with no choice but to file this action seeking injunctive relief and a declaratory judgment on some of the underlying issues. The injunctive relief seeks an Order enjoining the Defendants from effectuating the terms of the settlement agreement (including the dismissal of the GSP Lawsuit) until such time as Plaintiffs' interests are protected, and to withdraw the filing of the Stipulation of Dismissal. In other words, Plaintiffs should be permitted as parties to the GSP Lawsuit, and the GSP Lawsuit should not be resolved / dismissed until Plaintiffs have been provided an opportunity to be heard. As noted, those rights were taken away from Plaintiffs when the presiding Judge went on a leave of absence, and the remaining parties sought to dismiss the GSP Lawsuit out from under Plaintiffs who had a pending Motion to Intervene, which motion sought to intervene as of right.

Grandview Solar filed a Motion to Dismiss the present lawsuit. A separate Motion to Dismiss was also filed by the Town, and the Town's Board of Zoning Appeals, Council, and Zoning Administrator (collectively, the "Town Defendants").¹ Because the two motions

¹ Each of the Defendants' joined in the other's Motion to Dismiss. Some references below reference an argument raised by a particular Defendant in their Motion to Dismiss. All such

(collectively referred to as, the “MSJ Motions”) included matters outside of the pleadings, this Court converted the motions to motions for summary judgment. As discussed below, Plaintiffs have asserted proper claims in this proceeding and the MSJ Motions should be denied. Indeed, other than the Spencer Circuit Court’s decision, the sole “evidence” in support of the MSJ Motions are unauthenticated BZA minutes and findings and an unauthenticated letter from Grandview Solar. These unauthenticated documents are insufficient to support a motion for summary judgment under Indiana law. There are no genuine issues of material fact, and Plaintiffs are entitled to judgment in their favor, as a matter of law, denying the MSJ Motions.

II. SPECIFIC DESIGNATIONS OF MATERIAL FACT

1. On July 31, 2023, Grandview Solar Project LLC (“GSP”) filed a lawsuit in the Knox Superior Court as Cause No. 42 C01-2307-PL-000032 (the “GSP Lawsuit”) seeking injunctive relief, judicial review, and a declaratory judgment, among other things. *See* ¶3 of the Affidavit of Franklin T. Wike (the “Wike Affid”), a copy of which is attached as Exhibit “A”.

2. The GSP Lawsuit, among other things, sought to force the Town to issue an ILP for the Solar Project, and to otherwise allow the Solar Project to proceed. Wike owns property and resides within three miles of the Solar Project. To protect his interests, and avoid the harm associated with the Solar Project, he sought to intervene in the GSP Lawsuit along with others, to uphold the Town’s refusal to issue an ILP and prevent the Solar Project from going forward. *Id.* ¶4.

3. On October 30, 2023, Plaintiffs’ attorney filed an Appearance on their behalf in the GSP Lawsuit and also filed a Motion to Intervene. *Id.* ¶5.

references (and opposition to the arguments) should be construed to apply to all Defendants in light of the joinder.

4. GSP filed a brief in opposition to the Motion to Intervene on November 3, 2023, and Plaintiffs’ attorney filed a Reply Brief on November 15, 2023. *Id.* ¶6.

5. On November 21, 2023, a notice was issued in the GSP Lawsuit advising that Judge Miskimen has been granted an indefinite leave of absence and the parties may wish to select a new Special Judge to be appointed by the Court. *Id.* ¶7.

6. The Motion to Intervene was not ruled upon prior to the November 21 notice. *Id.* ¶8.

7. On December 1, 2023, the original parties to the GSP Lawsuit filed a Stipulation of Dismissal. *Id.* ¶9.

8. Plaintiffs’ attorney did not sign the Stipulation of Dismissal on their behalf. *Id.* ¶10.

9. The Motion to Intervene was not ruled upon prior to the Stipulation of Dismissal being filed. *Id.* ¶11.

10. The Motion to Intervene has not been ruled upon to date, and no special judge has been appointed in the GSP Lawsuit. *Id.* ¶12.

11. Since the Motion to Intervene has not been granted, Wike initiated the present lawsuit in an effort to set aside the settlement and dismissal of the GSP Lawsuit, and to be heard upon the merits of the Solar Project that will impact his personal and property rights. *Id.* ¶13.

III. ARGUMENT

A. Standard of Review

Motions for summary judgment should be granted guardedly and are only granted when there are no genuine issues of material fact, and when the movant is entitled to judgment as a matter of law. Ind. T.R. 56(C); *see also Newhouse v. Farmers Nat’l Bank of Shelbyville*, 532 N.E.2d 26, 28 (Ind. Ct. App. 1989). In reviewing a motion for summary judgment, “[t]he trial

court should not weigh evidence or judge the credibility of witnesses.” 22B Ind. Prac., Civil Trial Rule Handbook § 56:5. Moreover, if the moving party fails to meet their initial burden and establish a right to summary judgment, the motion will be denied and the burden never shifts to obligate the nonmoving party to designate evidence in opposition. *Id.*

If the moving party does meet their initial burden, and the Court does examine the designated evidence, all of the facts designated by the various parties (in addition to all inferences to be drawn from those facts) are viewed in a light most favorable to the non-movant(s). It is also said that:

[s]ummary judgment is not a substitute for a trial. *Board of Aviation Commissioners v. Hestor* (1985), Ind.App., 473 N.E.2d 151, 153. Its purpose is to terminate those cases which have no factual dispute and which may be determined as a matter of law. *Jones v. City of Logansport* (1982), Ind.App., 436 N.E.2d 1138, 1143, reh. den. 439 N.E.2d 666, trans. den. Too, summary judgment is not a procedure for trying facts and for determining preponderance of the evidence. *Poxon v. General Motors Acceptance Corp.* (1980), Ind.App., 407 N.E.2d 1181, 1183. Even if the trial court believes that the nonmoving party will not be successful at trial, summary judgment should not be entered where material facts conflict or where conflicting inferences are possible. *Grimm v. Borkholder* (1983), Ind.App., 454 N.E.2d 84, 86.

Haase v. Brousseau, 514 N.E.2d 1291, 1292 (Ind. Ct. App. 1987).

Here, as discussed below, Defendants never met their initial burden, and the burden never shifted to Plaintiffs to oppose. Even if Defendants did meet their burden, the designated evidence, together with all inferences drawn in favor of Plaintiffs (and proper application of Indiana law), compels the denial of the MSJ Motions.

B. Defendants Failed To Meet Their Initial Burden Or To Otherwise Support The Entry Of Summary Judgment, And The MSJ Motions Should Be Denied

The Court converted the Motions to Dismiss to motions for summary judgment because matters outside the pleadings were presented and not excluded by the Court. However, given the nature of the extraneous matters presented, the result of the conversion was to effectively deny the

MSJ Motions. The MSJ Motions, in fact, should be denied on their face as Defendants did not support the MSJ Motions with any evidence, and Defendants did not meet their initial burden on summary judgment.

As noted previously, if the moving party fails to meet their initial burden on summary judgment the motion will be denied, and the burden never even shifts to the opposing party to present evidence in opposition. *See* 22B Ind. Prac., Civil Trial Handbook §56:5. “In ruling on a motion for summary judgment, [a] trial court will consider ***only*** properly designated ***evidence which would be admissible at trial...[and] [u]nsworn statements and unverified exhibits do not qualify as proper Rule 56 evidence.*** 487 Broadway Company, LLC v. Robinson, 147 N.E.3d 347, 353 (Ind. Ct. App. 2020)(emphasis added).

Here, the MSJ Motions were “supported” by only three documents purporting to be evidence. Exhibit 1 to the MSJ Motions purports to be unauthenticated copies of BZA minutes, proposed conditions, and unsigned and undated Findings of Fact. These are not sworn statements, complete documents, official documents, or placed into evidence by way of affidavit or otherwise. Exhibit 2 to the MSJ Motions is an unauthenticated and unworn document addressed to “To Whom It May Concern” and containing nothing but impermissible hearsay. Exhibit 3 is a copy of the Injunctive Relief Order issued by the Spencer Circuit Court (the “Injunctive Relief Order”), a copy of which was attached as an Exhibit to Plaintiffs’ Verified Petition. None of the first two Exhibits, as presented, constitute evidence that would be admissible at trial. They are not properly designated as summary judgment evidence. With the MSJ Motions unsupported by any properly designated evidence (other than the existence of the Injunctive Relief Order”), the MSJ Motions must be denied, and the burden never even shifts to Plaintiffs to respond and designate evidence in opposition.

C. This Lawsuit Is Not An Impermissible Collateral Attack On The 2019 Zoning Decision

As noted, the MSJ Motions should be denied outright due to the overall lack of evidentiary support as required by the Trial Rules. Proceeding to the Defendants' arguments themselves, the first failed argument in the MSJ Motions is the suggestion that this proceeding is an impermissible collateral attack on the 2019 zoning decision. Notably, the 2019 zoning decision was not designated as evidence in the MSJ Motions. The MSJ Motions also state in support of their argument that Plaintiffs had knowledge of the purported 2019 approvals, that Grandview Solar spent tens of millions of dollars, and that Grandview Solar's relationship with its primary contractor was at risk, among other things. Again, the MSJ Motion was not supported by any designated evidence to support any of these contentions, and Defendants are not entitled to those inferences on summary judgment.

As to the merits of the collateral attack argument, it is not supported by Indiana law. In essence, the Defendants' argument is that:

- The 2019 special exception approval is a zoning decision;
- The exclusive means for judicial review of a zoning decision is a judicial review proceeding; and
- Any judicial review proceeding had to be filed within 30 days of the 2019 decision.

The 2019 zoning decision is important because that is what Grandview Solar relies upon to circumvent the fact that the Town does not have ETJ. As noted in the Verified Complaint, Grandview Solar argued that the Town waived any argument that it does not now have jurisdiction because it previously issued a related special exception four years ago, and that approval was not the subject of a judicial review proceeding. *See* Verified Complaint, ¶93.

The waiver argument ignores the well settled doctrine confirming that when a zoning board acts in excess of the power granted under the statutes and zoning ordinance, those acts are *ultra vires* and **void**. See *Elkhart County Bd. of Zoning Appeals v. Earthmovers, Inc.*, 631 N.E.2d 927, 929 (Ind. Ct. App. 1994). Acts or decisions that are **void** can be the subject of collateral attack at any time. *Id.*

Defendants attempt to counter by arguing *Georgetown Bd. of Zoning Appeals v. Keele*, 743 N.E.2d 301, 302 (Ind. Ct. App. 2001), stands for the proposition that because the Town BZA had subject matter jurisdiction over zoning matters generally, untimely challenges *to subject matter jurisdiction* are waived. That argument misses the point and *Keele* is not germane to the issue before this Court. The issue is not whether the Town BZA has authority to issue special exceptions. The issue is not one of subject matter jurisdiction. The issue is whether the Town BZA exercised zoning control over real property outside of its jurisdiction. If so, the action is *ultra vires* and void. This is no different than a town zoning board in Michigan attempting to grant a special exception over property in Indiana. Indiana law is clear that acts that are *ultra vires* are void ab initio. *Earthmovers*, 631 N.E.2d at 929. As such, they can be the subject of collateral attack at any time and the MSJ Motions should be denied.

D. Plaintiffs' Declaratory Judgment Count Does Not Fail As A Matter Of Law

Defendants next attack Plaintiffs' declaratory judgment claim. Initially, Defendants contend the declaratory judgment claim should be denied because it is an attempt to circumvent judicial review (and claim that any judicial review claim now would be untimely). The propriety of the timing is discussed above. Moreover, the Defendants' arguments ignore the nature of the declaratory judgment claim. The crux of the claim is the invalidity of the settlement between Grandview Solar and the Town Defendants and the purported dismissal of the GSP Lawsuit. That

is not an issue of judicial review. To reach the conclusion regarding the settlement, the Plaintiffs necessarily included a request for the Court to make certain supporting declarations regarding the propriety of the underlying subject matter.

Additionally, the GSP Lawsuit included a claim for judicial review and the matter of the propriety of the 2019 zoning approval was at issue in the GSP Lawsuit. Plaintiffs sought to intervene in that action, but the GSP Lawsuit was improperly and purportedly dismissed (based upon the settlement) before Plaintiffs could be heard due to the lack of a presiding judge. The propriety of the settlement and attempted dismissal are at the heart of this proceeding and request for injunctive relief. Upon the entry of an injunction, the pending Motion to Intervene can be ruled upon and the issues addressed.

Next, Grandview Solar takes issue with two² of the several items for which Plaintiffs seek a declaratory judgment. First, Grandview Solar argues that the purpose of a declaratory judgment action is to determine a question of construction or validity arising under an “instrument, statute, ordinance, contract, or franchise.” I.C. §34-14-1-2. Then, Grandview Solar notes that Plaintiffs request a declaration regarding the lack of a comprehensive plan and argues that the Court cannot issue a declaratory judgment of rights arising under the lack of something (i.e., the lack of a comprehensive plan). That entirely unsupported argument wholly misses the mark. The validity of the 2019 zoning decision, the settlement, and the dismissal are entirely appropriate subjects of a declaratory judgment, and that is not challenged by Defendants on summary judgment. The lack

² The remaining items for which declaratory judgment is sought are not the subject of the MSJ Motions.

of a comprehensive plan is simply one of the reasons the 2019 zoning decision, the settlement, and the dismissal should be declared invalid.

While Defendants do not challenge that the validity of the settlement agreement is a proper subject of a declaratory judgment claim, Grandview Solar does argue Plaintiffs cannot challenge the settlement because they are not parties to the agreement. In support, Grandview Solar cites authority for the general proposition that one who is not a party to a contract, or in privity with a party, has no rights under the contract. That authority is irrelevant. Plaintiffs are not claiming to be a party to the settlement and are not seeking to enforce obligations under the agreement. Rather, as discussed, the settlement is void ab initio, and based on the purported settlement, the Defendants sought to improperly dismiss a lawsuit to prevent Plaintiffs from being heard and to develop the Solar Project which will cause harm to Plaintiffs. Plaintiffs can properly challenge the settlement so they can be heard and require the Town Defendants to comply with the law and operate within the scope of its authority.

E. Plaintiffs' Request For Injunctive Relief Should Not Be Dismissed

The MSJ Motions argue that Count II of the Verified Complaint seeking injunctive relief should be dismissed. The argument on this issue is limited to two sentences, both of which are incorrect. Specifically, Grandview Solar argues that Plaintiffs' case on the merits is the declaratory judgment relief sought. Grandview Solar then argues that because the declaratory judgment claim should be dismissed (not on the facts, but as a legally insufficient claim) the request for injunctive relief should likewise be dismissed.

First, as discussed above, Plaintiffs have asserted a proper claim for declaratory judgment, which claim should proceed to be determined in the merits. Second, the suggestion that Count II seeking injunctive relief is wholly premised upon Count I seeking declaratory judgment is simply

incorrect. Contrary to Grandview Solar's assertion, withdrawing the Stipulation of Dismissal, enjoining the settlement, and allowing Plaintiffs the opportunity to intervene and be heard in the GSP Lawsuit (as the GSP Lawsuit should have played out) is plainly part of the injective relief sought. In fact, it was the denial of this opportunity, occasioned by the presiding Judge's unavailability and Defendants' subsequent attempt to dismiss the case, that necessitated the filing of the present action.

F. The GSP Lawsuit Was Not Dismissed As A Matter Of Law

The Town Defendants argue in a footnote that it was inaccurate for the Verified Complaint to allege that the GSP Lawsuit was not yet dismissed because the Stipulation of Dismissal had not yet been ruled upon. Specifically, the Town Defendants argue that the GSP Lawsuit was automatically dismissed upon the filing of the Stipulation of Dismissal, without further action or approval required by the Court. That conclusion is inaccurate under the facts of this case.

The following excerpts from Indiana's Trial Rules are germane to the analysis:

- Ind. Trial Rule 41(A)(1)(b) provides that, "[s]ubject to contrary provisions of these rules or of any statute, an action may be dismissed by the plaintiff without order of court, by filing a stipulation of dismissal ***signed by all parties who have appeared in this action.***
- T.R. 24(A) allows for intervention as of right. If a party meets the requirements, the party ***shall be permitted to intervene.***
- T.R. 3.1(C) discusses Intervening Parties and provides that at the time the first matter is submitted to the Court seeking to intervene, the attorney representing such party or parties shall file an appearance.

The above Trial Rules inform that the Stipulation of Dismissal could not have been granted unless it was signed by all parties that appeared in the GSP Lawsuit. It is undisputed that Plaintiffs were "parties" to the GSP Lawsuit for purposes of Trial Rule 41, and it is undisputed that Plaintiffs

did not sign the Stipulation of Dismissal. *See* Wike Affid., ¶10. As such, there is no automatic dismissal as suggested by the Town Defendants.

While maybe not a “party” to the GSP Lawsuit in general terms since the Motion to Intervene had not yet been formally granted due to the unavailability of the presiding Judge, as noted, Plaintiffs are parties to the GSP Lawsuit for purposes of Trial Rule 41, and they appeared in the action. Again, intervening “parties” are required to file an Appearance when they first seek to intervene. That happened, and Plaintiffs, as intervening “parties” filed an Appearance in the GSP Lawsuit. *See* Wike Affid., ¶5. Because they were a party that appeared in the action, a stipulation cannot serve to dismiss the GSP Lawsuit unless Plaintiffs were signatories. It is undisputed they were not.

Further supporting Plaintiffs’ position is the fact that they were seeking to intervene *as of right*. *See* Wike Affid., ¶5 and Ex. C. Plaintiffs had the mandatory right to intervene, as opposed to a permissive right. Rushing to dismiss a lawsuit prior to ruling on a mandatory right to intervene is inconsistent with the Trial Rules and the whole point of mandatory intervention and requiring a signature of all parties that appeared – i.e., to give a voice to all parties to the proceeding, not just a select few who want a dismissal for their specific reasons having nothing to do with the merits or impacts on others directly affected. Equitable considerations also support the denial of the MSJ Motions, the withdrawal of the Stipulation of Dismissal, and the propriety of the injunctive relief sought by Plaintiffs. Indeed, the only reason this lawsuit was filed was due to the fact that no Judge was presiding over the GSP Lawsuit to rule upon the mandatory intervention, and because Defendants sought to take advantage of that unique and unfortunate situation by seeking to dismiss the GSP Lawsuit before Plaintiffs could ensure the merits were properly addressed. If a party is substantially prejudiced by a voluntary dismissal, it is improper to dismiss the case. *Hidden Valley*

Lake Property Owners Assoc. v. HVL Utilities, Inc., 445 N.E.2d 575, 576 (Ind. Ct. App. 1983).

Thus, even if Plaintiffs were not required to sign the Stipulation of Dismissal to be effective, it should be withdrawn³ due to the resulting prejudice to Plaintiffs.

G. Plaintiffs' Injunctive Relief Claim Should Not Be Dismissed

Grandview Solar's final argument (other than a statement indicating it is joining in the Town Defendants' MSJ Motion) is the argument that Count II of the Verified Complaint seeking injunctive relief should be dismissed. Grandview Solar's argument on this issue is limited to two sentences, both of which are incorrect statements. Specifically, Grandview Solar argues that Plaintiffs' case on the merits is the declaratory judgment relief sought. Grandview Solar then argues that because the declaratory judgment claim should be dismissed (not on the facts, but as a legally insufficient claim) the request for injunctive relief should likewise be dismissed.

First, as discussed above, Plaintiffs have asserted a proper claim for declaratory judgment, which claim should proceed to be determined in the merits. Second, the suggestion that Count II seeking injunctive relief is wholly premised upon Count I seeking declaratory judgment is simply incorrect. Contrary to Grandview Solar's assertion, withdrawing the Stipulation of Dismissal, enjoining the settlement, and allowing Plaintiffs the opportunity to intervene and be heard in the GSP Lawsuit (as the GSP Lawsuit should have played out) is plainly part of the injunctive relief sought. In fact, it was the denial of this opportunity, occasioned by the presiding Judge's unavailability and Defendants' subsequent attempt to dismiss the case, that necessitated the filing of the present action.

H. The Plaintiffs Have Standing To Collaterally Attack The Defendants' Settlement

³ "When a case is dismissed and then reinstated, it stands as if it had not been dismissed." *Hidden Valley*, 445 N.E.2d t 576.

The Town Defendants' Motion to Dismiss argues that Plaintiffs lack standing to attack the settlement agreement between the Defendants. That argument, in sum, contends that:

- Towns have general powers, including the power to sue and be sued;
- Settlement agreements are favored; and
- There is a general rule that a non-settling party lacks standing to object to a settlement between other parties.

That argument misses the mark and is not supported by the authority relied upon by the Town Defendants. First, to the extent the settlement requires the Town to issue an ILP for a portion of a project over which it legally cannot assert jurisdiction – that is something not within its power. As already discussed, such an action would be *ultra vires* and void. Not voidable, **but void**. Moreover, the standing authority cited by the Town Defendants does not support the result they seek. For example, after noting the general rule, the *Goldberg* decision cited by the Town Defendants for the above general rule, allows a non-settling party to challenge a partial settlement (in a class-action case) when they establish plain legal prejudice, including being stripped of a legal claim or cause of action, or the right to present evidence at trial. *Goldberg v. Farno*, 953 N.E.2d 1244, 1252-1253 (Ind. Ct. App. 2011).

Here, this case does not involve a partial settlement, where Plaintiffs remained able to pursue claims and present evidence. To the contrary, the settlement at issue resulted in the dismissal of the GSP Lawsuit in its entirety – it literally seeks to preclude Plaintiffs from any and all involvement and potential relief in the GSP Lawsuit. That is the definition of prejudice in the authority relied on by the Town. Plaintiffs have standing to challenge the settlement and the attempted dismissal of the GSP lawsuit.

IV. CONCLUSION

As discussed above, Defendants failed to meet their initial burden on summary judgment and the burden never shifted to Plaintiffs to respond. To the extent a response is deemed required, the above argument and supporting designated evidence, together with the inferences in Plaintiffs' favor as required by Indiana law, all serve to defeat the MSJ Motions, and Plaintiffs request the entry of an Order denying the MSJ Motions in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 10, 2024, the foregoing document was electronically served upon the following via the Indiana E-Filing System:

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