

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF GOODHUE

FIRST JUDICIAL DISTRICT

File No.

GreenMark Solar, LLC, a Minnesota
limited liability company,CASE TYPE: 14. Other Civil
(Mandamus)

Plaintiff-Petitioner,

v.

**VERIFIED COMPLAINT AND
PETITION FOR WRIT OF
MANDAMUS**Wacouta Township, a political
subdivision of the State of Minnesota,**EXPEDITED LITIGATION TRACK
REQUESTED**

Defendant-Respondent.

Plaintiff-Petitioner GreenMark Solar, LLC, for its Verified Complaint and Petition for Writ of Mandamus, states and alleges as follows:

PARTIES AND INTRODUCTION

1. Plaintiff-Petitioner GreenMark Solar, LLC (“GreenMark”) is a Minnesota limited liability company with its principal place of business located at 4626 Emerson Ave. S., Minneapolis, Minnesota 55419. GreenMark is engaged in the business of Community Solar Garden development.

2. Defendant-Respondent Wacouta Township (the “Township”) is a political subdivision of the State of Minnesota located in Goodhue County, Minnesota, with its offices located at 27700 Grace Trail, Red Wing, Minnesota 55066.

3. GreenMark has planned a project to build a Community Solar Garden in the Township on property located at 29121 Wildwood Lane, Red Wing, Minnesota (the “Project Site”).

4. The Project Site is owned by Howard T. Stenerson and Joyce L. Stenerson, husband and wife, and their son Howard P. Stenerson, as joint tenants, who have contracted to lease the Project Site to GreenMark, conditioned upon the receipt of all land use and other approvals necessary to develop and build the solar energy system.

5. GreenMark has obtained all legally-necessary land use approvals, including a conditional use permit (“CUP”) from Goodhue County (the “County”), to build a Solar Energy System (“SES”) pursuant to Article 19 of the County Zoning Ordinance, which specifically regulates SES.

6. This is a mandamus action brought under Minn. Stat. Ch. 586, which seeks a writ of mandamus from this court ordering the Township to issue GreenMark a Building Permit for SES development and construction. GreenMark is entitled to the Building Permit because the Township has exceeded its powers in violation of Minn. Stat. § 394.33, by purporting to enforce CUP requirements upon GreenMark that are inconsistent with the controlling CUP requirements of the County.

JURISDICTION AND VENUE

7. Jurisdiction is proper in Goodhue County District Court pursuant to Minn. Stat. § 586.11, which provides that “[t]he district court has exclusive original jurisdiction in all cases of mandamus”

8. Venue is proper because the subject property is located in Goodhue County.

BACKGROUND FACTS

9. GreenMark has contracted to lease certain real property in the Township located at 29121 Wildwood Lane, consisting of two legal parcels with PID Nos. 43.135.0200 and 43.136.0380. These parcels are legally described as:

Part of the Southeast $\frac{1}{4}$ of Section 35, Township 113, Range 014
and
Part of the West $\frac{1}{2}$ of the Southwest $\frac{1}{4}$ of Section 36, Township
113, Range 014 in Wacouta Township

(collectively, the "Property"). The Property area totals approximately 56.5 acres.

10. The Property consists predominantly of wetlands (over 43 delineated acres), but for many decades, the wetlands have been disturbed by peat mining (since at least 1925) and farming (for at least 50 years). Since 1995, the farming has been limited to the seeding of grasses, which are harvested for hay.

11. GreenMark selected the Property for solar development because (a) Xcel Energy ("Xcel") has designated the Property as a suitable site for use as a Community Solar Garden, and (b) GreenMark believed that a Community Solar Garden incorporating improved and updated agricultural practices (as detailed *infra*) was a more beneficial use for the site than the current use of peat mining and hay farming.

12. Other favorable characteristics of the Property for solar power development are that (a) it is situated along U.S. Highway 61 and along a heavy rail line, and (b) there is a point of interconnection nearby because three-phase power is provided to a Cemstone cement plant and USG Interiors, a manufacturer of wall- and ceiling-related construction materials, both of which are close to the Property.

13. GreenMark seeks to develop and build a five mega-watt ("MW") Community Solar Garden on the Property, which will cover approximately 28 acres, or half of the Property's total area. The provision of this solar power will be used to assist in meeting the demand and

regulatory requirements set forth in the Minnesota Renewable Energy Standard mandate (Minn. Stat. § 216B.1691, subd. 2(a)) to produce 25 percent of the State's electricity generation through renewable energy by 2025.

14. Conversion of the Property to GreenMark's planned Community Solar Garden will discontinue peat mining and hay farming disturbances to the wetlands on the Property and will incorporate more modern agricultural and land preservation practices. It will also result in reducing carbon emissions compared to coal-fired power generation. It is estimated that GreenMark's proposed project for the Property will reduce carbon emissions equivalent to 500 passenger plane rides from London to New York City per year.

15. Because of GreenMark's commitment to environmentally-sustainable practices, in addition to development of the Community Solar Garden, GreenMark proposes as part of the project, both to improve the Property's wetland characteristics and also to create pollinator habitat to facilitate honey production.

16. The County has adopted in Article 19 of its Zoning Ordinance specific regulations allowing for the development and construction of solar energy systems as a conditional use. A true and correct copy of Article 19, entitled "Solar Energy System Regulations" (as amended May 3, 2016) is attached and incorporated into this pleading as **Exhibit A**.

17. On or about March 28, 2016, GreenMark applied to the County for a CUP pursuant to Article 19 of the County Zoning Ordinance. A true and correct copy of GreenMark's CUP application to the County is attached and incorporated into this pleading as **Exhibit B**.

18. On April 11, 2016, because the Property is located in the Township, GreenMark principals appeared before the Township's Town Board and made a PowerPoint presentation to introduce the Town Board to the project. GreenMark believed that the Township was not

intending to exercise any authority over the project other than through its Building Permit application process.

19. On May 3, 2016, GreenMark's CUP application came before the County Board of Commissioners (the "County Board"), which approved on a 4-1 vote the following: (a) a zoning text amendment to Article 19 that allowed solar development as an interim use in shoreland and wetland areas pursuant to a duly-issued Interim Use Permit ("IUP"); and (b) the issuance of an IUP "to allow construction and operation of a Utility Scale Solar Energy System" on the Property, subject to 11 enumerated conditions. A true and correct copy of the County Board minutes memorializing this approval is attached and incorporated into this pleading as **Exhibit C**.

20. Conditions included in the IUP granted by the County included that the project must comply "with all necessary State and Federal registrations, permits, licensing, and regulations" and that GreenMark "shall comply within [sic] all applicable Wetlands Rules and Regulations." Exhibit C (pp. 388384).

21. Conspicuously absent from the conditions was any condition that GreenMark must obtain a CUP from the Township. *Id.*

22. At no time during the County permitting process did the Township inform either the County or GreenMark that it would impose its own CUP process on GreenMark.

23. On November 1, 2016, the County Board again approved an IUP for GreenMark on nearly-identical terms as its May 3, 2016 IUP approval. A true and correct copy of the November 1, 2016 IUP is attached and incorporated into this pleading as **Exhibit D**. Again, the IUP approved by the County in November did not include any condition that GreenMark must

obtain a CUP from the Township. One of the CUP conditions requires GreenMark to exercise its rights under the IUP within a year after its issuance or face expiration of its permit.

24. GreenMark retained the services of professional consulting engineers to assist it in making application to governmental authorities for approvals necessary to proceed with the project. GreenMark's consultants undertook wetland delineation, vegetation assessment, a Minnesota Routine Assessment Methodology for Evaluating Wetland Functions (a so-called "MNRAM"), a detailed assessment of wetland impacts anticipated from the project, analyses of wetland impact avoidance and project alternatives, wetland mitigation, project planning and layout, and plans for site restoration.

25. In addition, GreenMark's consultants undertook research to inventory any endangered or threatened species, special fish or wildlife resources, any archaeological, historic, or cultural sites and groundwater and water resources investigation.

26. A true and correct copy of GreenMark's February 3, 2017 Application to the Goodhue County Soil and Water Conservation District ("SWCD") pursuant to the Minnesota Wetland Conservation Act is attached and incorporated into this pleading as **Exhibit E**.

27. A true and correct copy of GreenMark's February 2, 2017 "Joint Application Form for Activities Affecting Water Resources in Minnesota" is attached and incorporated into this pleading as **Exhibit F**. Exhibit F contains a detailed accounting of actions taken by GreenMark's consulting experts, as summarized above.

28. In March 2017, a Technical Evaluation Panel ("TEP") of the Goodhue County SWCD held a series of meetings to evaluate GreenMark's proposal with respect to (a) the nature and extent of wetlands on the Property, (b) the project's impact on the wetlands, and (c) the

project's proposed methods for mitigating wetland impacts, undertaking wetland replacement and improving wetlands in conjunction with the project's development.

29. TEP produced findings and a report on March 9, 2017 that approved GreenMark's wetland delineation and made recommendations on alternative wetland replacement amounts, but stated that TEP required final information on the proposed solar panel layout before TEP could make recommendations on approval of such layout. A true and correct copy of TEP's March 9, 2017 Findings Report is attached and incorporated into this pleading as **Exhibit G**.

30. In response to TEP's March 9 report, GreenMark's consultants provided TEP with additional technical information on March 10, 2017, including an aerial map showing the proposed locations and layout of the solar panels on the Property. A true and correct copy of the additional technical information from GreenMark's consultants is attached and incorporated into this pleading as **Exhibit H**.

31. On March 15, 2017, TEP issued a decision approving GreenMark's wetland replacement plan, but indicating TEP still needed additional information on the final solar panel layout for the project. A true and correct copy of TEP's March 15, 2017 Memorandum to the Goodhue County Board is attached and incorporated into this pleading as **Exhibit I**.

32. GreenMark complied with TEP's request for additional information and on March 20, 2017, TEP recommended to the County Board that it approve GreenMark's wetland replacement plan. A true and correct copy of TEP's March 20, 2017 Memorandum to the Goodhue County Board is attached and incorporated into this pleading as **Exhibit J**.

33. On March 28, 2017, GreenMark, by and through the property owner for the Property, obtained approval from the County for a temporary access needed during the

construction of the Community Solar Garden. A true and correct copy of the Access Permit Application and County approval is attached and incorporated into this pleading as **Exhibit K**.

34. On March 31, 2017, a representative of GreenMark made application to the Township for a Building Permit for the Community Solar Garden by paying the \$100 application fee. The Township's zoning administrator advised the GreenMark representative that he could not and would not sign off on the Building Permit until instructed to do so by the Town Board.

35. In April 2017, at the Township's insistence and over GreenMark's objections, GreenMark was forced by the Township to apply for a CUP from the Township.

36. Prior to the CUP hearings before the Township Planning Commission (the "Planning Commission") and Town Board, GreenMark's attorneys had argued to the Township attorney that the Township was exceeding its powers under Minn. Stat. § 394.33, subd. 1, by attempting to enforce a zoning ordinance against GreenMark that was inconsistent with the County's zoning ordinance governing Solar Energy Systems. A true and correct copy of the objection letter from GreenMark's attorneys to the Township attorney is attached and incorporated into this pleading as **Exhibit L**.

37. Following back-to-back hearings by the Planning Commission and the Town Board, which were both held on May 15, 2017, these bodies issued nearly-identical "Findings of Fact, Conclusions, and Decision Denying Application" (the "Decisions"). The Township attorney provided the Decisions to GreenMark's attorneys under cover of a letter dated May 16, 2017. True and correct copies of the transmittal letter and the Decisions are attached and incorporated into this pleading as **Exhibits M-1** (transmittal letter), **M-2** (Planning Commission Decision) and **M-3** (Town Board Decision).

38. Both Decisions state in part that the Township was justified in requiring GreenMark to obtain a CUP because “the Township has independent zoning authority from the County.” *Id.*

39. In reviewing GreenMark’s CUP application, the Township relied on a zoning ordinance provision that allows as a conditional use in its Agricultural Protection District “commercial and industrial uses primarily intended to serve the *agricultural community*.” Art. 10, § 3, subd. 10 (emphasis added). The Township admits that, “‘Agricultural Community’ is not a term defined in the Ordinance.” Exhibits M-2 and M-3 (Finding No. 11).

40. Because the grant or denial of the CUP turned upon the meaning of an admittedly undefined term in the Township’s zoning ordinance, the Township attorney drafted Findings that referenced other terms that were defined—“Agricultural Operation” and “Agricultural Use”—and then provided the Planning Commission and Town Board with a multiple choice of four alternatives for the meaning of the undefined term, “Agricultural Community.” Exhibits M-2 and M-3 (Finding Nos. 11 and 12). The Planning Commission and the Town Board were each instructed to “[PICK ONE]” of the four alternatives for the definition of what constitutes the “Agricultural Community.” (Emphasis in original).

41. The Planning Commission and the Town Board selected different definitions for the term “Agricultural Community.” The Planning Commission selected alternative “a.” and the Town Board selected alternative “b.” Alternative “a” defined Agricultural Community as “those enterprises and citizens engaged in agricultural operations [**in the Township/in the County/anywhere**].” (Emphasis in original). Alternative “b” defined Agricultural Community as “those enterprises and citizens engage [sic] in agricultural operations and the processing of agricultural products [**in the Township/in the County/anywhere**].” (Emphasis in original).

42. The Township concluded that GreenMark's proposed Community Solar Garden failed to meet the Township's ordinance standard because, "while it will incidentally benefit the agricultural community, [it] is not primarily intended to benefit the agricultural community" as the Township had chosen to define the term "agricultural community." Exhibits M-2 and M-3 (Conclusion No. 2).

43. GreenMark had argued that it met the ambiguous language of the Township ordinance of serving the agricultural community because its solar garden plan includes the development of pollinator habitat, a recognized and critical agricultural use. More than half the Project Site will be covered with native vegetation that can be classified as pollinator habitat.

44. GreenMark had further argued that it had met the ambiguous language of the Township ordinance of serving the agricultural community because its project preserves open space and habitat, which are recognized beneficial uses for the agricultural community.

45. GreenMark had further argued that it had met the ambiguous language of the Township ordinance of serving the agricultural community because GreenMark proposed to offer preferential subscriptions to the Community Solar Garden to the local agricultural community, before offering subscriptions to other potential solar power users.

46. The Township's zoning ordinance for its Agricultural Protection District that limits commercial and industrial uses to those uses "primarily intended to serve the *agricultural community*" is ambiguous and, under Minnesota law, must be enforced in favor of the property owner and against the Township. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980).

47. The Township has committed a clear violation of its powers under Minn. Stat. § 394.33, subd. 1. This statute prohibits a town from enacting or enforcing "official controls

inconsistent with or less restrictive than the standards prescribed in the official controls adopted by the board [of the county commissioners].”

48. The Township has enforced its official controls in a manner that is inconsistent with the standards adopted by the County. The County allows “Solar Energy Systems”—SES—in agricultural zoning districts as either conditionally permitted or interim permitted uses. Exhibit A, pp. 178-79 (County Zoning Ord. Art. 19, § 7). Issuance of a County CUP or IUP for an SES is subject to SES standards, application requirements, and decommissioning requirements that are set out in Sections 4, 5 and 6 of Article 19 in the County Zoning Ordinance. *Id.* pp. 173-78.

49. The Township’s official controls are completely inconsistent with the County’s official controls for permitting Solar Energy Systems because the Township has no specific provisions relating to approval of utility scale solar gardens. The Township denied GreenMark’s CUP application by applying an undefined and ambiguous CUP provision that restricts commercial and industrial uses in agricultural districts to those “primarily intended to serve the agricultural community”. This was inconsistent with the County’s specific and directly applicable provisions regulating Solar Energy Systems and allowing these uses in agricultural districts. Accordingly, the Township’s application of its ordinances was impermissibly “inconsistent” with the controlling County ordinances, in violation of Minn. Stat. § 394.33.

50. The Township has failed and refused to issue a Building Permit to GreenMark in response to its paid application for the sole reason that the Township has illegally imposed CUP requirements upon GreenMark that are inconsistent with the County’s requirements and that therefore exceed the Township’s powers under State law.

51. GreenMark has an agreement with Xcel for interconnection services to allow connection of GreenMark's Community Solar Garden with Xcel's power grid. The agreement required GreenMark to deposit the sum of \$900,000 with Xcel.

52. Xcel has put GreenMark on notice that it intends to commence work on the interconnection beginning June 9, 2017, and intends to use GreenMark's funds on deposit to do so. Should GreenMark fail to obtain a Building Permit from the Township and proceed with its work, it stands to lose a substantial portion, if not all, of its nearly one million dollar deposit with Xcel.

53. Moreover, GreenMark faces the possible loss of its IUP obtained from the County if it is unable to exercise its rights under the IUP within a year after its issuance. GreenMark has made what it understands to be a one-time-only extension request of its IUP from the County, which has granted the request and extended the time frame for implementation of the solar energy system to May 3, 2018. A true and correct copy of the County Planning and Zoning Administrator's extension letter is attached and incorporated into this pleading as **Exhibit N**. The Township's continuing failure and refusal to issue a Building Permit to GreenMark jeopardizes GreenMark's ability to proceed with development of the Community Solar Garden before expiration of the County-issued IUP.

54. GreenMark has a critical need to commence construction of its project as soon as possible in order to meet its contractual obligations, to avoid a devastating financial loss and to avoid losing its rights through expiration of its County IUP.

COUNT I—MANDAMUS

55. GreenMark restates and realleges each and every allegation contained in the paragraphs above.

56. This cause of action is brought pursuant to Minn. Stat. § § 586.02 *et seq.* for an order from this court directing the Township to issue a Building Permit to GreenMark.

57. GreenMark has suffered injury in fact from the Township's abuse of its powers and its failure and refusal to issue GreenMark the Building Permit.

58. The failure of the Township to comply with its legal duties constitutes a public wrong specifically injurious to GreenMark.

59. Because there is no plain, speedy and adequate remedy in the ordinary course of law, GreenMark is entitled to an alternative writ of mandamus ordering the Township to issue the Building Permit.

COUNT II—DECLARATORY JUDGMENT

60. GreenMark restates and realleges each and every allegation contained in the paragraphs above.

61. This case presents a justiciable controversy pursuant to Minn. Stat. Ch. 555.

62. GreenMark is entitled to a declaratory judgment pursuant to Minn. Stat. Ch. 555 that the Township has exceeded its powers by forcing GreenMark to apply for a CUP, and denying that CUP by enforcing an inconsistent and ambiguous ordinance provision against GreenMark.

63. Even if the Township had not exceeded its powers, its ambiguous ordinance requires the Court to recognize that such ambiguity must be construed against the Township and in favor of the property owner.

64. GreenMark's understanding and attempted fulfillment of the Township's ambiguous ordinance provision that its business must primarily serve the *agricultural community*

(as alleged *supra*, ¶¶ 42-44) is reasonable and must be enforced against the Township as the author and attempted enforcer of its ambiguous ordinance provision.

65. Accordingly, GreenMark, in the alternative, is entitled to an order of this Court reversing the Township's denial of the CUP and directing the Township to issue a CUP to GreenMark on account of the ambiguity of the zoning ordinance provision that the Township enforced against GreenMark.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Petitioner GreenMark Solar, LLC, prays for judgment and other relief against Defendant-Respondent Wacouta Township as follows:

1. Ordering that a writ of mandamus issue, compelling Defendant-Respondent Wacouta Township to immediately issue a Building Permit for a Community Solar Garden to Plaintiff-Petitioner GreenMark Solar, LLC, in accordance with GreenMark's submitted plans.
2. Entering judgment declaring that Defendant-Respondent Wacouta Township has exceeded its powers in violation of Minn. Stat. § 394.33, subd. 1, by enforcing an ambiguous zoning ordinance that is inconsistent with the zoning ordinance of Goodhue County.
3. Entering judgment in the alternative that Defendant-Respondent Wacouta Township's zoning ordinance is ambiguous and should be construed against it such that the Township's denial of a CUP to Plaintiff-Petitioner GreenMark Solar, LLC must be reversed and ordering the Township to issue a CUP to GreenMark in accordance with its submitted plans for a Community Solar Garden.
4. Granting and awarding Plaintiff-Petitioner GreenMark Solar, LLC its attorneys' fees, costs and disbursements to the extent such fees and costs may be recoverable by law or equity.
5. Granting and awarding such other and further relief as this Court may deem just and equitable.

Dated: June 9, 2017

s/ Gary A. Van Cleve

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