

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Border	)	
Basin I, LLC for a Certificate of	)	
Environmental Compatibility and Public	)	
Need to Construct a Solar-Powered Electric	)	Case No. 21-277-EL-BGN
Generation Facility in Hancock County,	)	
Ohio.	)	

**REPLY BRIEF OF INTERVENOR ROBIN L. GARDNER, INDIVIDUALLY,  
AS TRUSTEE, AND ON BEHALF OF GARDNER BROTHERS, LLC**

In her Post-Hearing Merit Brief, Intervenor Robin L. Gardner<sup>1</sup> established that the Joint Stipulation and Recommendation (“Stipulation”) is not reasonable and that Border Basin I, LLC (“Border Basin”) did not satisfy all criteria under R.C. 4906.10(A) entitling it to a Certificate of Environmental Compatibility and Public Need (“Certificate”) for the proposed project – a 120 MW solar generation facility (“Project”).

Although Ms. Gardner does not now rehash all of those arguments in this Reply Brief, she states that Border Basin’s Initial Brief contains no response to the issues raised regarding the location of the substation. Ms. Gardner further submits that very little reply argument is needed because Border Basin’s Initial Brief fails to plug the holes in Border Basin’s investigation relative to the nature of Project’s probable environmental impact. Nor does Border Basin’s Initial Brief overcome evidence that the facility does not represent the minimum adverse environmental impact.

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<sup>1</sup> Intervenor Robin L. Gardner submitted a Post-Hearing Merit Brief on behalf of herself, individually, as Trustee, and on behalf of Gardner Brothers, LLC. She now does the same for this Reply Brief.

In that vein, Border Basin's wildlife studies failed to encompass the impact of glare on federally-protected birds present in the Project area. This deficiency only compounds adverse visual impacts to non-participating, adjacent property owners like Ms. Gardner. The totality of information presented and referenced in Border Basin's Initial Brief does not substantiate Border Basin's conclusory contention that the Application and Stipulation comply with R.C. 4906.10(A)(2) and (A)(3).

Additionally, Border Basin's Initial Brief offers hollow justification relative to whether the Project will serve the "public interest." Border Basin's broad assumptions about tax benefits to the community are not guaranteed and, in any event, do not trump the interests of local residents. Border Basin also overstates its public engagement efforts – self-described as "extensive." (*See* Border Basin Initial Br. at 26.) Yet a number of intervenor property owners did not find out about the Project until after Border Basin filed its Application, by which time Border Basin had already decided on the layout. (Hearing Transcript ("Tr."), Vol. I at 21:19-22:4, 22:25-23:1, 37:5-16, 144:22-145:1, 148:1-16.) And Ms. Gardner did not receive actual notice of the Project until this calendar year, even though her name and associated properties were identified on Border Basin's service list for notice of the second public informational meeting hosted on August 6, 2021. (*See id.* at 36:12-20, 178:16-24.)

In fact, that second public informational meeting became necessary because Border Basin's notice of the first did not comport with the Board's rules. (Hearing Transcript Vol. I at 37:7-12; 38:21-39:3.)

Border Basin neither genuinely nor sufficiently considered input from adversely-affected local residents. Consequently, none of the local resident intervenors have signed good neighbor agreements or support the Stipulation. The Board should not condone Border Basin's lack of due diligence and public engagement by issuing a Certificate for this Project.

## REPLY ARGUMENT

### **1. The Stipulation and Record Lack Information Enabling the Board to Determine Material Issues Relative to the Nature of Probable Environmental Effect Critical to a Finding under R.C. 4906.10(A)(2).**

#### **1.1 Border Basin's Initial Brief Still Does Not Address Evidence of Flooding in the Area of the Proposed Project Substation.**

The evidence remains undisputed that Border Basin's Hydrologic Assessment did not account for evidence of flooding. Apparently, Border Basin still has not modeled why the flooding may occur or explained how construction of its substation in the area will not exacerbate the flooding problem. It was incumbent on Border Basin to investigate evidence of flooding relative to hydrologic conditions once Border Basin acquired knowledge of it.<sup>2</sup>

Border Basin's Initial Brief simply states that "a Hydrologic Assessment was completed to ascertain information relating to the existing hydrologic conditions of the Project area." (Border Basin Brief at 15.) Because flood conditions were not considered, the Hydrologic Assessment is incomplete.

#### **1.2 Border Basin's Wildlife Investigations Did Not Study The Effect of Glare on Federally-Protected Bird Species.**

In the Biological Resources Technical Memo appended to its Application, Border Basin recognizes that seven avian species designated by the Migratory Bird Treaty Act ("MBTA") as birds of conservation concern ("BCC") are known to reside near or migrate through the Project area. (*See* Application, Exhibit P at Appendix D.) BCC are federally protected; the MBTA prohibits even their "incidental take." (*Id.* at 2.) Yet Border Basin first mentions BCC in its Initial Brief. (*See* Border Basin's Initial Br. at 18 ("Potentially-suitable habitat for \*\*\* BCC species may occur in the forested areas,

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<sup>2</sup> The ODNR recommended that Border Basin reach out to a local floodplain administrator. (Application, Exhibit Q.) There is no record evidence that Border Basin has done so.

palustrine forested wetlands, and within the streams [in the Project area].”).) Border Basin’s Application never addresses the Project’s impact on BCC.

Similarly, the record demonstrates evidence of bald eagles near the Project area. (Hearing Tr., Vol. I at 185:25-187:23.) Bald eagles are also protected under the federal Bald and Golden Eagle Protection Act (BGEPA). (Application, Exhibit P at 2.) Border Basin again does not investigate the Project’s impact on bald eagles.

Critically, Border Basin’s glare analysis did not assess whether the solar modules may have an impact on any of these protected bird species. (*See* Hearing Tr., Vol. I at 107:7-18.)

In response to questioning from Ms. Gardner during the evidentiary hearing, Border Basin’s environmental scientist witness, Korey McCluskey, hypothesized that solar panels would not affect the migration of birds, but did not point to any concrete evidentiary support for his opinion that, “I would think there is enough adjacent suitable habitat for most migrating birds to not be affected by this project.” (Hearing Tr., Vol. I 126:19-127:6) (emphasis added.) Simply put, however, glare wasn’t studied relative to birds. (Hearing Transcript Vol. I at 107:7-16.) As a result, Border Basin’s assertion that the Project will have no effect on BCC—solely based on a lack of visual observation during the two days in which the onsite biological survey was conducted—is untenable. (Border Basin’s Initial Br. at 17-18; Hearing Tr., Vol. I at 123:23-124:20.)

Border Basin has not presented any compelling evidence for the Board to conclude that glare from the solar panels will not adversely impact protected resident or migratory bird species, including the bald eagles. And no Certificate condition will suffice in the event Project impacts do cause incidental take of BCC or other harm to federally-protected birds.

**2. The Application and Joint Stipulation Do Not Assure Definitive Vegetative Screening, On Which Border Basin Relies For Achieving Minimum Adverse Environmental Impact.**

Border Basin's Initial Brief also reinforces the inadequacy of proposed visual impact mitigation, dedicating just one sentence to vegetative screening for its argument that the Project complies with R.C. 4906.10(A)(3). Border Basin describes: "potential mitigation measures, in the form of vegetative screening, can be offered to obstruct or soften views of the Project." (Border Basin Initial Br. at 19.) (emphasis added.) The qualifying words that Border Basin selected are important because the Stipulation's vegetative screening condition is indeterminate and thus toothless from the standpoint of a property owner enduring adverse aesthetic impacts from the Project:

Ultimately, the extent of vegetative screening is left up to Border Basin. (*See* Application at 68.) Although the Stipulation requires Border Basin to "prepare a landscape and lighting plan in consultation with a landscape architect," Border Basin retains authority to decide where vegetative screening will be implemented. (*See* Joint Stipulation, at 5 (Condition (23))). Moreover, Border Basin still fails to assure any measures to "soften views" of the substation. (Hearing Tr., Vol. II, 240:9-241:19. *See* Border Basin Initial Br. at 19.)

**3. Border Basin Overstates Points Allegedly Demonstrating that the Project Will Serve the Public Interest, Convenience and Necessity In Compliance With R.C. 4906.10(A)(6).**

**3.1 Border Basin's Public Engagement Efforts Were Not "Extensive."**

Border Basin maintains that it "undertook extensive public engagement efforts throughout the development of the Project" and that it "voluntarily held a second in-person public information meeting." (Border Basin Brief at 26-27.) The record reflects a different narrative.

Border Basin's first public information meeting did not conform with the Board's rules because Border Basin did not send notice to all affected and adjacent property owners. (*See* Hearing Tr., Vol. I.

at 21:19-22:2.) Over 200 recipients were entitled to notice of the public information meeting, but notice of the first public information meeting went out to only 48 residences. (Hearing Transcript Vol. I at 22:3-23:23.) Hence, Border Basin's second public information meeting was a legally-compelled "do-over" rather than a gesture of good will. The "broader service list" to which Border Basin alludes was actually the corrected service list – and the service list required by Ohio Adm.Code 4906-3-03. (Border Basin Initial Br. at 27.)

Even so, Ms. Gardner did not receive written notice of this Project until January 18, 2022. (Hearing Transcript Vol. I at 36:19-20; 178:16-24.)

As referenced in R.C. 4906.10(A)(6), public interest, convenience, and necessity can be looked at through a broad lens. *In the Matter of the Application of Republic Wind, LLC for a Certificate to Site Wind-Powered Electric Generation Facilities in Seneca and Sandusky Counties, Ohio ("Republic Wind")*, Case No. 17-2295-EL-BGN, Opinion, Order, and Certificate, \* 2 (June 24, 2021). This statutory criterion must also encompass the local public interest, ensuring a process that allows for local citizen input. *Id.*

Border Basin has not developed this Project with appropriate consideration for the legitimate concerns that the local resident intervenors have been forced to litigate. Border Basin also did not come forward with any evidence of good faith attempts to execute good neighbor agreements with them. Given the intervenors' opposition arguments, Border Basin's level of public engagement fails to support a finding that the Project is in the public interest.

### **3.2 Local Revenues From The Project Are Not Guaranteed And Should Not Take Precedence Over Adverse Impacts.**

The Board has already declared, in connection with siting wind generation facilities, that part of its responsibility under R.C. 4906.10(A)(6) is to balance projected benefits against the magnitude of

potential negative impacts on the local community. *In re the Adoption of Chapter 4906-17 of the Ohio Adm.Code and the Amendment of Certain Rules in Chapters 4906-1, 4906-5 and Rule 4906-7-17 of the Ohio Adm.Code to Implement Certification Requirements for Electric Generation Wind Facilities ("Wind Facility Rules")*, Case No. 08-1024-EL-ORD, 2008 WL 4822923, ¶40 (Oct. 28, 2008).

Border Basin emphasizes economic benefit from the Hancock County Commissioners' approval of Border Basin's application to be designated a Qualified Energy Project ("QEP") under R.C. 5727.75 and a payment in lieu of taxes. (Border Basin Initial Brief at 27.) Border Basin does not acknowledge, however, that tax credits are inherently contingent on the facility's tax liability (a function of profitability); there is no guaranteed annual payment to local taxing units.

Consequently, this argument is overblown. In any event, the Board has previously emphasized ". . . that an applicant's assertion [\*40] that there is a particular economic benefit to the community regarding a proposed wind energy facility will not be an offset to the public protection." *Wind Facility Rules*, ¶40. This same rationale should hold true for solar generation facilities.

As came up during the evidentiary hearing: less than a week after signing the Stipulation in this case, the Hancock County Commissioners passed a resolution designating all unincorporated areas of Hancock County except Biglick Township as a restricted area for large wind farms and large solar facilities. (See attached Exhibit A (Resolution #250-22); Hearing Tr., Vol. I at 191:1-8.) The Board should take administrative notice of this Resolution for purposes of considering Border Basin's socioeconomic impact argument as well as the reasonableness of the Stipulation. See *In re Application of American Municipal Power-Ohio, Inc., for a Certificate of Environmental Compatibility and Public Need for an Electric Generation Station and Related Facilities in Meigs County, Ohio*, Case No. 06-1358-EL-BGN, Opinion (March 3, 2008) (taking administrative notice of the issuance of final air permit by the Ohio EPA).

Given the breadth and magnitude of concerns raised by local resident intervenors, in terms of outreach to affected property owners as well as Border Basin's siting studies, the Board should not find that the Project will serve the public interest, convenience, and necessary in accordance with R.C. 4906.10(A)(6).

### CONCLUSION

For the foregoing reasons, Ms. Gardner requests that the Board deny Border Basin's Application and reject the Stipulation in its entirety.

Respectfully submitted,

/s/ Devan K. Flahive

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## CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served upon the persons below this 1st day of July, 2022.

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/s/ Devan K. Flahive

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RESOLUTION

April 19, 2022

Resolution No. ~~250-22~~ 250-22

**RE: A RESOLUTION DECLARING PORTIONS OF THE UNINCORPORATED AREAS OF HANCOCK COUNTY, OHIO TO BE RESTRICTED, PROHIBITING CONSTRUCTION OF ECONOMICALLY SIGNIFICANT WIND FARMS, LARGE WIND FARMS, AND LARGE SOLAR FACILITIES PURSUANT TO R.C. 303.57, et. seq.**

The Board of County Commissioners, Hancock County, Ohio met in regular session on the 19<sup>th</sup> day of April, 2022, with the following Commissioners present:

Michael Pepple, William Bateson, and Timothy Bechtol.

The Clerk advised that the Board followed the notice requirements of Section 121.22 of the Revised Code and the implementing rules adopted by the Board pursuant thereto for the meeting.

Bateson

moved for adoption of the following resolution:

**WHEREAS**, the Ohio General Assembly adopted Senate Bill 52 (hereinafter "SB 52") which provides for more localized regulation of large utility facilities, defined as economically significant wind farms, which are defined in R.C. 4906.13; large wind farms; and solar facilities, which are defined in R.C. 4906.01 (hereinafter collectively referred to as "large utility facilities"); and

**WHEREAS**, SB 52 went into effect October 11, 2021 and is now designated as Ohio Revised Code §303.57, et. seq.; and

**WHEREAS**, the County Boards of Commissioners, pursuant to Ohio Revised Code §303.57, et. seq., have been vested with the authority to regulate Large Utility Facilities by way of designating all or part of the unincorporated areas of a County as restricted, prohibiting the construction of said Large Utility Facilities within said restricted areas; and

**WHEREAS**, the Board of Commissioners, Hancock County, Ohio (Board) has responsibility for preserving the general health, safety, and welfare within the territory of Hancock County, Ohio; and

**WHEREAS**, the development of "economically significant wind farms" as defined in Ohio Revised Code §4906.13, "large wind farms" and "large solar facilities" as both are defined in Ohio Revised Code §4906.13 (collectively referred to as "large utility facilities") and subject to restriction pursuant to Ohio Revised Code §303.57 et. Seq., has numerous potential impacts on users and property owners in the vicinity of such developments; and

**WHEREAS**, the Board has considered the potential impacts of development as well as the interests of property owners in making their land available for development; and

**WHEREAS**, utilizing the above considerations, and considerations from all townships within the unincorporated areas of the County, the Board has prepared a map containing the restricted areas within the unincorporated areas of Hancock County, Ohio; and

**WHEREAS**, pursuant to Ohio Revised Code §303.58, said map has been posted at all public libraries within Hancock County, Ohio for a period of at least thirty (30) days; and

WHEREAS, pursuant to Ohio Revised Code §303.58, public notice of this meeting has been given to all school districts, municipal corporations and Boards of Township Trustees located in whole, or in part within the boundaries of the proposed restricted areas.

NOW THEREFORE BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS, HANCOCK COUNTY, OHIO, The Board of Commissioners hereby designates all unincorporated areas of Hancock County, Ohio as a restricted area for construction of "economically significant wind farms" as defined in Ohio Revised Code §4906.13, "large wind farms" and "large solar facilities" as both are defined in Ohio Revised Code §4906.13, also known as "large utility facilities" except for the unincorporated area of Biglick Township, Hancock County, Ohio; and

BE IT FURTHER RESOLVED, in Biglick Township, Hancock County, Ohio, Large Utility Facilities may be permitted to be constructed, subject to the provisions of Ohio Revised Code §303.57 *et seq.* and all other applicable law; and

BE IT FURTHER RESOLVED, a map documenting the restricted areas of the unincorporated areas of Hancock County, Ohio is attached hereto and marked as Exhibit A and incorporated by reference; and

BE IT FURTHER RESOLVED, this resolution shall be in full force and effect thirty (30) days after its adoption, pursuant to Ohio Revised Code §303.59, unless it is timely petitioned for a referendum by the requisite number of registered electors in the county.

BE IT FURTHER RESOLVED that it is found and determined that all formal actions of the Board of Commissioners, Hancock County, Ohio relating to the adoption of this resolution were adopted in an open meeting of this Board, and that all deliberations of this Board and any of its committees that resulted in such formal action were in meetings open to the public, in compliance with all legal requirements.

Pepple seconded the Resolution and the roll being called upon its adoption, the vote resulted as follows:

Board of Hancock County Commissioners

Michael W. Pepple Yes  
Michael W. Pepple, President

William L. Bateson yes  
William L. Bateson, Vice-President

Timothy K. Bechtol No  
Timothy K. Bechtol, Commissioner

ATTEST:

Alba Hehr  
Clerk/Assistant Clerk

Board of Hancock County Commissioners

DATE: April 19, 2022

Auditor

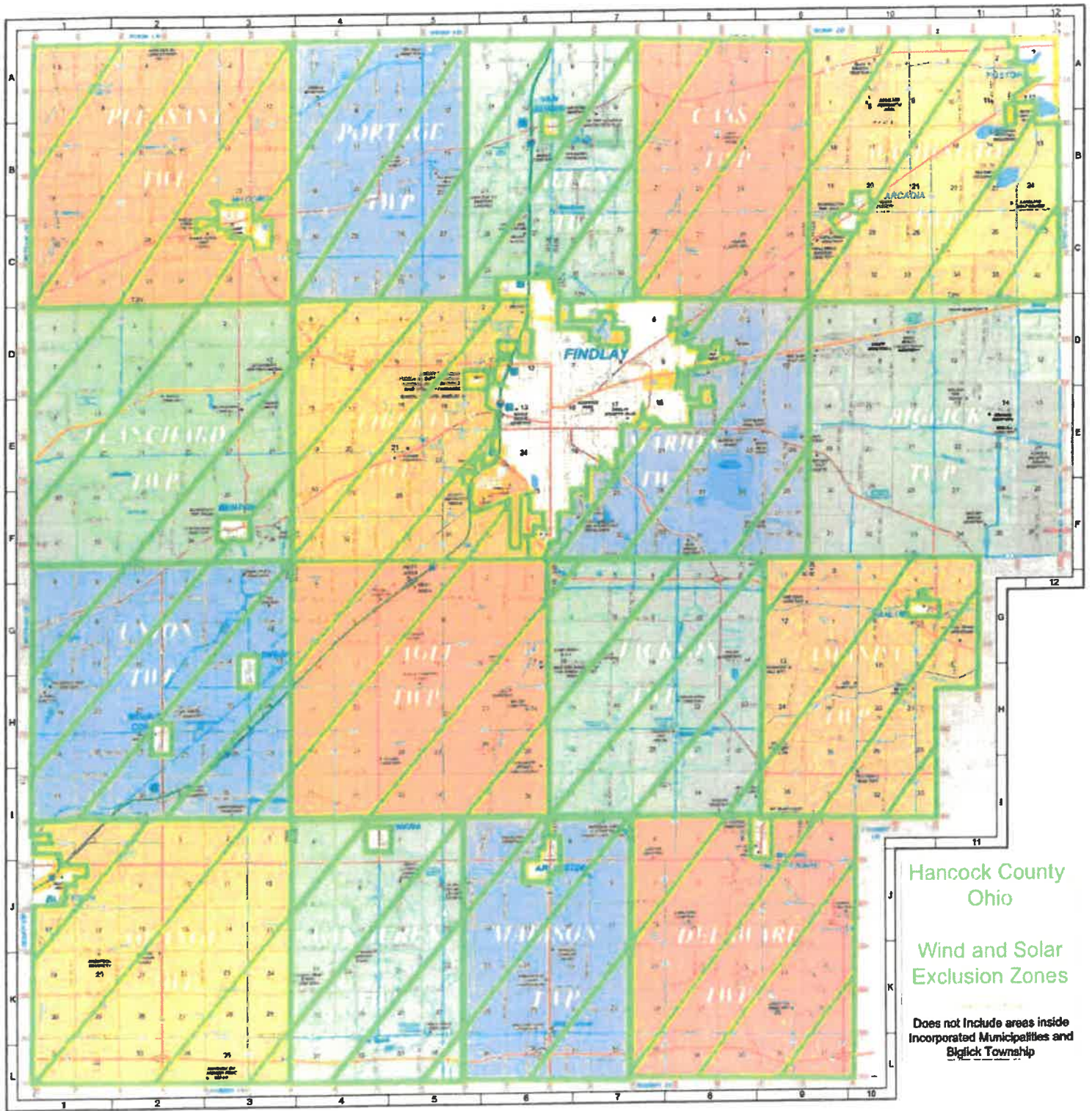
L. Land

Commissioners File

G:LML/SolarEnergy/ExclusionZoneEstablishmentRes



# EXHIBIT A



**This foregoing document was electronically filed with the Public Utilities  
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**in**

**Case No(s). 21-0277-EL-BGN**

Summary: Reply Reply Brief of Intervenor Robin L. Gardner electronically filed by  
Ms. Devan K. Flahive on behalf of American Transmission Systems Incorporated