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July 3, 2019

PSC STAFF OPINION 2019-006

Chris Killenberg
Community Energy Solar, LLC
151 E. Rosemary St., Suite 202
Chapel Hill, North Carolina 27514

RE: Community Energy Solar, LLC Request for Staff Opinion
Regarding Logan County, Kentucky

Dear Mr. Killenberg:

Commission Staff acknowledges receipt of your letter dated June 18, 2019, on behalf of Community Energy Solar, LLC requesting an advisory opinion. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Kentucky State Board on Electric Generation and Transmission Siting (Siting Board) should the issues be formally presented for Commission resolution.

You request an opinion as to whether the Logan County Fiscal Court, an entity that enacts ordinances regulating land use that are then enforced by a Joint Cities/County Planning Commission created by the County and local municipalities, is a "planning and zoning commission" for the purposes of KRS 278.704(3). Specifically, the letter requests an opinion as to whether a solar setback ordinance established by the Logan County Fiscal Court, rather than by a formal planning and zoning commission, would have primacy under KRS 278.704(3) over the setback requirements established in KRS 278.704(2) and (5).

In reviewing your request, Commission Staff notes that KRS 278.704(3) provides, in full, as follows:

If the merchant electric generating facility is proposed to be located in a county or a municipality with planning and zoning, then setback requirements from a property boundary, residential neighborhood, school, hospital, or

nursing home facility may be established by the planning and zoning commission. Any setback established by a planning and zoning commission for a facility in an area over which it has jurisdiction shall:

(a) Have primacy over the setback requirement in subsections (2) and (5) of this section; and

(b) Not be subject to modification or waiver by the board through a request for deviation by the applicant, as provided in subsection (4) of this section.

The question of whether a fiscal court that passes ordinances regulating land use would have primacy over the setback requirements in subsections (2) and (5) of KRS 278.704 appears to be an issue of first impression as there are no decisions from the (Siting Board) addressing this issue. Commission Staff notes, however, that the Siting Board was created in 2002 with the enactment of KRS 278.700–278.716 to provide oversight of construction of merchant electric generation facilities and nonregulated electric transmission lines, which facilities prior to 2002 could be constructed without undergoing any regulatory overview.¹ In addition, the Siting Board statute, since its inception, provides for local involvement by way of local public meetings,² public involvement undertaken by the applicant prior to the filing of the application,³ and notification to the local public and to affected landowners of any proposed project.⁴

In light of the intent of the Siting Board statute to provide regulatory oversight and ensuring that local impacts from merchant generating and nonregulated transmission line projects be minimized through local public involvement, Commission Staff is of the opinion that the term “planning and zoning commission” as used in KRS 278.704(3) does not require that local setback requirements can only be established by a “planning and zoning commission.” Commission Staff notes that there are examples where the “planning and zoning commission” entity in a county or area development district are known as “Planning Commission” or “Planning and Development Commission.” Commission Staff is of the opinion that the name of the entity is irrelevant as KRS 278.704 is concerned with whether the entity is acting as a “planning and zoning commission.” Commission Staff further notes that a “Planning Unit” is defined by KRS 100.111⁵ as “any city, county, consolidated local government, urban-county government, charter county government, or unified local government, or any combination of cities, counties, or parts of counties, or parts of consolidated local governments engaged in planning operations.” Moreover, joint planning units are

¹ The Siting Board’s jurisdiction was expanded in 2011 to include construction of carbon dioxide transmission pipelines.

² KRS 278.704(6)–(8).

³ KRS 278.706(2)(f).

⁴ KRS 278.706(2)(e).

⁵ KRS 100.111 is part of KRS Chapter 100, which is Kentucky’s local government planning and zoning enabling laws.

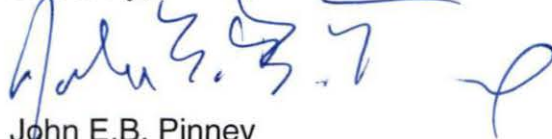
permissible under KRS 100.121, which provides that “the legislative bodies of cities and the fiscal court of the county containing the cities may enter into an agreement to form a joint planning unit by combining planning operations in order that they may carry out a joint city-county planning program.” As stated in your letter, Logan county participates in a Joint Logan-Cities Planning Commission as a joint planning unit under KRS 100.121. Lastly – a parallel example – a pertinent provision in KRS 100.987, originally enacted in 1998, states as follows:

(1) A planning unit as defined in KRS 100.111 and legislative body or fiscal court that has adopted planning and zoning regulations may plan for and regulate the siting of cellular antenna towers in accordance with locally adopted planning or zoning regulations in this chapter.⁶

To the extent that Logan County Fiscal Court conducts itself like a planning and zoning commission, Commission Staff is of the opinion that a setback ordinance passed by the Logan County Fiscal Court would fall under the terms of KRS 278.704(3) as one that is established as a planning and zoning commission for purposes of the primacy language provided in subsection (a) of that section. Commission Staff is further of the opinion that such a setback requirement would not be subject modification or waiver by the Siting Board.

This letter represents Commission Staff’s interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Siting Board should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Quang D. Nguyen at (502) 782-2586.

Sincerely,



John E.B. Pinney
Acting General Counsel

⁶ Cited in *Kentucky Public Service Com’n v. Shadoan*, 325 S.W.3d 360, 363 (Ky. 2010).