

COMMONWEALTH OF KENTUCKY  
BEFORE THE KENTUCKY STATE BOARD ON  
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

ELECTRONIC APPLICATION OF	)	
STONEFIELD SOLAR, LLC FOR A	)	
CERTIFICATE OF CONSTRUCTION FOR	)	
AN APPROXIMATELY 120 MEGAWATT	)	Case No. 2022-00011
MERCHANT ELECTRIC SOLAR GENERATING	)	
FACILITY AND NONREGULATED	)	
TRANSMISSION LINE IN HARDIN COUNTY,	)	
KENTUCKY PURSUANT TO KRS 278.700	)	
ET SEQ. AND 807 KAR 5:110.	)	

**RESPONSE OF STONEFIELD SOLAR, LLC, TO SECOND NOTICE OF DEFICIENCY**

The Applicant, Stonefield Solar, LLC (“Stonefield Solar” or “Applicant”), by and through counsel, hereby provides its response to the Second Notice of Filing Deficiency (NOD) issued on August 26, 2022, by the Kentucky State Board on Electric Generation and Transmission Siting (the “Board”) in response to the application for a construction certificate for a merchant solar electric generating facility submitted by the Applicant on August 19, 2022 (the “Application”).

As background, Stonefield Solar in its Application stated its intention to construct the project on property zoned as I-2 within Hardin County. Hardin County’s Development Guidance System Zoning Ordinance (the “Ordinance”) has designated setbacks for I-2, which the Applicant identified and relied on throughout the Application. (See Application ¶3; Application ¶12, Exhibit C; Application ¶20, Exhibit B-6; and SAR ¶8, SAR Exhibit F). The Board then issued a NOD alleging the Application was deficient pursuant to KRS 278.704(3), stating:

The Hardin County Solar Ordinance was found invalid by Hardin Circuit Court. Therefore, the county setbacks listed in the application are not correct. The setbacks in KRS 278.704(2) apply unless a deviation is requested.”

Stonefield Solar responded by clarifying that the Hardin County Circuit Court did not invalidate the entire Ordinance, but instead only invalidated a portion of the Ordinance, which the Applicant never intended to rely upon. Specifically, the court invalidated Section 15-8: Procedures for Nonlisted Uses. Applicant has stated its intention to rely on Section 3-13 of the Ordinance, which provides the setbacks for property zoned I-2. The invalidation of one section of the Ordinance does not invalidate any other section of the Ordinance. Section 1-13 of the Ordinance specifically provides that “[i]f a section, sentence, clause, or phrase of this ordinance is adjusted by a court of competent jurisdiction to be invalid, the decision shall not affect the remaining portions of this ordinance.” Because the I-2 setbacks provided in Section 3-13 remain valid, KRS 278.704(3) applies, and KRS 278.704(2) does not.

Subsequently, the Siting Board issued a second NOD alleging a related, but substantively different, deficiency with the Applicant’s intent to rely on the I-2 setbacks provided for in the Ordinance. The deficiency states:

“The Application and the Response to the Notice of Deficiency stated that Stonefield Solar is proposing to develop the merchant generating facility in an area zoned Heavy Industrial I-2. The Hardin County Development Guidance Zoning Ordinance (Ordinance) for Zone I-2 states, ‘the Permitted, Accessory and Conditional Uses for lots and structures are set forth in the Land Use Table.’ The Land Use Table does not list any electric generation or solar development as a permitted, accessory, or conditional use in Zone I-2. Section 15-8 of the Ordinance outlined the procedures to be followed for the grant of a conditional permit of a nonlisted use[.]. Hardin Circuit Court invalidated Section 15-8. Therefore, there are no local setbacks applicable to the project and a deviation of the setbacks found in KRS 278.704(2) must be requested.”

The Applicant must again respectfully disagree with the Siting Board on the grounds that (1) interpreting the Ordinance is outside of the Siting Board’s authority, and (2) the Siting Board’s analysis is incorrect.

## **1. THE SITING BOARD HAS NO AUTHORITY TO INTERPRET THE COUNTY ORDINANCE**

The Siting Board exceeded its authority when it interpreted the Ordinance’s I-2 zone as excluding solar electric generation as a permitted use. The Kentucky Legislature has delegated authority for local planning and zoning to county fiscal courts and local planning and zoning commissions, per KRS 100.111 *et. seq.* Any interpretation of the local zoning ordinance may, therefore, only be conducted by the local authorities or a court of competent jurisdiction. *Evangelical Lutheran Good Samaritan Soc., Inc. v. Albert Oil Co.*, 969 S.W.2d 691, 694 (Ky. 1998). Thus, the question of whether the Ordinance provides for solar generation as a permissive use within I-2 zones is a determination reserved exclusively for the Hardin County Planning and Development Commission (the “Commission”).

While the Siting Board’s authority is similar to a local jurisdiction in certain issues pertaining to siting, its authority is still bound exclusively to those functions specifically prescribed by the legislature. *United Sign, Ltd. v. Commonwealth*, 44 S.W.3d 794, 798 (Ky. Ct. App. 2000) (citing *Flying J Travel Plaza v. Commonwealth, Transportation Cabinet, Department of Highways, Ky.*, 928 S.W. 2d 344, 347 (Ky. 1996). (“[A]n administrative agency’s authority is limited to a direct implementation of the functions assigned to the agency by the statute.”). The legislature did not assign to the Siting Board the authority to interpret local zoning ordinances. Thus, the Siting Board’s interpretation of the Ordinance, leading it to a conclusion that there are no local setbacks applicable to the project, is itself an ultra vires action. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297, 133 S. Ct. 1863, 1869, 185 L. Ed. 2d 941 (2013). (“Both the agency’s power to act and how they are to act is authoritatively prescribed by [statute], so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.”).

Thus, Applicant has correctly asserted in the Application that KRS 278.704(3) applies, and KRS 278.704(2) does not.

## **2. SOLAR ELECTRICAL GENERATION IS A MANUFACTURING USE PERMITTED ON PROPERTY ZONED I-2**

The Siting Board incorrectly concluded that “electric generation or solar development” are not permitted uses within an I-2 zone. While the Siting Board is correct that electric generation and solar development are not listed uses, “Manufacturing” is a permitted use in I-1 and I-2 zones. Generation of electricity via a solar facility has been recognized by the Commonwealth of Kentucky to be a manufacturing use. Thus, Stonefield Solar’s proposed utility-scale solar electrical generation facility is a recognized manufacturing use that is permitted on property zoned as I-2.

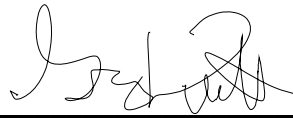
The generation of electricity has consistently been treated as a manufacturing use under Kentucky law, including for tax and financing purposes. For example, the Kentucky Office of the Attorney General found that in the context of industrial revenue bonds, “[electric] generating stations satisfy the statutory definition of industrial buildings because they are used to manufacture electricity, and electricity constitutes a commercial product.” *See*, Ky. OAG 01-2 (internal quotations omitted); *see also*, *Kentucky Electric Co. v. Beuchel*, 146 Ky. 660 (Ky. 1912) (holding that the Kentucky Electric Company was engaged in the business of manufacturing when it produced electricity). Further, the Kentucky Department of Revenue, in Technical Advice Memorandum KY-TAM-21-01 dated April 22, 2021, stated that “[a] solar power company’s generation of electricity is considered to be manufacturing for Kentucky ad valorem property tax purposes” and further explained that “[t]he manufacturing process of a solar power facility begins when the solar panels capture sunlight and ends when the product, the electricity, is in a form or condition for sale on the open market for the purpose for which it was intended to be used.”

Applicant has discussed with Hardin County authorities the Commonwealth's interpretation that solar generation is a manufacturing use, which means that a solar generation facility is a permissive use on I-2 property in Hardin County and the I-2 setbacks will apply absent any agreement with the County for alternative setbacks. The authorities have generally agreed with this legal analysis and conclusion. As a result, Applicant intends to file a zoning application with the Commission in the coming weeks seeking to rezone the applicable properties to I-2 for the purpose of building and operating the subject project.

Therefore, Applicant respectfully requests that both NODs be deemed either rescinded or cured without need for further filing by the Applicant.

Dated this 22nd day of September 2022.

Respectfully submitted,



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