

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

In the Matter of:

**In the Matter of the Application of Dogwood Corners,)
LLC for a Certificate of Construction for an)
Approximately 125 Megawatt Merchant Electric Solar) Case No. 2023-00246
Generating Facility in Christian County, Kentucky)
Pursuant to KRS 278.700 and 807 KAR 5:10)**

RESPONSE TO MOTION TO INTERVENE

Dogwood Corners LLC (“Dogwood Corners”), by counsel, provides the following response to Christian County’s Motion to Intervene.

Dogwood Corners respectfully submits that the County has failed to demonstrate that it has met the grounds for intervention in a Siting Board case. The regulation indicates that a motion to intervene should be granted if the movant proves “(a) That he has a special interest in the proceeding; or (b) That his participation in the proceeding will assist the board in reaching its decision and would not unduly interrupt the proceeding.” The County only argues that it should be granted intervention by alleging that it has a special interest in the proceeding.

None of the items mentioned by the County create a special interest for the County to intervene. First, the County suggests that the purported ordinance (that was not adopted through the mandated process set by KRS Chapter 100) provides support for the County’s intervention in this case. Ordinances, however, speak for themselves, *City of Lexington v. Edgerton*, 159 S.W.2d 1015, 1017 (Ky. 1941), and thus, would not create an interest of the governmental body in intervention in a state-agency proceeding.

Next, the County asserts that the pending litigation in Christian Circuit Court somehow creates an interest for the County in this Siting Board matter. To state the obvious, however, the Circuit Court case and the Siting Board case are pending in two different jurisdictions. The Siting Board has previously denied intervention when “such intervention will involve the Board in a legal dispute outside of [its] jurisdiction” *See Kentucky Mountain Power, LLC / Enviropower, LLC*, Case No. 2002-00149 (K.S.B.E.G.T.S. Aug. 01, 2002). The County’s motion for intervention should likewise be denied.¹

Finally, the County maintains state statutes create an interest for the County in this matter. Similar to the principle mentioned above, statutes speak for themselves. *Doll v. Young*, 149 S.W. 854, 856 (Ky. 1912). As the County mentioned, KRS 67.083 articulates additional powers of a fiscal court, one of which is “[p]lanning, zoning, and subdivision control according to the provisions of KRS Chapter 100.” The Siting Board does not have jurisdiction to render a decision on the powers of fiscal court. Similarly, the Siting Board’s focus in deciding this matter will not be on KRS 278.718, but rather, will be on KRS 278.710, which articulates the criteria on which the Siting Board must consider in granting or denying a construction certificate. One of those elements is “[w]hether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed.” *See* KRS 278.710(1)(e). Simply put, these statutes do not create a special interest for the County to intervene in this case.

As the Public Service Commission has indicated on several occasions, denial of intervention does not prevent someone from participating in the case. *See, e.g., New Cingular Wireless PSC, LLC*, Case No. 2022-00062 (Ky. PSC May 19, 2023). The County can review all public documents filed in this case and monitor the proceedings via the Commission’s website. In

¹ Dogwood Corners is firmly committed to providing timely updates about the Circuit Court decision to the Siting Board.

addition, the County may file substantive comments as frequently as it chooses to the extent it disagrees with statements or information provided in the case, and those comments will be entered into the record of this case.

Moreover, the statutory scheme already provides for local involvement in Siting Board cases. KRS 278.702 establishes a seven-member board. In each Siting Board case, one of those members must be the chairman of the planning commission with jurisdiction over the area in which facility is proposed to be located or, if there is no such planning commission with jurisdiction, the county judge/executive or a city mayor. The simple fact that local government is directly involved in the Siting Board decision-making process demonstrates that the County does not have a special interest to intervene as a party.

Moreover, intervention as a party to this case by the County raises substantial concerns as to whether the chairman of the planning commission or judge/executive must recuse himself in this matter. The Executive Branch Code of Ethics was adopted to ensure that a public official be “independent and impartial.” KRS 11A.005(1)(a). It requires a public servant to consider certain factors in determining whether he or she should abstain due to a potential conflict of interest, including “[w]hether a substantial threat to his independence of judgment has been created by his personal or private interest” and “[t]he effect of his participation on public confidence in the integrity of the executive branch.” KRS 11A.030. Certainly, questions would be raised as to whether the planning commission chairman or county judge/executive could be independent if the county were allowed to intervene as a party to the case, and it would even more so raise questions on public confidence in the integrity of the executive branch.

Beyond the Executive Branch Code of Ethics, due process demands a fair process. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *see also LaGrange City Council v. Hall Bros. Co. of*

Oldham Cnty., 3 S.W.3d 765, 771 (Ky. App. 1999). A biased decisionmaker is constitutionally unacceptable, and “our system of law has always endeavored to prevent even the probability of unfairness.” *Withrow*, 421 U.S. at 46-47. In addition, this may present a “situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial[.]” *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). It is a general rule of law that a party should not be a judge in his own case. See *Tumey v. State of Ohio*, 273 U.S. 510, 525-26 (1927).

In addition to due process concerns, questions over functional incompatibility arises. Functional incompatibility depends on the character and relation of the offices and not on the matter of physical inability to discharge the duties of both of them. *Lagrange*, 3 S.W.3d at 769. The test for functional incompatibility is “whether one office is subordinated to the other, or whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest.” *Id.* at 770. The doctrine related to incompatibility is to ensure the responsibilities of one office do not influence the responsibilities of the other. *Id.* For example, “fundamental fairness does not permit the same person to exercise decision-making authority in one capacity and then review the same matter in another capacity.” *Id.* at 771.


If the County is permitted to intervene in this matter, at least two actions should be taken to ensure fairness in the process. First, the planning commission chairman or judge/executive should seek an opinion from the Executive Branch Ethics Commission to determine whether he should recuse himself from participating as a member of the Siting Board in this case.² Second, if he does not recuse himself, certain protections must be implemented to ensure that this ad hoc

² Even if the County is not granted intervention, it would be appropriate for this member to seek an opinion from the Executive Branch Ethics Commission simply because the County has taken an adversarial position in the case.

board member is screened from having ex parte communications with the County, including its public officials and attorneys, as it relates to Dogwood Corners's application for a construction certificate.

In conclusion, and for the reasons stated above, Dogwood Corners requests the County's motion be denied because the County has failed to demonstrate that it has met the grounds for intervention in a Siting Board case.

Respectfully submitted,



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