

Case No. 2023-00246  
Dogwood Corners LLC  
Response to Staff's Second Request for Information

**STAFF DR 2-1:**

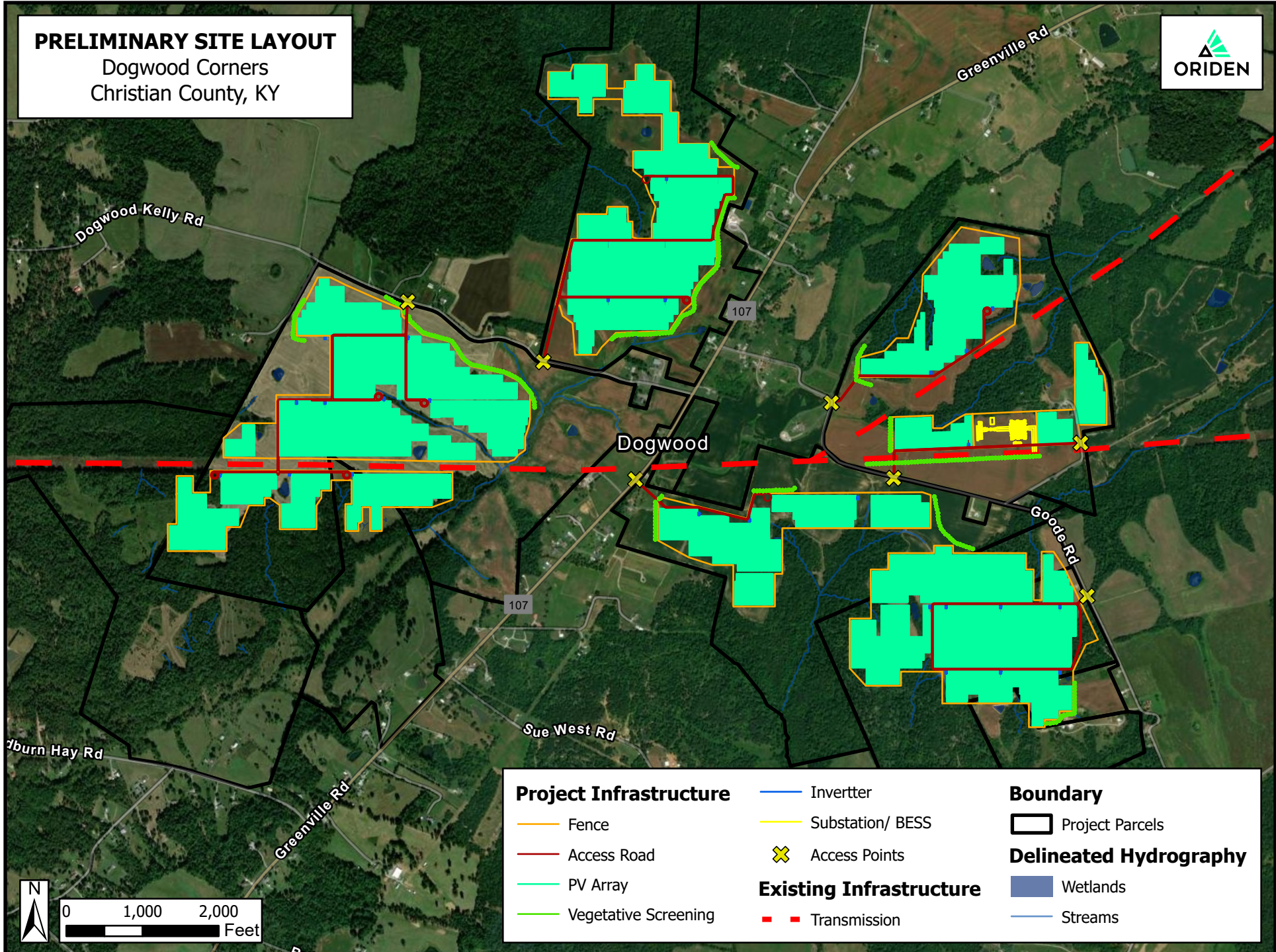
1. Provide an updated site map showing the location of:
  - a. Parcel boundaries.
  - b. Perimeter fencing.
  - c. Access roads.
  - d. Access points.
  - e. Transmission line.
  - f. Substation.
  - g. Battery energy storage system (BESS).
  - h. Vegetative screening.

**Response:** Please refer to the attached Preliminary Site Layout for the updated site map.

**Witness:** Megan Stahl

# PRELIMINARY SITE LAYOUT

Dogwood Corners  
Christian County, KY



### Project Infrastructure

- Fence
- Access Road
- PV Array
- Vegetative Screening

- Inverter
- Substation/ BESS
- Access Points

### Existing Infrastructure

- Transmission

### Boundary

- Project Parcels

### Delineated Hydrography

- Wetlands
- Streams



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**STAFF DR 2-2:**

Explain why a new substation location was chosen. Include in the response why the original location is no longer being utilized. Include factors led to deciding the new substation location.

**Response:** A new substation location was chosen because the previous location was not agreeable to the landowner. To determine the new location Dogwood Corners primarily considered minimization of impacts. Specifically, Dogwood Corners understands that there are concerns from neighbors about potential visual and sound related impacts. The new substation location is approximately 1,100 feet away from the closest neighbor. Additional screening is proposed around the substation and an analysis of potential sound impacts shows that the substation will not cause an increase in background noise levels at the closest receptor. Dogwood Corners chose the proposed substation location based on the greatest distance to neighboring landowners while considering the following additional factors. Dogwood Corners attempted to reduce land disturbance and potential impacts to natural resources (such as forested habitat, stream and wetland resources) by choosing a location along the 161kV Hopkinsville-Lost City transmission line, to which the project will connect. This prevents the need for installation of an additional transmission line to connect the project to the 161kV Hopkinsville-Lost City transmission line. Dogwood Corners chose a location near TVA's preferred location at the intersection of the existing 161kV Hopkinsville-Lost City and 69kv transmission lines. Finally, the substation location requires suitable, relatively flat terrain and favorable geotechnical results.

**Witness:** Megan Stahl

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**STAFF DR 2-3:**

Refer Dogwood Corners response to Siting Board Staff's First Request for Information (Staff's First Request), Item 26. Provide an update to the selection of the Point of Interconnection.

**Response:** Item 26 requested the POI location along the existing 161kV Hopkinsville-Lost City transmission line and a statement on whether the POI is on land leased or owned by Dogwood Corners. The new substation location is located at approximately 36.948022, -87.396866 immediately north of the existing 161kV Hopkinsville-Lost City transmission line. The land is currently secured by an Option for Lease but will eventually be purchased and transferred to TVA.

**Witness:** Megan Stahl

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**STAFF DR 2-4:**

Refer to the Application, Compliance with Local Ordinances and Regulation at 7 and Dogwood Corners response to Staff's First Request, Item 11. Provide a status update new developments regarding Christian Circuit Court Case No. 2022-CI-01010.

**Response:** In Christian Circuit Case No. 2022-CI-01010, the Plaintiff, Dogwood Corners LLC, filed a motion for judgment on the pleadings on July 31, 2023. After three rounds of briefing and two oral arguments, the motion was submitted for decision on October 25, 2023. In that Motion, Dogwood Corners argued that Christian County Ordinance No. 22-004 was void ab initio because the Christian County Fiscal Court has failed to establish planning and zoning primacy pursuant to KRS Chapter 100. Because of that failure, the Christian Fiscal Court cannot regulate planning and zoning land use issues in the incorporated areas of Christian County, except for subdivisions. Even if the Fiscal Court had authority to issue and enforce planning and zoning regulations in the unincorporated areas of Christian County, the Fiscal Court failed to first receive a recommendation from the Christian County Planning Commission (known as the "Community and Development Services" in Christian County) regarding the Ordinance and the Christian County Planning Commission failed to hold a public hearing on the Ordinance. These facts are undisputed. The Court has yet to rule on the motion for judgment on the pleadings.

Dogwood Corners has since learned that the Christian County Fiscal Court voted to approve a new purported ordinance identified as Ordinance 23-05 on November 28, 2023. A copy of this purported ordinance is attached hereto. Dogwood Corners believes Ordinance 23-05 is subject to the same or similar procedural and substantive defects as Ordinance 22-004 currently being reviewed by the Circuit Court. Regardless, Ordinance 23-05 indicates that

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Ordinance 22-004 is repealed, reinforcing Dogwood Corners's claim that Ordinance 22-004 is not binding on the Siting Board in this case.

Following public reporting of Ordinance 23-05, the court emailed counsel of record asking whether the adoption of Ordinance 23-05 made the issues in the court case involving Ordinance 22-004 moot. Counsel for Dogwood Corners advised the court that the issue was not moot because 278.710 (1)(e) requires an applicant to demonstrate “whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed.” The court advised counsel by email dated December 18, 2023, that the matter will remain under advisement and that the judge expected to make a decision “very soon.”

**Witness:** Megan Stahl and Counsel for Dogwood Corners

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**STAFF DR 2-5:**

Refer to Dogwood Corners response to Staff's First Request, Item 15. Explain when Dogwood Corners will request a deviation from the Christian County Ordinance.

**Response:** Dogwood Corners does not anticipate that it will request a deviation from the invalid setbacks identified in Ordinance 22-004 for several reasons. First and foremost, as has been explained in this matter, Ordinance 22-004 should be held to be void ab initio because Christian County failed to adhere to the requirements of KRS Chapter 100. This is the subject of Christian Circuit Court Case No. 2022-CI-01010, which is still pending. It is Dogwood Corners' position that, because Ordinance 22-004 is void ab initio, there are no local setbacks for which a deviation is needed.

This particular provision further demonstrates problems with the purported ordinance. This type of "deviation" is known as a "variance" under KRS Chapter 100. The adoption of "variances" is also controlled by KRS Chapter 100. A variance is "a departure from dimensional terms of the zoning regulation pertaining to the height, width, length, or location of structures, and the size of yards and open spaces where such departure meets the requirements of KRS 100.241 to 100.247." KRS 100.111. Only Boards of Adjustments and Planning Commissions have "power to hear and decide on applications for variances" pursuant to the standards found at KRS 100.243. KRS 100.241 and 100.203(5), (6). Again, these "deviations" are "variances," and are controlled by KRS Chapter 100 through a comprehensive statutory scheme. Thus, the statutory scheme may not authorize Fiscal Court to act in this way.

Moreover, the purported ordinance provides no guidance on how a deviation is requested, the procedure by which Fiscal Court will determine whether a deviation is appropriate, and the



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impact of an agreement with a neighboring property owner, which is mentioned elsewhere in the purported ordinance.

Dogwood Corners expressed these concerns to Christian County on multiple occasions, including orally at a Fiscal Court meeting on November 29, 2022 (Attachment DR1-13f), and by letter dated November 20, 2022 (Attachment DR1-13c).

In addition, Dogwood Corners has since learned that the Christian County Fiscal Court voted to approve a new purported ordinance identified as Ordinance 23-05 on November 28, 2023. A copy of this purported ordinance is attached to Item 4 above. Dogwood Corners believes Ordinance 23-05 is subject to the same or similar procedural and substantive defects as Ordinance 22-004 currently being reviewed by the Circuit Court. Regardless, Ordinance 23-05 indicates that Ordinance 22-004 is repealed, reinforcing Dogwood Corners' claim that Ordinance 22-004 is not binding on the Siting Board in this case.

Even if it were valid, Ordinance 23-05 does not appear to contain a provision allowing for a deviation by Fiscal Court, thus further demonstrating its unreasonable and unlawful status.

**Witness:** Megan Stahl and Counsel for Dogwood Corners

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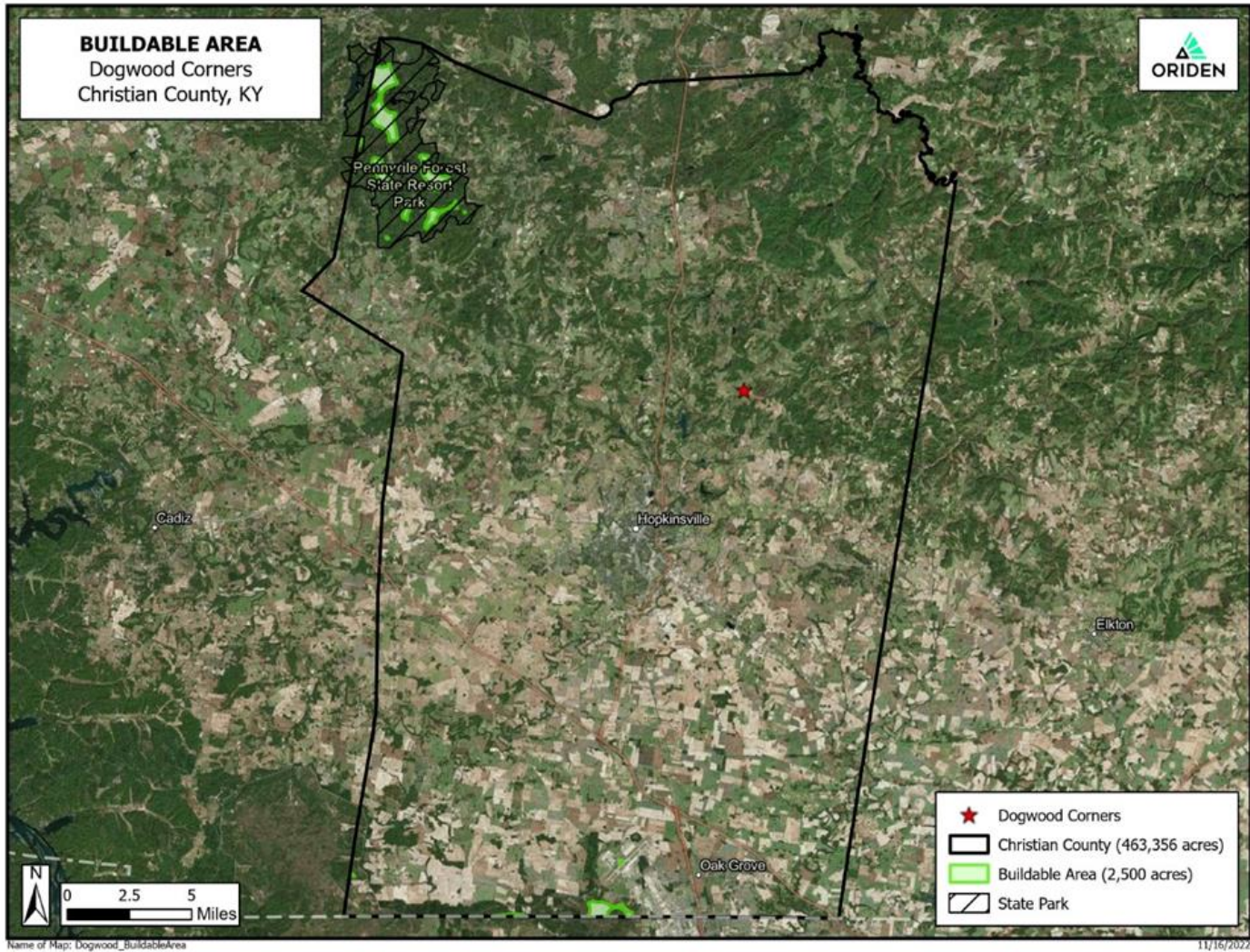
**STAFF DR 2-6:**

Refer to Dogwood Corners response to Staff's First Request, Item 15. Explain why Dogwood Corners cannot acquire more property to meet the requirements of the Christian County Fiscal Court Ordinance.

**Response:** Absent the ability to achieve a deviation, or variance, from the 2,000' setbacks as referenced in Response to DR 2-5, there is no way to build a large-scale solar energy system in Christian County, except in two locations marked in green on the map below. The map was created by evaluating a 2,000' setback from the boundary line of any property and rights-of-way for any publicly dedicated or maintained roadway as described in purported Ordinance 22-004. The green areas show the only usable areas allowed outright by the purported Ordinance. The northern location is not consistent with Dogwood Corners' goal of minimizing impacts to natural resources as it is within the Pennyryle Forest State Resort Park. The southern location is located within Fort Campbell.

Moreover, there are numerous other factors driving whether a project can acquire more property, including financial constraints and property owners who are willing to lease or sell their land.

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Witness: Megan Stahl

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**STAFF DR 2-7:**

Refer to KRS 278.710(1)(e). Explain how Dogwood Corners is in compliance with all planning and zoning requirements that existed as of the date the application was filed given there has been no legal finding from any court the Christian County Fiscal Court Ordinance is invalid.

**Response:** Dogwood Corners acknowledges that KRS 278.710(1)(e) requires the Siting Board to consider in its determination “[w]hether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed . . . .”

There are several reasons why the Siting Board should approve a construction certificate for Dogwood Corners even if a court has not issued an order finding that the ordinance is invalid. First and foremost, based on Christian County's own arguments, Dogwood Corners is in compliance with all planning and zoning requirements that existed as of the date the application was filed because there were no planning and zoning requirements in the unincorporated areas of Christian County as of the date the application was filed. As conceded by the Christian County Fiscal Court in court filings, “Christian County does not have any zoning ordinance in the unincorporated areas of the County.” Defendant's Supplemental Brief in Support of the Validity of Ordinance No. 22-004, Case No. 2022-CI-01010, Christian Cir. Ct., Ky., (filed October 25, 2023) at 3. In fact, the County maintains that Ordinance 22-004 is not a planning and zoning ordinance. It explicitly stated, “Christian County Fiscal Court did not adopt this ordinance pursuant to planning and zoning statues of KRS Chapter 100.” Defendant's Response to the

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Plaintiff's Motion for Judgment on the Pleadings, Case No. 2022-CI-01010, Christian Cir. Ct., Ky., (filed August 15, 2023) at 3.<sup>1</sup>

Even if the Christian County wanted to establish planning and zoning requirements for the unincorporated areas of Christian County, it did not do so at the date the application was filed, or even the date this Response is filed, because the Christian Fiscal Circuit Court has failed to follow the statutory requirements in KRS Chapter 100 to establish planning and zoning regulations in those areas.

Moreover, there may be options whereby the Siting Board approves the construction certificate on the condition that a court of competent jurisdiction declares the ordinance to be invalid or otherwise not applicable to the analysis identified in KRS 278.710(1)(e).

**Witness:** Counsel for Dogwood Corners

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<sup>1</sup> Copies of the briefs from that case are attached hereto.

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COMMONWEALTH OF KENTUCKY  
CHRISTIAN CIRCUIT COURT  
DIVISION II  
CIVIL ACTION NO. 22-CI-1010  
*Electronically Filed*

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DOGWOOD CORNERS, LLC

PLAINTIFF

v.

CHRISTIAN COUNTY FISCAL COURT

DEFENDANT

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**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR JUDGMENT ON THE PLEADINGS**

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Comes now the Plaintiff, Dogwood Corners, LLC (“Dogwood Corners”), by and through counsel, and pursuant to CR 12.03, hereby submits this Memorandum in Support of its Motion for Judgment on the Pleadings against the Christian County Fiscal Court (“Fiscal Court”). Dogwood Corners seeks a declaration from this Court that Christian County Ordinance No. 22-004 *is* an invalid zoning ordinance because it attempts to regulate setbacks and screening between buildings and other structures (as set forth in KRS 100.203), and because the Fiscal Court violated the other provisions of KRS Chapter 100 in its enactment. The Fiscal Court has admitted as much in its *Answer* and that the Christian County Community & Development Services (“CDS”) did not hold a hearing or make any recommendation to the Fiscal Court regarding the zoning ordinance in violation of KRS 100.207. Therefore, Dogwood Corners is immediately entitled to a judgment on the pleadings. Plaintiff hereby states as follows.

**STATEMENT OF FACTS**

This declaration of rights action involves the unlawful enactment of a zoning ordinance by the Christian County Fiscal Court, Ordinance No. 22-004, in violation of KRS §§ 67.083,

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67.080, 100.203, 100.207, and 100.217.<sup>1</sup> Plaintiff, Dogwood Corners, is seeking to construct a solar energy generating facility on real property located in Christian County and is injured and aggrieved by the unlawful enactment of Ordinance No. 22-004.

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KRS 67.080 and 67.083 delineate the powers of the Fiscal Court, which may enact ordinances relating to “planning, zoning, and subdivision control according to the provisions of KRS Chapter 100.” KRS 67.083(k). In other words, the Fiscal Court can only enact zoning ordinances if it has satisfied the requirements of KRS Chapter 100. However, the Fiscal Court cannot regulate zoning under the guise of conservation or regulation of commerce to avoid compliance with KRS Chapter 100. Here, the Fiscal Court attempted to pass an ordinance regulating setbacks and screening for solar energy systems without the proper input from the CDS and in direct violation of the provisions of KRS 100.203, 100.207, and 100.217.

The Fiscal Court enacted Ordinance No. 22-004 on November 29, 2022. The short title of the Ordinance is “An Ordinance relating to the establishment of minimum setback, screening, and decommissioning requirements for solar energy system installations in Christian County, Kentucky.” *See* Ordinance 22-004 (attached to *Petition*). The goals of the Ordinance, as set forth by the Fiscal Court, state that it is intended to establish “properly designed land use standards” for solar energy systems. *Id.* The Fiscal Court relies on KRS 278.704(3) as a basis for its statutory authority to establish setbacks. KRS 278.704(3) provides no such authority to the Fiscal Court. In fact, KRS 278.704(3) specifically states, “If the merchant electric generating facility is proposed to be located in a county or a municipality with planning and zoning, then decommissioning and setback requirements from a property boundary... may be established by the **planning and zoning commission.**” (Emphasis added). The Fiscal Court elected to have

<sup>1</sup> Ordinance No. 22-004 is attached to the *Petition for Declaratory Judgment* as Exhibit A.

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planning and zoning regulations in Christian County, as governed and implemented by the CDS.

Therefore, the law requires the CDS (not the Fiscal Court) to hold a public hearing, and review

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and recommend setback and decommissioning requirements for solar energy systems, consistent with the other provisions of KRS Chapter 100. The Fiscal Court has admitted in ¶ 7 of its *Answer* that the CDS did not have the statutorily required hearing to review and recommend Ordinance No. 22-004.

Dogwood Corners filed its *Petition for Declaration of Rights* on December 22, 2022, requesting a declaration that Ordinance No. 22-004 is invalid and has no legal effect, and in the alternative, that the Ordinance is arbitrary and capricious and oppressive and should be invalidated for violating Kentucky Const. § 2. The Christian County Fiscal Court filed its *Answer* on April 20, 2023, admitting in ¶ 5 that the Ordinance was not a zoning ordinance even though it regulates setbacks and screening for solar energy systems and admitting in ¶ 7 that no hearing was held, and no recommendation received from the CDS prior to enactment of the zoning ordinance. For these reasons, Dogwood Corners respectfully requests judgment on the pleadings pursuant to CR 12.03 for the claims alleged in its *Petition* as the controlling facts are not in dispute and only a question of law is to be decided.

**STANDARD OF REVIEW**

“After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” CR 12.03. “The purpose of the rule is to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute. It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of law is to be decided... [t]he basis of the motion is to test the legal sufficiency of a claim or defense in view of all the adverse pleadings... [t]he judgment should be



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granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief.” *Pioneer Village v. Bullitt Co. ex. rel. Bullitt Fiscal Court*, 104

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S.W.3d 757, 759 (Ky. 2003).

A motion for judgment on the pleadings is proper in this case on the purely legal issues contained in Count I of the *Petition* and because the Fiscal Court has admitted in its *Answer* that the CDS did not hold a hearing or tender a recommendation as to the Ordinance No. 22-004 which regulates zoning and violates the other provisions of KRS Chapter 100. This issue is ripe for judicial review.

**ARGUMENT**

**I. PLAINTIFF IS ENTITLED TO A DECLARATION THAT ORDINANCE NO. 22-004 IS A ZONING ORDINANCE, THAT THE FISCAL COURT VIOLATED KRS CHAPTER 100 BY ENACTING IT, AND THAT ORDINANCE NO. 22-004 SHOULD BE INVALIDATED.**

**A. Ordinance 22-004 is a Zoning Regulation Pursuant to KRS Chapter 100.**

The Fiscal Court has admitted that the Ordinance 22-004 attached to the *Petition* was passed by the Fiscal Court. *Answer* at 1, ¶ 2. Ordinance No. 22-004 attempts to regulate setbacks and screening for solar energy systems outside of the parameters of the zoning ordinance – in direct violation of KRS 100.203. Ordinance No. 22-004, §§ 2 and 3.

Zoning regulations shall be defined as “[a] text, which shall list the types of zones which may be used, and the regulations which may be imposed in each zone, which must be uniform throughout the zone.” If enacted, those zoning regulations “shall” consist of “minimum distance requirements between buildings or other structures.” KRS 100.203(1)(c). In fact, setbacks are only one of three types of zoning requirements specifically allowed for agricultural property under KRS Chapter 100. KRS 100.203 (4)(a). *See Herndon v. Wilson*, 524 S.W.3d 490, 492 (Ky. App. 2017), *Grannis v. Schroder*, 978 S.W.2d 328, 331 (Ky. App. 1997), *Kleen Sheen III, LLC v.*

*Wheeler*, 2019 WL 258159, at \*2 (Ky. App. 2019) (all recognizing the validity of setback requirements as part of a zoning ordinance). *See also* Richard V. Murphy and Glenn A. Price, Jr., *Land Use and Zoning in Kentucky*, 5th ed. § 5.2 (University of Kentucky) (2018) (where setbacks are included as being regulated pursuant to KRS Chapter 100).

Setbacks from property boundaries and structures are commonplace in zoning ordinances across Kentucky. KRS Chapter 100 includes setbacks as part of the statutory scheme for zoning in Kentucky. Ordinance No. 22-004 is no different. Ordinance No. 22-004 is a zoning ordinance within the purview of KRS Chapter 100.

**B. In Order to Approve a Zoning Ordinance, the Fiscal Court Must Comply with KRS Chapter 100.**

Count I of the *Petition* requests a declaration of rights that Ordinance No. 22-004, produced in its entirety as an exhibit to the *Petition*, is invalid and has no legal effect because the Fiscal Court did not follow the procedures prescribed by KRS 67.080, KRS 67.083, and KRS Chapter 100. If the Fiscal Court chooses to regulate using setbacks, such regulation must comply with the zoning requirements of KRS Chapter 100. “When the state has preempted a field, the city must follow that scheme or refrain from planning.” *Bellefonte Land, Inc. v. Bellefonte*, 864 S.W.2d 315, 317 (Ky. App. 1993) *citing Creative Displays, Inc. v. City of Florence, Ky.*, 602 S.W.2d 682 (Ky. 1980). “Zoning ordinances are an exercise of the police power of the state, and no subdivision thereof may exercise that power except through a grant made by the people of the state through its legislative branch.” *Hardin Cty. v. Jost*, 897 S.W.2d 592, 594 (Ky. App. 1995).

KRS 100.203 allows Fiscal Courts to enact “zoning regulations.” Despite the Fiscal Court’s efforts to characterize Ordinance 22-004 as a valid exercise of their right to conserve natural resources and regulate commerce (citing KRS 67.083(3)(h) and KRS 67.083(3)(m)), the Ordinance itself states that the objective is to regulate “land use standards” (Ordinance 22-004 at

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1) and establish minimum setbacks, screening, and decommissioning for solar energy systems.

Nothing in the Fiscal Court’s meeting minutes from the First and Second Reading of Ordinance

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No. 22-004, nor in the text of the Ordinance itself, supports the Fiscal Court’s contention that the Ordinance is not a zoning regulation. Again, “land use standards” are specifically mentioned as a basis for the ordinance.

KRS 67.080 and KRS 67.083 set forth the powers of fiscal courts. KRS 67.083(k) grants the fiscal courts the power to enact ordinances regarding “(k) Planning, zoning, and subdivision control *according to the provisions of KRS Chapter 100.*” (Emphasis added).<sup>2</sup> KRS 82.082(2) states, “A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes.” KRS Chapter 100 has widely been recognized as the comprehensive statutory scheme for regulating planning and zoning in Kentucky. *Nash v. Campbell Cnty. Fiscal Court*, 345 S.W.3d 811, 814 (Ky. 2011) The Fiscal Court violated KRS 67.083 when it enacted Ordinance No. 22-004 without first complying with the provisions of KRS Chapter 100. *See Sladon v. Hawk*, 815 S.W.2d 404 (Ky. App. 1991) (Fiscal Court may amend a local zoning ordinance if the planning commission holds a hearing and makes a recommendation as to the change).

The goal of the Ordinance No.22-004 is to regulate setbacks, screening, and decommissioning requirements for solar energy systems – these are inherent land use matters which should be regulated by KRS Chapter 100 and are routinely recognized by the judiciary as preempting a Fiscal Court from engaging in planning and zoning through any process that differs

<sup>2</sup> The Fiscal Court has admitted in its *Answer* that planning, zoning and subdivision control ordinances are passed pursuant to KRS Chapter 100. *Answer* at 1, ¶ 2.

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from the process established by the KRS Chapter 100 framework. There is no inherent power, separate from KRS Chapter 100, through which a Fiscal Court may adopt a zoning ordinance or otherwise engage in planning and zoning. That is precisely what the Fiscal Court has attempted here. While the Fiscal Court may act in support of a public purpose (in furtherance of conserving natural resources and regulating commerce as it argues), it may not act in conflict with a constitutional provision or statute. KRS 82.082(2) expressly prohibits the Fiscal Court from attempting to regulate planning and zoning outside of the confines of KRS Chapter 100.

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The Fiscal Court has unlawfully ignored the statutorily required zoning process, and unlawfully adopted this zoning ordinance.

**C. The Fiscal Court Admitted that the Planning Commission Did Not Hold a Public Hearing Before the Approval of the Ordinance, a Violation of KRS Chapter 100.**

KRS 100.207 sets forth the requirements for zoning regulations. Section 1 states, “Before a city or county enacts zoning regulations, as authorized by KRS 100.201, the planning commission shall prepare the text and map of all zoning regulations and shall hold at least one (1) public hearing,” and must submit, along with their recommendation, the ordinance to the Fiscal Court. KRS 100.207(1) and (2). For zoning ordinance text amendments, the Planning Commission must also hold a public hearing and make recommendations to the Fiscal Court.

KRS 100.211(3) states:

A proposal to amend the text of any zoning regulation which must be voted upon by the legislative body or fiscal court may originate with the planning commission of the unit or with any fiscal court or legislative body which is a member of the unit. Regardless of the origin of the proposed amendment, it shall be referred to the planning commission before adoption. The planning commission shall hold at least one (1) public hearing after notice as required by KRS Chapter 424 and make a recommendation as to the text of the amendment and whether the amendment shall be approved or disapproved and shall state the reasons for its recommendation. In

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the case of a proposed amendment originating with a legislative body or fiscal court, the planning commission shall make its recommendation within sixty (60) days of the date of its receipt of the proposed amendment. It shall take an affirmative vote of a majority of the fiscal court or legislative body to adopt the proposed amendment.

The Fiscal Court must pass a zoning ordinance in strict compliance with the procedural requirements of the KRS Chapter 100 statutory scheme. *City of Lakeside Park v. Quinn*, 672 S.W.2d 666, 668 (Ky. 1984); *Bellefonte Land, Inc. v. Bellefonte*, 864 S.W.2d at 317, *supra*, citing *Creative Displays, Inc. v. City of Florence*, 602 S.W.2d 682 (Ky. 1980). Here, the statutory scheme is to first hold a public hearing on the ordinance at the CDS, and then for the CDS to make a recommendation to the Fiscal Court before Fiscal Court approval. Again, the Fiscal Court, in ¶ 7 of its Answer, has admitted that this did not occur. This is an admission of a violation of the plain language of KRS 100.207 and KRS 100.211 and an immediate declaration voiding the ordinance *ab initio* is warranted.

**II. THE COURT HAS AUTHORITY TO DECLARE THE ORDINANCE VOID AB INITIO.**

Ordinance No. 22-004, as currently passed, is void *ab initio*, as the Fiscal Court was without statutory authority to enact a zoning ordinance without first holding a public hearing and allowing the CDS to offer a recommendation. *See Bellefonte Land Inc.*, 864 S.W.2d at 316, *supra* (“If the ordinances are void *ab initio*, the City had not yet obtained planning and zoning authority, a prerequisite to jurisdiction to regulate the appellant’s road as was being done (KRS 100.113, KRS 100.187(3), and KRS 100.201)”). The Ordinance is already void *ab initio* as the Fiscal Court lacked the lawful authority to enact Ordinance No. 22-004. Dogwood Corners is now requesting the Court declare it void and invalidate it.

Here, the Court has the authority to void a zoning ordinance that fails to comply with procedural requirements. *See Bellefonte Land Inc.*, *supra* (Court voided the amended zoning

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ordinance after finding that the City cannot amend a zoning ordinance or subdivision regulation without the Planning Commission hearing the matter first), *Helm v. Citizens to Protect the Prospect Area, Inc.*, 864 S.W.2d 312 (Ky. App. 1993) (Court voided the ordinance, a zoning map amendment, for the failure of the City Council to wait to receive the Planning Commission’s minutes and recommendation prior to enacting the ordinance), and *Creative Displays, Inc., supra* (Court voided the Boone County Comprehensive Plan and any zoning ordinance adopted pursuant to the illegal Comprehensive Plan because of a failure to comply with KRS Chapter 100 and because the Planning Commission never held a public hearing before the Comprehensive Plan was adopted).

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Dogwood Corners respectfully requests that the Court exercise its authority and declare the Ordinance void.

**CONCLUSION**

Because there are no issues of material fact in dispute, and the Fiscal Court has admitted in its *Answer* that the text of Ordinance 22-004 speaks for itself (and it is clearly a zoning ordinance as it regulates setbacks and buffering), and that no hearing by CDS was held and that no recommendation received in violation of KRS 100.207, Dogwood Corners respectfully moves this Court to grant its motion for judgment on the pleadings pursuant to CR 12.03. Plaintiff is entitled to an immediate declaration that Ordinance 22-004 is an invalid zoning ordinance because it attempts to regulate setbacks and screening between buildings and other structures and because the Fiscal Court violated KRS Chapter 100 in its enactment. The Ordinance should be declared void.

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Respectfully submitted,

/s/ Randal A. Strobo  
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 dspenard@strobobarkley.com  
*Counsel for Dogwood Corners, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 31, 2023, a copy of the above was filed with the Clerk of the Court using KYeCourts CourtNet 2.0 filing system, and the following were served by electronic mail to:

Harold Mac Johns  
 English, Lucas, Priest & Owsley, LLP  
 12 Public Square; P.O. Box 746  
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/s/ Randal A. Strobo  
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COMMONWEALTH OF KENTUCKY  
CHRISTIAN CIRCUIT COURT  
CIVIL ACTION NO.: 22-CI-01010  
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DOGWOOD CORNERS, LLC

PLAINTIFF

VS.

CHRISTIAN COUNTY FISCAL COURT

DEFENDANT

**DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION FOR  
JUDGMENT ON THE PLEADINGS**

The Defendant, Christian County Fiscal Court (“Christian County”), by and through counsel, and for their Response to Plaintiff’s Motion for Judgment on the Pleadings, states as follows:

**FACTS**

On November 29, 2022, Christian County adopted Ordinance No. 22-004 regarding the establishment of minimum setbacks, screening, and decommissioning requirements for solar energy system installations in Christian County, Kentucky. It cannot be overemphasized this is not a Zoning Ordinance. The Plaintiff, Dogwood Corners, seeks to construct a solar energy generating facility in Christian County. The purpose of Ordinance No 22-004, is to conserve and protect the natural resources of Christian County. To fulfill that purpose, the Ordinance imposes various requirements for the development of solar farms. Rather than follow the requirements imposed by the Ordinance, Plaintiff in this action seeks to invalidate the Ordinance altogether. This case is in its infancy stage and discovery has not occurred. Nevertheless, to short circuit the legal process, Plaintiff seeks Judgment on the Pleadings. In



the case at bar, there are questions of law and fact which make Plaintiff's Motion for Judgment on the Pleadings premature, and as a result, this Court should deny Plaintiff's Motion.

### **LEGAL STANDARD**

Kentucky Rule of Civil Procedure 12.03 provides any party to a lawsuit may move for a judgment on the pleadings. The basis of the motion is to test the legal sufficiency of a claim or defense in view of all the adverse pleadings. *City of Pioneer Vill. v. Bullitt Cnty. ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003). When a party moves for judgment on the pleadings, she admits for the purposes of her motion not only the truth of all his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all his own allegations which have been denied by his adversary. *Id.* (citing *Archer v. Citizens Fidelity Bank & Trust Co.*, 365 S.W.2d 727 (Ky. 1963)). The judgment should be granted if it appears beyond doubt the nonmoving party cannot prove any set of facts that would entitle her to relief. *Id.* (citing *Spencer v. Woods*, 282 S.W.2d 851 (Ky. 1955)).

Here, as a matter of law, Plaintiff is not entitled to judgment on the pleadings.

### **ARGUMENT**

Christian County is permitted to regulate land use and adopt ordinances pursuant to Kentucky Revised Statutes outside Chapter 100. Pursuant to KRS 67.083(3)(h) and (m),

The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds, and employ personnel in performance of the following public functions: ...

(h) Conservation, preservation and enhancement of natural resources including soils, water, air, vegetation, and wildlife; ...

(m) Regulation of commerce for the protection and convenience of the public;

The legislature has promulgated several ways in which fiscal courts have the power to carry out governmental functions through enacting ordinances. In the case at bar, Christian County enacted the Ordinance in question as a means to conserve, preserve, and enhance natural resources, as well as in an effort to regulate commerce for the protection and convenience of the public, pursuant to KRS 67.083. Contrary to Plaintiff's assertion, the Fiscal Court heard public comments on the issue. Christian County Fiscal Court did not adopt this ordinance pursuant to planning and zoning statutes of KRS Chapter 100. Rather, it adopts this Ordinance based upon its authority to conserve, protect, and enhance natural resources. KRS 278.704(3) addresses circumstances where a "merchant electric generating facility is proposed to be located in a county or municipality with planning and zoning, then decommissioning and setback requirements from a property boundary, residential neighborhood, school, hospital or nursing facility may be established by the Planning and Zoning Commission." While the Planning and Zoning Commission exists in Christian County, that Planning and Zoning Commission has not been created in such a way that it has the authority to exercise its powers in the rural areas of Christian County. Moreover, the optional and permissive language "may" in KRS 278.704(3) suggests that counties have other avenues (e.g., KRS 67.083) to dictate decommissioning and setback requirements. This alternative route is precisely what Christian County Fiscal Court selected.

Ordinance Number 22-004 regulates numerous aspects of the contemplated activity. The Ordinance regulates not only setbacks, but also decommissioning, screening, and other activities of contemplated solar facilities. Those are precisely the sort of activities in which the County has a governmental interest to conserve, preserve, and enhance natural resources, including the soil, water, vegetation, and wildlife.

If this case concerned a zoning ordinance under KRS Chapter 100 and the Christian Fiscal Court failed to adhere to its statutory requirements, the plaintiff's argument for a Judgment on the Pleadings would be compelling. However, this is not such an ordinance. Moreover, as questions of both law and fact exist, Plaintiff's motion is premature and should be denied as a matter of law.

**CONCLUSION**

For the aforementioned reasons, the Defendant respectfully requests this Court deny Plaintiff's Motion for Judgment on the Pleadings.

This 15th day of August, 2023.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2023, I electronically filed the foregoing with the clerk of the court by using the CourtNet system, which will notify the following:

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COMMONWEALTH OF KENTUCKY  
CHRISTIAN CIRCUIT COURT  
DIVISION II  
CIVIL ACTION NO. 22-CI-1010  
*Electronically Filed*

03270-6

DOGWOOD CORNERS, LLC

PLAINTIFF

v.

CHRISTIAN COUNTY FISCAL COURT

DEFENDANT

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**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DOGWOOD CORNERS’ MOTION FOR  
JUDGMENT ON THE PLEADINGS**

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Comes now the Plaintiff, Dogwood Corners, LLC (“Dogwood Corners”), by and through counsel, and hereby submits this *Supplemental Memorandum in Support of Dogwood Corners’ Motion for Judgment on the Pleadings* in accordance with the Court’s bench Order issued on August 16, 2023, to brief the relevance of *Upchurch v. Cumberland County Fiscal Court*, No. 2000-CA-002607-MR (Ky. App. Jan. 31, 2003), and other matters relevant to the parties.

**I. UPCHURCH IS NOT CITABLE, IS NOT BINDING, AND IS DISTINGUISHABLE FROM THIS CASE.**

For the first time, during oral argument, the Fiscal Court presented a Kentucky Court of Appeals case to the Plaintiff and Court, allegedly in support of its position that planning and zoning ordinances do not need to be promulgated pursuant to KRS Chapter 100. The *Upchurch* Opinion does not constitute citable precedent. There are Opinions of the Supreme Court of Kentucky that address and control the legal issue in the instant case. *See* SCR 1.040(5). It does not meet the requirements of RAP 41(A). In addition, the discussion in *Upchurch* is distinguishable and is not persuasive. For these reasons, the Opinion has no place in the instant

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case and should not have been presented. *Upchurch* is not relevant, and even if it were, it is not final or published and has no binding authority on this Court. *Upchurch* is legally and factually distinguishable and should be disregarded by the Court.

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On January 31, 2003, the Kentucky Court of Appeals issued its Opinion in *Upchurch v. Cumberland County Fiscal Court*, No. 2000-CA-002607-MR (Ky. App. Jan. 31, 2003). A majority of the Court of Appeals' panel held that the Home Rule provisions of KRS 67.083 were broad enough to permit land use regulation of the construction and operation of a poultry facility in the absence of the adoption of a comprehensive planning and zoning scheme. *Upchurch*, Slip. Op. at 2 and 3. However, the Kentucky Supreme Court granted discretionary review, and the case was later settled while the Supreme Court had jurisdiction over the matter. The Supreme Court, with authority over the status of the Court of Appeals' Opinion, did not order it to be published. *See former* CR 76.28(4)(a) ("Upon entry of an order of the Supreme Court granting a motion for discretionary review the opinion of the Court of Appeals shall not be published unless otherwise ordered by the Supreme Court."). The Opinion has no citable or binding value, especially because of the many published Supreme Court and Court of Appeals opinions that contradict this uncitable, non-binding opinion.

The rationale of the Court of Appeals' majority Opinion in *Upchurch* suggests an unfettered source of county Home Rule authority was rejected by the Supreme Court of Kentucky in *Fiscal Court of Jefferson Co. v. City of Louisville*, 559 S.W.2d 478, 481 (Ky. 1977). The rationale of *Upchurch* that Home Rule authorizes a local override of a comprehensive scheme was likewise rejected by the subsequent Supreme Court of Kentucky's decisions in *Kentucky Restaurant Ass'n v. Louisville/Jefferson County Metro Gov't*, 501 S.W.3d 425, 428 (Ky. 2016) and *Kentucky Licensed Beverage Ass'n v. Louisville-Jefferson County Metro Gov't*,

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127 S.W.3d 647, 651 (Ky. 2004). **Exhibits 1 and 2**, respectively. These Supreme Court decisions are controlling over the Kentucky Court of Appeals. SCR 1.030(8)(a) and SCR 1.040(5). The Court of Appeals' majority Opinion in *Upchurch* cannot serve as the basis for upholding a local override of a comprehensive scheme through Home Rule.

The nature of the Kentucky Court of Appeals' majority Opinion in *Upchurch* conflicts with precedent established by Supreme Court. It is not binding authority. Therefore, it cannot be followed. *See* SCR 1.030(8)(a) ("The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.") and SCR 1.040(5).

In addition, as noted above and on the face of the document provided to the Circuit Court, the Supreme Court granted Discretionary Review on February 11, 2004 (Case No. 2003-SC-142-DR) transferring jurisdiction of the matter from the Court of Appeals to the Supreme Court. The Court of Appeals' Opinion was withdrawn on February 13, 2004. Once discretionary review was granted, the publication of the Court of Appeals' Opinion was dependent upon an express Order of publication by the Supreme Court. *See* RAP 40(D)(2).<sup>1</sup> *See also* CR 76.28(4)(a) (former rule). The Supreme Court did not order publication of *Upchurch*. Thus, the Court of Appeals' Opinion in *Upchurch* only serves as law of the case for matters decided by that court for which discretionary review was not granted. *Humana, Inc. v. Blose*, 247 S.W.3d 892 (Ky. 2008).

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<sup>1</sup> RAP 40(D)(2) states:

If a motion for discretionary review of an opinion of the Court of Appeals is filed under RAP 44, the opinion may not be published until the Supreme Court has entered an order making a final disposition of that matter. If the motion for discretionary review is denied or withdrawn, whether the opinion shall be published is determined by how the Court of Appeals designated the opinion, unless the Supreme Court directs otherwise. If the motion for discretionary review is granted, the opinion of the Court of Appeals shall not be published unless expressly ordered to be published by the Supreme Court.

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The Court of Appeals' Opinion in *Upchurch* also fails to satisfy the requirements for citation under RAP 41(A). RAP 41(A) states:

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**(A) Kentucky Opinions.** "Not To Be Published" opinions of the Supreme Court and the Court of Appeals are not binding precedent and citation of these opinions is disfavored. A party may cite to and rely on a "Not To Be Published" opinion for consideration if:

- (1) it was rendered after January 1, 2003,
- (2) it is final under RAP 40(G),
- (3) there is no published opinion of the Supreme Court or the Court of Appeals that would adequately address the point of law argued by the party, and
- (4) the party clearly states that the opinion is not binding authority.

As discussed, there is published precedent of the Supreme Court addressing and refuting the point of law argued by the Fiscal Court. Therefore, the Opinion fails to satisfy RAP 41(A)(3), SCR 1.030(8)(a), and SCR 1.040(5). The Opinion is not final under RAP 40(G) or its predecessor because discretionary review was granted, and the Opinion (as stated on the face of the document supplied to the Circuit Court) was withdrawn. It serves as the law of the case for the parties; however, because it was withdrawn upon the grant of discretionary review, it never became final for purposes of citation. Therefore, the Opinion fails to meet RAP 41(A)(2). *See also* RAP 40(H) ("Non-final opinions, orders, or opinions and orders may not be cited as binding precedent in any court of this state and may not be cited without indicating the non-final status.")

Aside from being uncitable and not binding, the Court of Appeals' Opinion in *Upchurch* is also readily distinguishable because it focuses on a discussion and exercise of Home Rule under KRS 67.083 for a potential poultry facility regarding noxious odor mitigation which is quite distinct from a merchant electric generating facility. *Upchurch* does not construe KRS



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278.704 or the statutes governing the State Board. For these reasons, *Upchurch* does not meaningfully speak to the issue before the Circuit Court.

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**II. THE KENTUCKY LEGISLATURE HAS ESTABLISHED A PROCESS BY WHICH A LOCAL GOVERNMENT MUST APPROVE PLANNING AND ZONING LAWS AND REGULATIONS PURSUANT TO KRS CHAPTER 100 AND THE COURTS HAVE REPEATEDLY AFFIRMED THAT COMPREHENSIVE SCHEME.**

As previously argued in Dogwood Corners' *Memorandum in Support of Plaintiff's Motion for Judgment on the Pleadings*, the Fiscal Court cannot enact its own regulation, regulating setbacks and screening (planning and zoning matters), to bypass mandatory compliance with the legislature's comprehensive statutory scheme for planning and zoning found in KRS Chapter 100. *See Memorandum* at 6-7. The Fiscal Court cannot act in conflict with a constitutional provision or statute and KRS 82.082(2) expressly prohibits the Fiscal Court from regulating planning and zoning outside of the confines of KRS Chapter 100. Therefore, there is no inherent power, separate from KRS Chapter 100, through which a Fiscal Court may adopt a zoning ordinance or otherwise engage in planning and zoning.

"Tradition establishes that county government in Kentucky is based on the premise that all power exercised by the fiscal court must be expressly delegated to it by statute." *Fiscal Court of Jefferson Co. v. City of Louisville*, 559 S.W.2d 478, 481 (Ky. 1977). "[W]hile the General Assembly may grant governmental powers to counties it must do so with the precision of a rifle shot and not with the casualness of a shotgun blast. The thoughtful, purposeful and deliberate delegation of a known power is required of the General Assembly." *Id.*, at 482. The powers of the Christian County Fiscal Court are delegated and described by the legislature through KRS 67.080 and KRS 67.083.

When the General Assembly establishes a comprehensive scheme concerning regulation, the comprehensive scheme is the exclusive means through which a county may act. A

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comprehensive scheme denies action through any claim of authority other than the scheme itself.

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For example, a county’s Home Rule power concerning the regulation of commerce for the protection and convenience of the public, KRS 67.083 (3)(m), does not authorize the county to set a minimum wage higher than the minimum wage set by the comprehensive scheme in KRS Chapter 337. *Kentucky Restaurant Ass’n v. Louisville/Jefferson County Metro Gov’t*, 501 S.W.3d 425, 428 (Ky. 2016).

As another example, the General Assembly’s creation of a comprehensive and detailed legislative scheme in KRS Chapters 241–244 regarding the manufacture, sale, and distribution of alcoholic beverages restricts a local government from altering the intent of the legislature through an ordinance that extends the regulation to an area that is not authorized by KRS Chapter 241-244. *Kentucky Licensed Beverage Ass’n v. Louisville-Jefferson County Metro Gov’t*, 127 S.W.3d 647, 651 (Ky. 2004). In *Kentucky Licensed Beverage Ass’n*, the Court held that the ordinance conflicted with state statutes on the subject *and* separately found that the legislative body lacked the statutory authority to enact additional regulations regarding alcoholic beverage control. “A fiscal court does not have any power except that conferred by statute and it possesses no authority not delegated to it, expressly or impliedly, by some provision of the law.” *Id.* citing *Bickett v. Palmer-Ball*, 470 S.W.2d 343 (Ky. 1971).

In authorizing a county’s regulation of the sale of alcoholic beverages, KRS 67.083(3)(n) states: “Regulation of the sale of alcoholic beverages according to the provisions of KRS Chapters 241 to 244.” Specific identification of the statutes serving as the source of authority through which action may be taken demonstrates a comprehensive scheme for the sale of alcoholic beverages. *Compare Kentucky Licensed Beverage Ass’n.*, 127 S.W.3d at 651. The fact that the General Assembly restricts the authority of a county to engage in planning and zoning to

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the comprehensive scheme in KRS Chapter 100, in combination with the fact that the General Assembly has created an exclusive mechanism in KRS 278.704 for the exercise of primacy over decommissioning and setback requirements, demonstrates that there is no valid authority through which the Fiscal Court can set requirements through Ordinance 22-004. It is an unauthorized exercise that is void. *Compare Kentucky Restaurant Ass’n*, 501 S.W.3d at 428.

KRS 67.083 (3)(k) states that a county has the authority to carry out the public function of “[p]lanning, zoning, and subdivision control according to the provisions of KRS Chapter 100.” The General Assembly, thus, provides a unique and exclusive means through which a county may carry out and regulate planning and zoning. The goal of Ordinance No. 22-004 is to regulate setbacks, screening, and decommissioning requirements for solar energy systems – these are inherent land use matters which should be regulated by KRS Chapter 100 and are routinely recognized by the judiciary, as was the case in *Kentucky Licensed Beverage Ass’n*, as preempting a Fiscal Court from engaging in planning and zoning through any process that differs from the process established by the KRS Chapter 100 framework.

Therefore, if the Fiscal Court wants to regulate setbacks, screening, and decommissioning requirements for solar energy systems, it must comply with KRS Chapter 100. Specifically, the Fiscal Court must comply with KRS 100.203 which sets forth the parameters for the content of zoning regulations. It states, “Cities and counties may enact zoning regulations which **shall** contain: (1) ... The city or county may regulate: (c) Minimum or maximum areas or percentages of areas, courts, yards, or other open spaces or bodies of water which are left to be unoccupied, and minimum distance requirements between buildings or other structures.” If counties want to regulate minimum distance requirements between buildings and other structures and screening, then the county must enact zoning regulations which comply with the other provisions of

Chapter 100. That requires review of an ordinance by a Planning Commission, a public hearing with the Planning Commission, and a recommendation from the Planning Commission to the Fiscal Court. KRS 100.207(1) and (2), KRS 100.211(3). None of that occurred here.<sup>2</sup> By enacting Ordinance No. 22-004, without first complying with Chapter 100, the Fiscal Court has acted without statutory authority attempting to regulate setbacks and screening outside of the parameters of the comprehensive statutory scheme.<sup>3</sup>

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The Fiscal Court fails to identify any provision in statute through which it is authorized to exert primacy over decommissioning and setback requirements. Primacy in such matters is available only as established by a planning and zoning commission with jurisdiction over the area in which a facility is proposed. *See* KRS 278.704. The claim of general power through Home Rule does not supersede the controlling statutory provisions.

Seeking to do indirectly what it lacks in authority to do directly, the Fiscal Court enacted Ordinance 22-004 to engage in planning and zoning without following the mandatory provisions of KRS Chapter 100 and, also, exercise a discretion specifically withheld from the Fiscal Court by the General Assembly through KRS 278.704. Setbacks, screening, and decommissioning requirements for solar energy systems are inherent planning and zoning matters regulated by KRS Chapter 100. Therefore, Ordinance No. 22-004 is void *ab initio* and must be invalidated.

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<sup>2</sup> Because the Christian County Fiscal Court is not properly set up to promulgate planning and zoning ordinances and regulations does not mean that setbacks will not be imposed. In fact, the Siting Board has the authority to impose setbacks and has consistently done so for all approved solar facilities. KRS 278.706.

<sup>3</sup> An inexhaustive list of counties and cities that have approved setbacks pursuant to Chapter 100 includes the following jurisdictions: Pennbroke and Oakgrove (both in Christian County), Louisville Metro, Lexington Fayette Urban County Government, Somerset, Pikeville, Ashland, Kenton County, Warren County, Boone County, Hardin County, Daviess County, Madison County, Campbell County, Bullitt County, , Oldham County, McCracken County, Scott County, Jessamine County, Franklin County, and Shelby County, among others. *See Exhibit 3.*

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**III. KRS 278.704 DOES NOT GIVE FISCAL COURTS UNFETTERED AUTHORITY TO APPROVE SETBACK REQUIREMENTS FOR SOLAR FACILITIES. SUCH AUTHORITY IS ONLY FOUND IN KRS CHAPTER 100. PSC STAFF OPINION 2019-006 IS NOT BINDING ON THIS COURT OR ON THE PSC ITSELF.**

In Ordinance 22-004, the Fiscal Court claims that Public Service Commission Staff Opinion 2019-006 authorizes the Fiscal Court to establish setback requirements. While Dogwood Corners agrees that the Fiscal Court may establish setback requirements for solar facilities pursuant to KRS 278.704, it must do so pursuant to comprehensive planning and zoning scheme established by the Kentucky legislature in KRS Chapter 100. The Fiscal Court has failed to do so here.

**A. KRS 278.704 Only Requires the State Board to Accept Decommissioning and Setbacks Requirements *Established by a Planning and Zoning Commission with Jurisdiction Over an Area in which a Facility is Proposed.* The Statute Does Not Vest Any Other Entity with a Power of Primacy Over the State Board.**

The General Assembly, seeking to establish a comprehensive framework for the review and consideration of efforts to build merchant electric generating facilities and nonregulated electric transmission lines within the Commonwealth, enacted KRS 278.700 through KRS 278.718 which create the Kentucky State Board on Electric Generation and Transmission Siting (“State Board”).<sup>4</sup> These statutes expressly address, among other things, decommissioning and setback requirements for a merchant electric generating facility. KRS 278.704 arranges, as between the State Board and the planning and zoning commission, the assignments and priorities of authority over these two (2) matters.

KRS 278.704(3) provides for “a county or a municipality with planning and zoning,” the discretion (through use of the term “may”) to locally determine “decommissioning and setback

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<sup>4</sup> Ky Acts 2002, chapter 365.

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requirements from a property boundary, residential neighborhood, school, hospital, or nursing home facility.” A planning and zoning commission with jurisdiction over an area in which construction of a facility is proposed “may” establish decommissioning and setback requirements, but it is under no obligation to do so. The plain language of the statute confirms that the discretion is uniquely vested with a planning and zoning commission and not a general or undefined grant of discretion to local legislative bodies.

The exclusivity of discretion of a planning and zoning commission is further confirmed by the plain language of the effect of the exercise of discretion. In particular part, KRS 278.704 (3) provides:

Any decommissioning requirement or 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 decommissioning requirements in KRS 278.706(2)(m) and the setback requirement in subsections (2) and (5) of this section; and
- (b) Not be subject to modification or waiver by the [State] board through a request for deviation by the application, as provide in subsection (4) of this section or otherwise.

The effect of KRS 278.704(3) is that for areas over which a planning and zoning Commission has jurisdiction, the local planning and zoning commission *may* exercise primacy over decommissioning and setback requirements for a merchant electric generating facility. The exercise is binding upon the State Board. KRS 278.704(3)(b). Therefore, primacy is available so that a planning and zoning commission may prevent the State Board from interfering with or frustrating a locally developed and properly adopted comprehensive plan containing local policies regarding “the development of public and private property in the most appropriate relationships.” See KRS 100.183 (requirement and purpose of comprehensive plan).

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Per the plain language of the statute, no political subdivision or authority other than the local planning and zoning commission is vested with the discretion to exercise primacy over the State Board regarding decommissioning and setback requirements. The language is clear; therefore, and judicial inquiry into the statute is at its end. *See Seeger v. Lanham*, 542 S.W.3d 286, 291 (Ky. 2018).

As importantly, permitting any other exercise of local authority for primacy through a process outside of the framework established by KRS 278.704 would result in two (2) significant breaches of legislative authority. First, creation of a right of exercising primacy through an entity other than a planning and zoning commission is a political question uniquely reserved to the General Assembly under the separation of powers of the Commonwealth. The Legislature has not chosen to create such a right, and, until it does so, no right of primacy exists other than the right possessed by a planning and zoning commission through KRS 278.704. *See Jones v. Stearns*, 122 S.W.2d 766, 767 (Ky. 1938) (A court cannot “read into a statute a scheme of procedure that is not there merely because [the court] might think that the legislature would have authorized it if they had thought about it.”). Secondly, KRS Chapter 100 creates a comprehensive legislative framework which establishes a unique and exclusive basis to engage in planning and zoning activities for an area. Even if this Court determines that KRS 278.704 allows a Fiscal Court to pass a setback zoning ordinance for merchant facilities, which Dogwood Corners in no way concedes that it does, the Fiscal Court has admittedly failed to follow the process to do so as required by KRS Chapter 100. *See Section II, infra*. KRS 278.704 (3) creates the opportunity for a planning and zoning commission to act to prevent interference with a comprehensive plan for containing local policies for land use by the State Board. There is no ambiguity in this grant of authority.

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KRS 278.704 confirms an exclusive vesting of the right of primacy authority with a planning and zoning commission to (1) supersede and void other local ordinances inconsistent with or in conflict with a comprehensive plan and (2) prevent interference with the statutory instructions to the State Board by other local ordinances when primacy has not been exercised by a planning and zoning commission for setback requirements and decommissioning. This demonstrates legislative restraint against unauthorized interference with a comprehensive plan (planning and zoning efforts unauthorized or inconsistent with KRS Chapter 100) and, additionally, restraint against other local entities from interfering with the statutorily assigned authority and responsibility of the State Board. An exercise of power without authorization by the legislature (through the plain language of KRS 278.704) renders the portion of the statutory scheme vesting the exercise of discretion regarding primacy with a planning and zoning commission meaningless and violates a restraint expressly designed to carry out and protect the General Assembly's decision regarding the balancing of state and local interests. *See Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683 (Ky. 2010) (“[W]e are not free to ignore the portions of statutes that are inconvenient to a particular litigant’s position.”).

**B. PSC Staff Opinion 2019-006 Cannot Serve as the Basis for Control Over Decommissioning or Setback Requirements.**

Ordinance No. 22-004 includes, among other things, a reference to Public Service Commission (“PSC”) Staff Opinion 2019-006 with the allegation that the Staff Opinion authorizes the Fiscal Court to establish setback requirements which are not subject to waiver or modification. This conclusion in PSC Staff Opinion 2019-006 results from violation of the most basic principles of statutory construction. Moreover, it is not, through its own terms, binding authority upon the State Board (let alone the Circuit Court), and it is not a long-standing interpretation by the agency. Regardless, as noted above, even if this Court determines that a



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Fiscal Court can pass a setback zoning ordinance for merchant facilities, the Fiscal Court has admittedly failed to follow the process to do so as required by KRS Chapter 100. Opinion 2019-006 does not constitute binding authority, and it fails as persuasive authority as well.

In construing a statute, the first step is to look at the plain language of a statute and, if the language is clear, the inquiry ends. *Seeger v. Lanham*, 542 S.W.3d at 291. KRS 278.704(3) states that primacy for decommissioning and setback requirements may be “established by the planning and zoning commission.” The conclusion offered in Staff Opinion 2019-006 can only be reached upon acceptance of the premise that the unambiguous phrase “established by the planning and zoning commission” means something entirely different from its plain language meaning.

For purposes of KRS Chapter 100, KRS 100.111 (5) states: “‘Commission’ means planning commission.” KRS 100.111 (11) distinguishes a “legislative body” from a planning commission through purposely identifying and describing entities such as a fiscal court as entities separate and distinct from a commission. Likewise, KRS 100.111(15) and KRS 100.113 through KRS 100.131 distinguish a planning unit and its role in planning and zoning from a planning commission, the latter of which is governed by KRS 100.133 through KRS 100.182. The General Assembly spent considerable effort to establish a planning commission as an entity unique from a legislative body and subject to a different set of statutes than those applicable to a planning unit.

The premise in PSC Staff Opinion 2019-006 that primacy can be established through any entity other than a planning commission and that the General Assembly’s plain language in KRS 278.704 is “irrelevant” violates the fundamental principle of statutory construction. When a statute provides an unambiguous instruction, neither the judiciary nor a state agency has the authority to add new phrases to a statute or supply words or provide a new meaning to a statute.

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*See, for discussion, Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000). The General Assembly could not have provided clearer instructions, and the legislature alone is the branch of government that can enlarge the scope of KRS 278.704. Agency Staff cannot extend a statute to include options that the legislature has not specifically authorized. *See, for comparison, Tractor Supply v. Wells*, 647 S.W.3d 192, 195 (Ky. 2022). It does not matter if an agency thinks that an alternative that the legislature did not enact is a wiser course of action. The plain language of the legislature controls over the unilateral decision of the agency.

Staff Opinion 2019-006 (at page 1, paragraph 1) conspicuously states: “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.” The Opinion lacks any binding authority for proceedings before the State Board (referenced as “Siting Board”). It lacks any binding authority over the Circuit Court. Interpretation of a statute “is a quintessentially judicial function.” *Harilson v. Shepherd*, 585 S.W.3d 748, 759 (Ky. 2019) (footnote omitted). The Staff Opinion does not constitute and cannot serve as a source of authority.

While it is true that the judiciary may honor a “long standing statutory construction of law by an administrative agency charged with its interpretation,” *Revenue Cabinet v. Kentucky-American Water Co.*, 977 S.W.2d 2, 6 (Ky. 1999), Staff Opinion 2019-006 is not, by its own terms, a construction of law by the State Board.

Moreover, Staff Opinion 2019-006 states that it addresses “an issue of first impression as there are no decisions from the (Siting Board) addressing” the issue of whether an ordinance regulating land use has primacy over the setback requirements in KRS 278.704 (2) and (5).” It also fails to satisfy the requirement of being a long-standing statutory construction necessary for

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judicial deference. Staff Opinion 2019-006 is not binding authority and fails as persuasive authority because it extends the statute beyond its plain language by providing a meaning that the General Assembly did not intend. Again, even if this Court determines that a Fiscal Court can pass a setback zoning ordinance for merchant facilities, it has admittedly failed to follow the process to do so as required by KRS Chapter 100.

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#### IV. CONCLUSION

The discretion to exercise primacy for decommissioning and setback requirements is created by statute through a comprehensive scheme and extends only to a planning and zoning commission with jurisdiction over the area in which a project seeks to locate. The Fiscal Court may not rely upon Home Rule to rewrite the provisions of KRS 278.704 and extend primacy for decommissioning and setback requirements beyond the authorization of the General Assembly and the exclusive grant of the discretion to a local planning and zoning commission. Therefore, Fiscal Court Ordinance 22-004 is void *ab initio* because the Fiscal Court is without power to establish primacy and has not demonstrated compliance with the comprehensive planning and zoning scheme of KRS Chapter 100.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 6, 2023, a copy of the above was filed with the Clerk<sup>03270-6</sup> of the Court using KYeCourts CourtNet 2.0 filing system, and the following were served by electronic mail to:

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COMMONWEALTH OF KENTUCKY  
CHRISTIAN CIRCUIT COURT  
CIVIL ACTION NO.: 22-CI-01010  
*Electronically Filed*

03270-6

DOGWOOD CORNERS, LLC

PLAINTIFF

VS.

CHRISTIAN COUNTY FISCAL COURT

DEFENDANT

**DEFENDANT’S BRIEF IN SUPPORT OF THE VALIDITY OF  
ORDINANCE NO. 22-004**

The Defendant, Christian County Fiscal Court (“Christian County”), by and through counsel, and for their Brief in Support of the Validity of Ordinance No. 22-004, states as follows:

**FACTS**

On November 29, 2022, Christian County adopted Ordinance No. 22-004 regarding the establishment of minimum setbacks, screening, and decommissioning requirements for solar energy system installations in Christian County, Kentucky. It cannot be overemphasized this is not a Zoning Ordinance. The Plaintiff, Dogwood Corners, seeks to construct a solar energy generating facility in Christian County. The purpose of Ordinance No 22-004, is to conserve and protect the natural resources of Christian County. To fulfill that purpose, the Ordinance imposes various requirements for the development of solar farms. Rather than follow the requirements imposed by the Ordinance, Plaintiff in this action seeks to invalidate the Ordinance altogether. However, the Ordinance in question was validly adopted pursuant to the powers of the Christian County Fiscal Court, outside KRS Chapter 100, as outlined below.

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**LEGAL STANDARD**

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Kentucky Rule of Civil Procedure 12.03 provides any party to a lawsuit may move for a judgment on the pleadings. The basis of the motion is to test the legal sufficiency of a claim or defense in view of all the adverse pleadings. *City of Pioneer Vill. v. Bullitt Cnty. ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003). When a party moves for judgment on the pleadings, she admits for the purposes of her motion not only the truth of all his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all his own allegations which have been denied by his adversary. *Id.* (citing *Archer v. Citizens Fidelity Bank & Trust Co.*, 365 S.W.2d 727 (Ky. 1963)). The judgment should be granted if it appears beyond doubt the nonmoving party cannot prove any set of facts that would entitle her to relief. *Id.* (citing *Spencer v. Woods*, 282 S.W.2d 851 (Ky. 1955)).

Here, as a matter of law, Plaintiff is not entitled to judgment on the pleadings.

**ARGUMENT**

As stated in Christian County's response to Plaintiff's Motion for Judgment on the Pleadings, Christian County is permitted to regulate land use and adopt ordinances pursuant to Kentucky Revised Statutes outside Chapter 100. For example, pursuant to KRS 67.083(3)(h) and (m),

The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds, and employ personnel in performance of the following public functions: ...

(h) Conservation, preservation and enhancement of natural resources including soils, water, air, vegetation, and wildlife; ...

(m) Regulation of commerce for the protection and convenience of the public;

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The Kentucky legislature has promulgated several ways in which fiscal courts have the power to carry out governmental functions through enacting ordinances. In the case at bar, Christian County enacted the Ordinance in question as a means to conserve, preserve, and enhance natural resources, as well as in an effort to regulate commerce for the protection and convenience of the public, pursuant to KRS 67.083. Contrary to Plaintiff's assertion, the Fiscal Court heard public comments on the issue. Christian County Fiscal Court did not adopt this Ordinance pursuant to planning and zoning statutes of KRS Chapter 100. Rather, it adopted this Ordinance based upon its authority to conserve, protect, and enhance natural resources.

Additionally, pursuant to KRS 278.704(3),

If the merchant electric generating facility is proposed to be located in a county or a municipality with planning and zoning, then decommissioning and setback requirements from a property boundary, residential neighborhood, school, hospital, or nursing home facility *may* be established by the planning and zoning commission. Any decommissioning requirement or 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 decommissioning requirements in KRS 278.706(2)(m) and 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 or otherwise.

(emphasis added). While a Planning and Zoning Commission exists in Christian County, that Planning and Zoning Commission has not been created in such a way that it has the authority to exercise its powers in the rural areas of Christian County. Moreover, the optional and permissive language through the use of the word "*may*" in KRS 278.704(3) suggests that counties have other avenues (e.g., KRS 67.083) to dictate decommissioning and setback requirements. This alternative route is precisely what Christian County Fiscal Court selected.

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Importantly, pursuant to KRS 278.718,

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The provisions of KRS 278.700, 278.704, 278.706, 278.708, and 278.710 shall not supplant, any other state or federal law, including the powers available to local governments under the provisions of home rule under KRS 67.080, 67.083, 67.850, 67.922, 67A.060, 67C.101, and 82.082. **An ordinance, permit, or license issued by a local government shall have primacy over the provisions and requirements of KRS 278.700 and Sections 2, 3, and 4 of this Act, and any conflict between an order of the board and a local ordinance, permit, or license shall be resolved in favor of the local government's ordinance, permit, or license.**

(emphasis added). Ordinance Number 22-004 regulates numerous aspects of the Plaintiff's contemplated activity. The Ordinance regulates not only setbacks, but also decommissioning, screening, and other activities of contemplated solar facilities. Those are precisely the sort of activities in which the County has a governmental interest to conserve, preserve, and enhance natural resources, including the soil, water, vegetation, and wildlife.

Furthermore, the legislature clearly vests authority in local fiscal courts in adopting ordinances related to merchant electric generating facilities, as KRS 278.718 states that local government ordinances shall preempt the siting board.

Accordingly, statutes outside KRS Chapter 100, including KRS 67.083 and KRS Chapter 278, permit the regulation of merchant energy generating facilities. It is clear the Ordinance at issue here is just the sort of ordinance contemplated by KRS 278.718 which this Court should uphold the validity of same consistent with the statutory mandate of this section.

Finally, in an analogous circumstance, the regulation of poultry facilities, the Court of Appeals observed:

Through the County Home Rule Statute the legislature has likewise given counties broad discretion to perform the function of protecting the general health and welfare of its citizens, including but not limited to the control of animals, abatement of public nuisances, public sanitation, conservation of natural resources and the regulation of commerce. Without proper management and



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reasonable care for the surrounding environment, the noises, odors, insects and disposal of waste are potentially harmful to the surrounding properties and waterways, and ultimately become an intolerable nuisance to the surrounding community.

Upchurch v. Cumberland County Fiscal Court, 2003 Ky. App. LEXIS 22, \*6. (See copy attached.) As the Court further observed, “[q]uite simply, planning and zoning has nothing to do with the ordinance. It stands on its own through police powers granted to the county by KRS 67.083(3).” The Kentucky legislature, through the County Home Rule statute, gives Fiscal Courts quite broad powers to conserve, preserve, and enhance natural resources including soils, air, vegetation, and wildlife and regulate commerce for the protection and convenience of the public. As a result, this Court must uphold the validity of Ordinance No. 22-004.

### **CONCLUSION**

For the aforementioned reasons, the Defendant respectfully requests this Court deny the Plaintiff’s motion for Judgment on the Pleadings as there is clear legislative and judicial authority to uphold the validity of Ordinance No. 22-004 and Christian County’s right to enforce same. In light of that authority, Judgment on the Pleadings is an inappropriate means to resolve this litigation.

Further, the crux of the matter before this Court is whether a Judgment on the Pleadings is warranted. Such a judgment is only appropriate when the non-moving party—in this case, the Christian Fiscal Court, has no conceivable set of facts that would entitle it to relief. The plaintiffs contend that the Christian Fiscal Court violated KRS Chapter 100 by enacting an unlawful zoning ordinance. However, this argument misses the mark. What the Court enacted

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is not a zoning ordinance, but rather a lawful exercise of its authority under KRS 67.083, as the Defendant has consistently argued.

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Importantly, the home rule provisions of KRS 67.083 grant the Fiscal Court broad latitude to enact such a local ordinance, which is further bolstered by KRS 278.718. This latter statute gives local ordinances precedence, reinforcing the Court's authority to enact the Ordinance in question.

Therefore, given the latitude provided by these statutes, it is premature and incorrect to conclude that the Christian Fiscal Court lacks any set of facts that would entitle it to relief. As such, a Judgment on the Pleadings is an inappropriate means of resolving this litigation.

This 6th day of September, 2023.

*/s/ Harold Mac Johns*

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I hereby certify that on September 6, 2023, I electronically filed the foregoing with the clerk of the court by using the CourtNet system, which will notify the following:

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COMMONWEALTH OF KENTUCKY  
CHRISTIAN CIRCUIT COURT  
DIVISION II  
CIVIL ACTION NO. 22-CI-1010  
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03270-6

DOGWOOD CORNERS, LLC

PLAINTIFF

v.

CHRISTIAN COUNTY FISCAL COURT

DEFENDANT

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**SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DOGWOOD CORNERS’ MOTION  
FOR JUDGMENT ON THE PLEADINGS**

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Comes now the Plaintiff, Dogwood Corners, LLC (“Dogwood Corners”), by and through counsel, and hereby submits this *Second Supplemental Memorandum in Support of Dogwood Corners’ Motion for Judgment on the Pleadings* in accordance with the Court’s bench Order issued on October 11, 2023, to brief the extent of the Christian Fiscal Court’s (“Fiscal Court”) authorized regulation of land use, planning, and zoning in the unincorporated area of Christian County, and other matters relevant to the parties.

**I. THE FISCAL COURT ONLY ALLOWS FOR THE REGULATION OF SUBDIVISIONS IN THE UNINCORPORATED AREAS OF CHRISTIAN COUNTY. NO OTHER LAND USE, PLANNING, AND ZONING REGULATION IS ALLOWED.**

Based on a thorough review of Fiscal Court records at the Christian County Courthouse of adopted Fiscal Court orders and ordinances and Subdivision Guidelines adopted by the Fiscal Court<sup>1</sup>, the Fiscal Court has only authorized subdivision regulation in the unincorporated areas of

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<sup>1</sup> **Exhibit 1**, Subdivision Guidelines of Christian County, Kentucky, [https://comdev-services.com/wp-content/uploads/document\\_center/cds/ordinances/Christian\\_County\\_Subdivision\\_Guidelines.pdf](https://comdev-services.com/wp-content/uploads/document_center/cds/ordinances/Christian_County_Subdivision_Guidelines.pdf)

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Christian County and for no other types of land use regulation. Because Ordinance No. 22-004 does not involve a subdivision of land, the Ordinance is outside of the authority of what is legally permissible and has been unlawfully approved. The Fiscal Court is not authorized to further regulate the land use, planning, and zoning of property in the unincorporated county unless it does so pursuant to and after meeting the requirements of KRS Chapter 100.

KRS 100.273(2) states, “A county which does not wish to establish a planning program or form a planning unit may adopt regulations for the subdivision of land within its boundaries. In this case, the county shall be governed by the provisions of KRS 100.111(22), 100.277, 100.281, 100.283, 100.287 and 100.291, but any powers delegated to a planning commission in these sections shall instead be delegated to the fiscal court, any reference to the planning unit shall be considered a reference to the county, and any reference to the chairman of the planning commission shall be considered a reference to the county judge/executive.”<sup>2</sup> The establishment of discretion concerning the subdivision of land is a specific grant of power that necessarily limits the exercise of discretion to this type of land use. Thus, the Fiscal Court has been authorized by the Legislature to regulate only subdivisions if it so chooses; however, it is an expressly narrow grant. The Fiscal Court approved that option.<sup>3</sup>

<sup>2</sup> KRS 100.111(22), 100.277, 100.281, 100.283, 100.287 and 100.291 all regulate subdivisions.

<sup>3</sup> The Fiscal Court passed an order to adopt the “Planning Principles, Public Policies, Goals, Objectives, and Standards for the Unincorporated Portion of Christian County,” on August 10, 1982. That Order states, “The personal ownership of land shall be left as unrestricted, unregulated, and as free from local, state or Federal control as is legally possible. With the above statement as our goal, it shall be our community’s expressed desire that NO ZONING, AGRICULTURAL LAND PRESERVATION, LAND USE REGULATION or any other form of public control, restriction, or prohibition over private ownership or use of land be applied to any unincorporated portion of Christian County, Kentucky.” **Exhibit 2**; Order, Christian Circuit Court at 561-562 (August 10, 1982). However, it appears that the Fiscal Court did approve subdivision regulations, pursuant to KRS 100.273, that apply to all unincorporated lands of Christian County on June 11, 1985, with four amendments to the subdivisions regulations after

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More importantly, the Fiscal Court cannot further regulate land use, planning, and zoning within the unincorporated areas of Christian County, including the subject solar ordinance,<sup>03270-6</sup> without first complying with KRS Chapter 100. As stated in Dogwood Corners' Memorandum in support of its Motion for Judgement on the Pleadings, and its Supplemental Memorandum, "[t]he fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds, and employ personnel in performance of the following public functions...(k) Planning, zoning, and subdivision control **according to the provisions of KRS Chapter 100.**" KRS 67.083 (Emphasis added).

The Kentucky legislature has preempted the field of planning and zoning. When it does so, the County must follow the legislative scheme. *See again, Bellefonte Land, Inc. v. Bellefonte*, 864 S.W.2d 315, 317 (Ky. App. 1993) *citing Creative Displays, Inc. v. City of Florence, Ky.*, 602 S.W.2d 682 (Ky. 1980) ("When the state has preempted a field, the city must follow that scheme or refrain from planning.") and *Dogwood Corners' Memorandum in Support of its Motion for Judgment on the Pleadings* at 5-6. The Fiscal Court, in its Answer, has admitted that it failed to hold a public hearing regarding the subject solar ordinance, and the Planning Commission failed to make recommendations to the Fiscal Court. *Answer*, ¶ 7. These are direct violations of KRS

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the original was adopted. **Exhibit 1**, Subdivision Guidelines of Christian County, Kentucky at 1. Those subdivision regulations require the Hopkinsville-Christian County Christian County Planning Commission (now known as the Community and Development Services or ("CDS")) to enforce and administer them. *Id.* at 1. Thus, the authority to regulate land use in the unincorporated areas of Christian County is limited to subdivisions, which in no way concern or apply to the adoption of Ordinance No. 22-004. Again, Ordinance No. 22-004 must be adopted pursuant to KRS Chapter 100, which requires a public hearing at the Planning Commission and a recommendation from the Planning Commission. The Fiscal Court admitted that neither were done here.

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100.207(1) and (2) and KRS 100.211(3). The Fiscal Court has failed to conform to the KRS Chapter 100 planning and zoning statutory scheme.

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**II. ORDINANCE 22-004 IS A PLANNING AND ZONING REGULATION PURSUANT TO KRS CHAPTER 100.**

Ordinance 22-004 is a planning and zoning ordinance concerning the physical development of property within Christian County. KRS 100.111(14), *see also* KRS 100.203(1)(b) and (c), calling for the regulation of “the size, width, height, bulk, *location of structures*, buildings and signs,” and the “minimum distance requirements between buildings or other structures.” (Emphasis added). Ordinance 22-004 is void *ab initio* for failing to adhere to KRS Chapter 100.

The Ordinance’s preamble refers to standards such as those in the ordinance as “properly designed land use standards.” Ordinance 22-004 at 1. The Ordinance preamble also states, “KRS 278.704 sets forth minimum setback requirements of merchant electric generating facilities in the Commonwealth of Kentucky,” as authority for the Ordinance. *Id.* This is a further admission that the Fiscal Court intended the Ordinance to be a planning and zoning ordinance. However, KRS 278.704(3) only allows a county “with planning and zoning” to set minimum setbacks and decommissioning requirements “established by the planning and zoning commission.” KRS 278.704. The Community Development Services (formerly known as the Hopkinsville-Christian County Planning Commission) did not develop, recommend, establish, or approve Ordinance 22-004.

KRS Chapter 278 does not create or expand the authority of a fiscal court to engage in planning and zoning. Instead, it recognizes that KRS Chapter 100 permits the establishment of a planning and zoning commission and explains the relevance of a proper exercise of power on minimum setbacks and decommissioning requirements by a planning and zoning commission

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authorized to act through KRS Chapter 100 upon KRS Chapter 278. In Christian County, the Fiscal Court has only authorized the Planning Commission to regulate subdivisions in the unincorporated areas of Christian County; therefore, there are no minimum setbacks and decommissioning requirements established by a planning and zoning commission. And, for Christian County to adopt planning and zoning beyond the regulation of subdivisions, it must first comply with the procedural requirements of KRS Chapter 100. It has failed to do so. A local ordinance cannot lawfully establish land use policy by ignoring or bypassing the requirements of KRS Chapter 100. *Bellefonte Land, Inc., supra.*<sup>4</sup>

Ordinance 22-004 also requires significant setbacks. Setbacks regulate locations of buildings, as well as minimum distances between structures, as contemplated in KRS 100.111. This Ordinance specifically regulates these locations and minimum distances between solar facilities and homes, schools, churches, hospitals, nursing facilities, rights of way, and cemeteries. Ordinance at 3. Again, the adoption of these types of planning and zoning provisions are controlled by KRS Chapter 100.

The Ordinance also allows the Fiscal Court to “grant a deviation in its discretion from the requirements of this [setback] subsection upon a finding that the proposed facility is designed to and, as located, would meet the goals of KRS 224.10-280, 278.010, 278.212, 278.214, 278.216,

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<sup>4</sup> A determination that Ordinance 22-004 is void *ab initio* does not mean setbacks and decommissioning requirements will not be applied to this project. If a County fails to properly adopt setbacks or decommissioning requirements, the Kentucky State Board on Electric Generation and Transmission Siting (“Siting Board”) still has authority to do so. KRS 278.704. To date, the Siting Board has always imposed setback requirements to solar projects across the state. Dogwood Corners application for his project is currently pending before the Siting Board, and Dogwood Corners proposed a 500-foot setback to non-participating residences and a decommissioning plan. The Christian County CDS Chair is a member of the Siting Board for this case and will be fully involved in Siting Board decisionmaking. The Fiscal Court has also been granted full intervention in the case as a party.



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278.218, and 278.700 to 278.716 at a distance closer than those provided in this subsection.”

This type of “deviation” is also known as a “variance” under KRS Chapter 100. The adoption of “variances” is also controlled by KRS Chapter 100. A variance “means a departure from dimensional terms of the zoning regulation pertaining to the height, width, length, or location of structures, and the size of yards and open spaces where such departure meets the requirements of KRS 100.241 to 100.247.” KRS 100.111. Only Boards of Adjustments and Planning Commissions have “power to hear and decide on applications for variances” pursuant to the standards found at KRS 100.243. KRS 100.241 and 100.203(5), (6). Again, these “deviations” are “variances,” and are controlled by KRS Chapter 100 through a comprehensive statutory scheme.

The Ordinance also calls for the mandatory construction of structures and vegetative screening. Section (3) of the Ordinance requires the construction of fences, the planting of trees, and the maintenance of trees. It requires minimum distances for newly planted trees from property lines. Again, these are the size, width, height, bulk, location of structures, and the minimum distance requirements controlled by KRS Chapter 100. KRS 100.203(1)(b) and (c).

Lastly, the Ordinance allows for legal nonconforming status of certain solar facilities “in accordance with KRS 100.253.” Ordinance at 5. This provision speaks for itself. KRS 100.253 is the statute in KRS Chapter 100 that controls nonconforming uses. Obviously, nonconforming uses are part of the KRS Chapter 100 legislative scheme.

There is no question that Ordinance No. 22-004 is a planning and zoning ordinance that should have been promulgated pursuant to KRS Chapter 100. The Fiscal Court admitted that it failed to do so. The Ordinance is void *ab initio* because compliance with and satisfaction of the procedural requirements of KRS Chapter 100 are necessary for lawfully exercising this type of

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planning and zoning activity. The conditions for the lawful adoption of the policy were not established when the Ordinance was adopted and remain unestablished.

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### III. CONCLUSION

The Fiscal Court has only authorized the regulation of subdivisions in the unincorporated areas of Christian County, nothing more. There is no express or implied power to go beyond the regulation of subdivisions. Ordinance No. 22-004 does not contemplate subdivisions. Any further planning and zoning regulation requires additional compliance with KRS Chapter 100. Regardless, Ordinance No. 22-004 is a planning and zoning ordinance, and the procedure by which it must be passed is controlled by KRS Chapter 100. The Fiscal Court has admitted that it has failed to comply with KRS Chapter 100. As such, the Ordinance is void *ab initio*. Plaintiff's Motion for Judgment on the Pleadings should be granted.

Respectfully submitted,

/s/ Randal A. Strobo

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**CERTIFICATE OF SERVICE**

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I hereby certify that on October 25, 2023, a copy of the above was filed with the Clerk of the Court using KYeCourts CourtNet 2.0 filing system, and the following were served by electronic mail to:

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COMMONWEALTH OF KENTUCKY  
CHRISTIAN CIRCUIT COURT  
CIVIL ACTION NO.: 22-CI-01010  
*Electronically Filed*

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DOGWOOD CORNERS, LLC

PLAINTIFF

VS.

CHRISTIAN COUNTY FISCAL COURT

DEFENDANT

**DEFENDANT’S SUPPLEMENTAL BRIEF IN SUPPORT OF THE VALIDITY OF  
ORDINANCE NO. 22-004**

The Defendant, Christian County Fiscal Court (“Christian County”), by and through counsel, and for their Supplemental Brief in Support of the Validity of Ordinance No. 22-004, states as follows:

Attached hereto and incorporated by reference as if set forth in full herein is the 1982 “Agreement” between Christian County, the City of Hopkinsville, the City of Pembroke, the City of Oak Grove, the City of Crofton, and the City of Lafayette. This “Agreement” makes it clear that in the unincorporated areas of Christian County – no zoning exists.

Dogwood Corners, LLC seeks to challenge the authority of the Christian Fiscal Court to adopt ordinances to conserve, preserve, and enhance natural resources, as well as regulate commerce for the protection and convenience of the public pursuant to KRS 67.083(h) and (m) respectively, and specifically, of Christian County to enact an Ordinance designed to regulate the development and operation of solar farms. Dogwood Corners, LLC filed this action based upon the erroneous assertion the Ordinance was an attempt by the Fiscal Court to carry out planning and zoning functions in contravention of KRS Chapter 100. However, the Ordinance in question is not a planning and zoning measure, but instead a valid and enforceable

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regulation of a single commercial sector. Moreover, since the Ordinance is not a planning and zoning measure, it need not comply with KRS Chapter 100 and any deviation therefrom is immaterial. Accordingly, this Court must deny the Motion for Judgment on the Pleadings.

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**I. THE ORDINANCE IS A VALID EXERCISE OF CHRISTIAN COUNTY’S POWER TO CONSERVE NATURAL RESOURCES AND REGULATE COMMERCE AND IS NOT A PLANNING AND ZONING MEASURE.**

**A. Christian County was not performing a Planning and Zoning Function by enacting the Ordinance.**

The gravamen of Dogwood Corners, LLC’s position in this matter is that Christian County enacted a planning and zoning measure in violation of the requirements of KRS Chapter 100. Among a number of specific powers granted by KRS 67.083, county fiscal courts are granted the power to enact ordinances in the performance of planning and zoning functions. KRS 67.083(3)(k). Moreover, it is universally recognized that such planning and zoning functions must be performed in strict accordance with KRS Chapter 100, which requires adoption of a comprehensive plan, an appointment of a planning and zoning commission, among other requirements. It is almost beyond argument that if Christian County were indeed performing a planning and zoning function by enacting the Ordinance, the measure would fail for noncompliance with KRS Chapter 100.

However, when the Ordinance is properly characterized according to its stated purpose and its intended effects – to conserve, preserve, and enhance natural resources, as well as regulate the development and operation of solar farms in Christian County, Kentucky – KRS Chapter 100 is patently inapplicable in determining whether the Ordinance is valid. Along with the power to perform planning and zoning functions, county fiscal courts are also empowered to conserve, preserve, and enhance natural resources and regulate commerce for the protection

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and convenience of the public. KRS 67.083(h)(m). It was for these purposes – not planning and zoning – which the validity of the Ordinance must be adjudged. As stated above, Christian County does not have any zoning ordinance in the unincorporated areas of the County.

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Kentucky law provides this Court clear direction in assessing whether the Ordinance is an attempt to conserve natural resources and regulate commerce, rather than to perform planning and zoning functions. While there is no controlling definition of what is or is not a measure regulating commerce, there are clear statements of what is a planning and zoning measure. When compared to those standards, the Ordinance is plainly not a planning and zoning measure.

For example, KRS 100.111(14) states:

"Planning operations" means the formulating of plans for the physical development and social and economic well-being of a planning unit, and the formulating of proposals for means of implementing the plans;

This definition of ‘planning operations’ is critical, because only when the fiscal court is engaging in ‘planning operations’ must it comply with the provisions in KRS Chapter 100. There can be no serious contention the Ordinance constitutes ‘planning operations’ under KRS 100.111(14), or any other standard. The Ordinance deals with the regulation of a single industry in Christian County, Kentucky. It does nothing to ‘plan for the physical development and social and economic wellbeing’ of the county. Nor does it resemble any proposal for implementing plans which affect the physical development or social or economic wellbeing of the county.

The fact the Ordinance is not a planning operation under KRS 100.111(14) stands as strong evidence that it is not a planning and zoning measure at all, but rather a measure

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designed to regulate the development and operation of solar farms in Christian County, Kentucky.

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Kentucky case law also provides a definition of planning and zoning under which the Ordinance would clearly be excluded. In Seligman v. Belknap, 155 S.W.2d 735, 736 (Ky. 1941), Kentucky's highest court stated:

“Planning” and “Zoning” are closely related, for, in a general way, planning embraces zoning and zoning may not entirely exclude planning. However, they do not cover identical fields of municipal endeavor for the protection of the common interest and the promotion of general welfare. Broadly speaking, “planning” connotes the systematic development of an area with particular reference to the location, character and extent of streets, squares, parks and to kindred mapping and charting. “Zoning” relates to the regulation of the use of property-to structural and architectural designs of buildings; also the character of use to which the property or the buildings within classified or designated districts may be put.

(emphasis added).

Under this standard, there is no fair construction of the Ordinance which would render it either a ‘planning’ or a ‘zoning’ measure. Nothing about the Ordinance amounts to an attempt to systematically develop an area with reference to streets, squares, parks, or mapping and charting, and nothing about the Ordinance relates to the structural or architectural designs of buildings or the type of use to which property or buildings may be put.

Dogwood Corners, LLC has argued they do not have to comply with the Ordinance's requirements of minimum setbacks as the Ordinance is invalid for the County's failure to follow the strict requirements of KRS Chapter 100 in not conducting a hearing on or recommendation of the planning commission. However, importantly, the Ordinance does nothing to tell landowners the specific uses to which they may or may not use their land. Such

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an ordinance might reasonably be characterized as a zoning regulation; this Ordinance, however, is of a distinctly different variety.

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Rather than restrict landowners throughout Christian County to particular uses based upon a classified or designated district within which that land is found, the Ordinance simply governs the guidelines within which all solar farms in Christian County must be developed and operated – regardless of where the solar farm is located. The Ordinance does not tell any landowner or developer that she on it may not operate a solar farm; it simply regulates how she on it may operate that facility if that is the use to which she chooses to put her land.

This conclusion is consistent with American Sign Corp. v. Fowler, 276 S.W.2d 651 (Ky. 1955), which clearly demonstrates the salient distinction at issue in this case: “Zoning has as one of its main purposes the regulation of the *use* of property. [] This means regulation of the purpose or object of the use, rather than the mere conditions or circumstances of the use.” Id. at 654. (emphasis in original) (citing Seligman v. Belknap, 155 S.W.2d 735 (Ky. 1941).

Examining the Ordinance in light of these standards, it cannot be considered a planning and zoning measure. American Sign makes clear a zoning ordinance is concerned with dictating what uses can and cannot be made of property, not with dictating the conditions or circumstances of a particular use. Logically, if an ordinance *does* dictate the conditions and circumstances for a particular land use, that ordinance must not be a planning and zoning regulation. In fact, such an ordinance would almost necessarily be a commercial regulation.

As stated, Kentucky law does not provide a clear line of demarcation between those measures which are planning and zoning functions and those which are commercial regulation functions. However, when the Ordinance is examined as a whole, as required by Combs v.



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Hubb Coal Corp., 934 S.W.2d 2500 (Ky. 1996) and a number of cases before it, there can be no serious claim that the Ordinance attempts to fulfill a planning and zoning function.

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First, the Ordinance states that its purposes are to conserve and preserve the natural resources of Christian County and to regulate the development of solar farms. By contrast, the authority cited above makes clear that the purpose of planning and zoning ordinances is to coordinate the physical development of a particular area for the social and economic welfare of that area, with particular emphasis on dictating the specific uses to which property may be put. The Ordinance's purpose is not consistent with those planning and zoning ordinances because it is not a planning and zoning ordinance.

Second, the Ordinance does not prohibit or eliminate any property use whatsoever. Like any other landowner in Christian County, Dogwood Corners, LLC is still free to use its property as a solar energy production facility – provided they do so consistent with the conditions and circumstances set forth in the Ordinance. By contrast, a true planning and zoning ordinance would, as described in American Sign, regulate the purposes or uses for the land. The Ordinance instead simply regulates the 'conditions or circumstances of the use' of the property, suggesting it is a measure designed to regulate commerce rather than to perform a planning and zoning function.

Finally, the fact that the Ordinance may employ one of the same mechanisms as a planning and zoning ordinance does not mark it as a planning and zoning ordinance. Specifically, Kentucky law permits zoning regulations to be adopted for the exclusive purposes of regulating activity on land, regulating the size and location of structures, and regulating open spaces to be left unoccupied and minimum distances between buildings and other structures. See KRS 100.203(1)(a)-(c). If the Ordinance did these things and nothing more,

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perhaps an argument could be made that it was a zoning ordinance, too. However, the Ordinance does much more than simply regulate how buildings are placed on the land. Among other things, the Ordinance requires minimum setbacks, screening, and decommissioning for solar energy system installations in Christian County, Kentucky. These provisions are designed to regulate the conditions and circumstances of property use, and it is these provisions that distinguish the Ordinance from a typical planning and zoning ordinance under American Sign.

Notwithstanding Dogwood Corners, LLC's assertions to the contrary, the Ordinance is plainly not an effort to perform the planning and zoning function because it is not characterized by the traditional purposes and goals of planning and zoning – the concurrent, coordinated development of community and private facilities. Therefore, this Court must deny the Motion for Judgment on the Pleadings.

**B. Christian County acted within its authority.**

In construing the Ordinance, this Court's function is to "ascertain and give effect to the intent" of the legislative body. Beckham v. Board of Educ. of Jefferson County, 873 S.W.2d 575, 577 (Ky. 1994). To ascertain the intent of the legislative body which enacted the Ordinance, this Court is "to look to the 'words employed in enacting the statute, rather than surmising what may have been intended but was not expressed.'" Owensboro Cablevision, Inc. v. Libs, 863 S.W.2d 331, 333 (Ky. App. 1993) (quoting Kentucky Ass'n of Chiropractors, Inc. v. Jefferson County Medical Society, 549 S.W.2d 817, 821 (1977)).

To the extent Christian County has clearly stated its intentions and expressly characterized its acts, this Court should inquire no further. Indeed, on its face, the Ordinance

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clearly has its origins in at least three functions Christian County is authorized to perform under KRS 67.083(3).

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The Ordinance has its origins in these three enumerated functions. For instance, the Ordinance is enacted to regulate not only setbacks, but also decommissioning, screening, and other activities of contemplated solar facilities. Those are precisely the sort of activities in which the County has a governmental interest to conserve, preserve, and enhance natural resources, including the soil, water, vegetation, and wildlife. Christian County was clearly exercising its authority under KRS 67.083(3)(h). Finally, because the Fiscal Court has expressly stated that it was acting to regulate the development of solar energy systems, the Ordinance is a clear exercise of the powers granted to Christian County in KRS 67.083(3)(m).

The fact that Christian County founded its action in these three statutory sections is of significant importance. The standards for statutory construction which govern this Court's review of the Ordinance require it to afford significant weight to the way in which Christian County characterized its own actions. Indeed, it is well settled that the true intention of the legislative body, not the literal language employed, is the law. See Asher v. Stacy, 185 S.W.2d 958 (Ky. 1945).

Christian County's actions are not ordinarily subject to constitutional attack unless it is shown that Christian County acted beyond the authority granted to it by the legislature. See generally Jefferson County ex rel. Grauman v. Jefferson County Fiscal Court, 118 S.W.2d 181 (Ky. 1938). Christian County is given express authority to conserve natural resources and to regulate commerce for the protection and convenience of the public. KRS 67.083(3)(h) and (m). It was both the express and apparent intent of Christian County in enacting the ordinance to exercise these functions. Moreover, Christian County's actions fall squarely within these

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enumerated powers. Accordingly, Dogwood Corners, LLC has not shown that Christian County acted in excess of its authority, and this Court must deny the Motion for Judgment on the Pleadings.

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This 25th day of October, 2023.

*/s/ Harold Mac Johns*

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**CERTIFICATE OF SERVICE**

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I hereby certify that on October 25, 2023, I electronically filed the foregoing with the clerk of the court by using the CourtNet system, which will notify the following:

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*/s/ Harold Mac Johns*  
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CONTRACTUAL AGREEMENT

To Establish a Joint Planning Commission for the County of Christian and Cities of Hopkinsville, Pembroke, Oak Grove, LaFayette and Crofton, Kentucky.

WHEREAS: Pursuant to Kentucky Revised Statutes, Chapter 100.127, "All agreements for joint planning units shall be in writing and shall describe the boundaries of the area involved, and shall contain all details which are necessary for the establishment and administration of the planning unit in regard to planning commission organization, preparation of plans and aids to plan implementation."

WHEREAS: Pursuant to Kentucky Revised Statutes, Chapter 100.127..."Approval of the agreement shall be by regulation and the agreement shall be executed by the parties to the agreement.."

WHEREAS: Pursuant to Kentucky Revised Statutes, Chapter 100.127..."Combined planning operations shall be jointly financed, and the agreement shall state the method of proration of financial support..."

WHEREAS: The following table of contents outlines the requirements to K.R.S. 100 in establishing this contractual agreement.

- I. Duties, goals, capabilities of preparing a comprehensive plan and aiding in its implementation.
- II. Boundaries of the area involved.
- III. By-Laws of Planning Commission, membership.
- IV. Method of financing joint commission.
- V. Official signatures of member city(s) and County.

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THEREFORE: Let it be resolved that the following contents, 590  
 represent the establishment, order and operation  
 of the joint planning unit to be known as the 03270-6  
 Hopkinsville-Christian County Planning Commission  
 in accordance with Kentucky Revised Statutes,  
 Chapter 100.

DUTIES, GOALS, CAPABILITIES OF PREPARING A COMPREHENSIVE  
 PLAN AND AIDING IN ITS IMPLEMENTATION

Duties: The Planning Commission, created by local ordinance, is made up of a mixture of elected and appointed citizens. However, all are to serve the interests of the entire citizenry of our communities. As a tool to be referenced in their decision making process, the Community's Comprehensive Plan serves as "the general plan of the community which states its official statement of major policies concerning desirable future physical development."

Goals: Therefore, it should be the goal of the Planning Commission to act as a conduit for the citizens, and to aid in the desirable future physical development of our communities.

Capabilities of Preparing the Comprehensive Plan: This is where the staff hired by the Planning Commission come into play. It shall be the job of the staff to provide the necessary technical guidance needed by the Commission to weigh its decisions based upon both the Communities objectives, reflected in a Comprehensive Plan, and the proposal being considered. Therefore, as a support staff, it should be their job to research and offer recommendation, not to misdirect or take the lead on issues opposing the Communities major goals and objectives.

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Aiding in the Comprehensive Plan's Implementation:

The job is not over once the Plan is prepared, reviewed and amended by both citizen and legislative bodies; it is just the beginning.

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It now becomes the job of the entire Community to transform the plans into reality; into bricks and mortar. The degree to which these plans become real can be measured by the participation and continued interest shown by our total Community.

Government, and its public agencies, can take the lead in implementation of the Plan through adoption, referral, capital improvement programming, and Plan updating.

However, it takes a unique combination of public/private cooperation to make the plan real in our Communities. Without private, self-imposed actions to see to it that the Plan is followed, we will fail.

BOUNDARIES OF THE AREAS INVOLVED

The physical boundaries of the Joint City/County Planning Commission shall be determined by it's membership cities and County participation. As the boundaries of each member city grow or as membership fluctuate, so to will the boundaries of this Commissions jurisdiction change.

Physical Setting:

Christian County is located in the South-western part of Kentucky, with the Southern boundary formed by the Tennessee state line, its Eastern boundary formed by the County of Todd, its Northern boundary formed by Muhlenberg & Hopkins Counties and its Western boundary's formed by Caldwell and Trigg Counties.



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The five incorporated areas party to this contract establishing a Joint Planning Commission are:

- Crofton: Located eleven miles North of the County seat of Christian County on Hwy. 41. 03270-6  
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- Pembroke: Located eight miles southeast of the County seat of Christian County on Hwy. 41.
- Lafayette: Located thirteen miles southwest of the County seat of Christian County on Hwy. 107.
- Oak Grove: Located ten miles South of the County seat of Christian County on Hwy. 41A.
- Hopkinsville: The County seat of Christian County, located at the geographical center of the County.

The County of Christian, party to this contract, as governed by the Fiscal Court of Christian County, Kentucky.

BY-LAWS OF THE HOPKINSVILLE-CHRISTIAN COUNTY PLANNING COMMISSION

ARTICLE I

OBJECTIVES

The objectives and purpose of the Hopkinsville-Christian County Planning Commission are those set forth in the Kentucky Revised Statutes, Chapter 100, and amendments and supplements thereto, and those powers and duties delegated to the Commission by the Common Council of the City of Hopkinsville, the Cities of Pembroke, Crofton, LaFayette, Oak Grove, and the Fiscal Court of the County of Christian by Ordinances.

ARTICLE II

OFFICERS AND THEIR DUTIES

SECTION 1.

The officers of the Commission shall consist of a Chairman, Vice-Chairman, and a Secretary.

SECTION 2.

The Chairman shall be the presiding officer at all meetings and hearings of the Commission and shall perform

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his duties as described by proper parliamentary procedure.

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SECTION 3.

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Under parliamentary procedure the Chairman's general duties are: to open and call the meeting to order; to announce the business to be conducted; to recognize persons entitled to the floor; to state and put to vote all questions which are regularly moved or necessarily rise in the course of proceedings and to announce the result of the vote; to vote only to break a tie vote and to refrain from debate on any question to be voted on; to protect the Commission from unnecessary or frivolous motions by not recognizing them; to speed up proceedings as much as possible; to require order and sincerity in meetings; to inform the group present to a point of order or a practice pertinent to pending business; and to authenticate, by his signature when necessary, all acts, orders, and proceedings of the Commission.

SECTION 4.

The Chairman shall be one of the citizen members of the Commission. He/she shall conduct business only for the benefit of the Commission involved and shall reflect no personal prejudice in any matter.

SECTION 5.

The Vice-Chairman shall assist the Chairman in any way possible subject to the Chairman's request. Upon the absence of the Chairman, the Vice-Chairman shall automatically become the presiding officer of the Commission.

SECTION 6.

The duties of the Secretary are as follows: to keep records and minutes of each meeting or hearing of the Commission; to keep roll of the members and to call this roll when required; to notify officers and committees of their appointment and to furnish committees with all papers referred to them; to record the number of votes for and against each question put to vote; to indicate any absences or disqualifications from voting when

a question is put to vote, and other duties which may be assigned to him/her.

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ARTICLE III

NOMINATION AND ELECTION OF OFFICERS

SECTION 1.

Nominations of officers shall be made from citizen members at the annual organization meeting which shall be held on the fourth Monday of March in each year. Nominations of citizen members only shall be accepted.

SECTION 2.

Election of officers shall take place immediately following nomination. Voting shall take place in one of the following ways: voice; show of hands; rising; balloting; roll call; or general consent.

SECTION 3.

A candidate receiving a majority vote of the entire membership of the Commission shall be declared elected and shall serve a term of one (1) year or until his successor shall take office. Officers are eligible for re-election.

SECTION 4.

Vacancies in unexpired terms of office shall be filled immediately by regular election procedure.

ARTICLE IV

MEMBERSHIP

SECTION 1.

If vacancies in membership are not filled within sixty (60) days by the appropriate appointing authority, then the Commission shall fill the vacancy. (K.R.S. 100.147)

SECTION 2.

Membership shall exist for each local government entity participating in the Joint Planning Commission, as outlined

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below:

Pursuant to K.R.S. 100.141, the Mayor of each participating City shall be entitled to one non-elected citizen member and the County Judge/Executive of the participating county shall appoint one non-elected citizen member; these appointments shall be with the approval of their respective legislative bodies.

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Pursuant to K.R.S. 100.133, the remaining membership shall be determined by the following functions which the participant City(s)/County have adopted.

Christian County: Extraterritorial jurisdiction exercised for: Subdivision Regulations--1 citizen member.

An elected representative of Fiscal Court shall also be appointed.

City of Hopkinsville: Extraterritorial jurisdiction exercised for: Subdivision Regulations - 1 citizen member, City Zoning Ordinance - 1 citizen member.

An elected representative of the Common Council, City of Hopkinsville, shall be appointed.

A citizen member shall be appointed to represent the City of Hopkinsville as the County seat of Christian County.

At least two-thirds (2/3) of the members of every planning commission shall be citizen members. (K.R.S. 100.133(2))

The term of office of all elected public officials appointed to the Planning Commission shall be the same as their official tenure in office. (K.R.S. 100.143)

The term of office of members first appointed shall be staggered so that a proportionate number serve one (1), two (2), three (3), and four (4) years respectively, and later appointment

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or re-appointments shall continue the staggered pattern.

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(K.R.S. 100.143)

The pattern for staggering the terms of the members **03270-6**  
first appointed shall be according to their present (1980) **596**  
population as follows:

<u>Member</u>	<u>(1980) Population</u>	<u>Appointment #'s</u>	<u>Years Appointed Initially</u>
Christian County	35,853	1 Citizen-----	2 years
		1 Citizen-----	3 years
		1 Elected-----	4 years
Hopkinsville	27,318	1 Citizen-----	1 year
		1 Citizen-----	2 years
		1 Citizen-----	3 years
		1 Citizen-----	4 years
		1 Elected-----	4 years
Oak Grove	2,088	1 Citizen-----	4 years
Crofton	823	1 Citizen-----	3 years
Pembroke	636	1 Citizen-----	2 years
LaFayette	160	1 Citizen-----	1 year

After the initial appointments have been served, each appointment shall be for four (4) years.

Vacancies on the Planning Commission, shall be filled within sixty (60) days by the appropriate appointing authority. If the authority fails to act within that time, the Planning Commission shall fill the vacancy. (K.R.S. 100.147)

All members of the Planning Commission shall, before entering upon their duties, qualify by taking the oath of office prescribed by Section 228 of the Constitution of the Commonwealth of Kentucky before any Judge, County Judge/ Executive, Notary Public, Clerk of a court, or Justice of the Peace within the district or county in which he/she resides. (K.R.S. 100.151)

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Compensation for expenses for citizen members serving on the Commission shall be set at twenty-five (25) dollars per meeting. Reimbursement for expenses may be authorized for public officials and employees of participating cities and counties who are members of the Planning Commission; reimbursement shall be based upon the documented travel expenses incurred in Planning Commission activities and petitioned by the member to the Secretary/Treasurer of the Planning Commission. No compensation shall be received by any elected official serving on the Planning Commission. (K.R.S. 100.153)

Any member of a Planning Commission may be removed by the appropriate appointing authority for inefficiency, neglect of duty, malfeasance, or conflict of interest. The procedures to be followed if this authority is to be exercised, shall be in strict compliance with Kentucky Revised Statutes, Chapter 100.157.

It shall be the duty and responsibility of each Commission member to attend all regular meetings. If a Commission member misses or is absent from four (4) regular meetings in one calendar year, the Commission may ask for his/her resignation.

ARTICLE V  
MEETINGS

SECTION 1.

Meetings shall be held on the fourth Monday of the month at 7:00 P.M. at the Hopkinsville Municipal Building unless otherwise agreed upon by a majority of the membership.

SECTION 2.

A quorum of a meeting is such a number as must be present in order that business can be legally transacted. The quorum refers to the number present, not the number voting.

SECTION 3.

A simple majority of the total number of members named and appointed to the Commission as established by this agreement shall constitute a quorum.

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SECTION 4.

Special meetings may be called by the Chairman. The notice of such a meeting shall specify the purposes of such a meeting and no other business may be considered. The Chairman shall notify all members of the Commission by oral or written notice not less than seven (7) days in advance of such special meeting. This notice shall contain the date, time, place, and subject of discussion.

SECTION 5.

All meetings at which official action is taken shall be open to the general public.

ARTICLE VI  
ORDER OF BUSINESS

SECTION 1.

The order of business at regular meetings shall be:

- (a) Roll Call
- (b) Reading of Minutes of Previous Meeting; and adoption
- (c) Current Business
- (d) Old and Unfinished Business
- (e) New Business
- (f) Adjournment

ARTICLE VII

TRANSACTION OF BUSINESS

SECTION 1.

Any member of the Commission who has any financial interest in any question called to vote shall notify the Chairman of such interest and thus disqualify him/her self from discussing or voting on the matter. It shall be the responsibility of each member to determine personal conflicts of interest.

SECTION 2.

Any member of the Commission who fails to notify the Chairman of his financial interest in a question called to

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vote shall have his voting qualification judged by the Commission as to his amount of interest in the question and his right to vote on it. A simple majority votes shall determine this question if raised by the Chairman.

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SECTION 3.

Any member of the Commission found to have any financial interest in a question called to vote shall not be considered in the quorum count prior to voting.

SECTION 4.

To transact any official business, a simple majority vote of the membership present shall be necessary except as otherwise provided herein. Voting shall take place in one of the following ways: voice; show of hands; rising; balloting or roll call. The method of voting shall be at the discretion of the presiding officer.

ARTICLE VIII

EMPLOYEES

SECTION 1.

The Commission may arrange for a member of its staff to assist the Secretary in the performance of his duties and perform such other duties as may be assigned to him by the Chairman.

SECTION 2.

The Commission may employ a staff to aid in the work of the Commission. Such employment shall be approved by a majority of the Commission membership.

ARTICLE IX

HEARINGS

SECTION 1.

In addition to those required by law, the Commission may hold public hearings at its discretion when it is apparent that such hearings will be in the public interest.



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SECTION 2.

Notice of such hearings shall be distributed to the 600 "publication area" as defined in the Kentucky Revised Statutes, 63270-6 Chapter 424.110. Notice shall be published at least once but may be published two or more times, provided that one publication occur not less than seven (7) days nor more than twenty-one (21) days before the occurrence of the hearing.

SECTION 3.

The matter before the Commission shall be presented in summary by the Chairman or a designated member of the Commission and/or staff and parties in interest shall have privilege on the floor. No record of statement shall be recorded or sworn to as evidence for any court of law without notice to the parties.

SECTION 4.

A record shall be kept of those speaking before the Commission by the Secretary.

SECTION 5.

The Commission may appoint one or more of its members to act as a hearing examiner or examiners.

ARTICLE X.

AMENDMENTS

SECTION 1.

These by-laws may be amended by a vote of a simple majority of the total membership of the Commission.

Adopted as Amended by: Hopkinsville-Christian County Planning Commission

*Lynn Lewis*  
Chairman

*8.26.22*  
Date

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METHOD OF FINANCING JOINT COMMISSION

The method of financing shall be by appropriation from 601 City(s) and County member participants. A yearly budget 03270-6 and program of work shall be prepared each fiscal year by the Planning Commission staff, outlining the functions to be performed by the Commission and the funding necessary to assure said program of work. This proposed budget shall be presented to each member contributor for their approval. The prorata share of the budget shall be assessed to contributors based upon the most current population of each City(s) and/or County.

SIGNATURE RECORD

City of Hopkinsville

Notary

*Mrs. Sherrill L. Jeffers*

Mrs. Sherrill L. Jeffers  
Mayor, City of Hopkinsville

*April 6, 1982*

Date

by Ordinance Number MO #3-82

Publicly read for the first time: 6 April 1982

Publicly read for the second time: \_\_\_\_\_

Passed by the Common Council on 6 April '82 by a date

vote of 12-0

County of Christian

Fiscal Court:

*M. Dianne Ginn*

*Frank Gary*

Notary

Mr. Frank Gary  
Co. Judge/Executive  
Christian County, KY

4-27-82

Date

By Fiscal Court Order Number Book #17 Page #

Publicly read on 4-13-82

Publicly read on 4-27-82

Passed by Fiscal Court on 4-27-82 by a vote date

of 8-0

NOT ORIGINAL

DOCUMENT

PM



City of Oak Grove

Becky Sutttrull

Notary

Raymond J. Elliott

Mr. Raymond J. Elliott  
Mayor, City of Oak Grove

12/20/2023 03:21:36

602-6  
05270-6

7-12-82

Date

by Ordinance Number \_\_\_\_\_.

Publicly read on 7-12-82.

Publicly read on 8-9-82.

Passed by the City Council on 8-9-82 by a  
date  
vote of 6-0.



City of Crofton

Barbara S. Marlan

Notary

Jimmy Grace

Mr. Jimmy Grace  
Mayor, City of Crofton

Sept 10, 1982

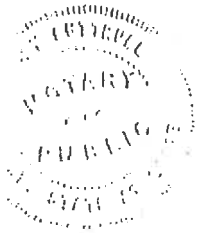
Date

by Ordinance Number \_\_\_\_\_.

Publicly read on March 19, 1982.

Publicly read on April 2, 1982.

Passed by the City Council on August 5, 1982 by a  
date  
vote of 4-0.



City of Pembroke

Becky Sutttrull

Notary

Ralph Combs

Mr. Ralph Combs  
Mayor, City of Pembroke

July 2 '82

Date

by Ordinance Number 8-16-82-1.

Publicly read on 8-16-82.

Publicly read on \_\_\_\_\_.

Passed by the City Commission on 8-16-82 by a vote  
date  
of 3-0.

NOT ORIGINAL

DOCUMENT

PM

City of LaFayette

*Noble Noel, Jr.*

12/20/2023 03:21:36

*Becky Holloway*

Mr. Noble Noel, Jr.  
Mayor, City of LaFayette

603

Notary

03270-6

Date

*11/15/82*

by Ordinance Number \_\_\_\_\_.

Publicly read on *8-2-82*.

Publicly read on *8-3-82*.

Passed by the Board of Trustees on *8- -82* by  
date

a vote of *4-0*.

STATE OF KENTUCKY, CHRISTIAN COUNTY -- SCT.

I, John T. Robertson, Christian County Clerk, do certify that the  
foregoing Contractual Agreement from Christian County  
to City of Hopkinsville et al was this day produced  
to me in my office, with the foregoing certificate of acknowledgement thereon  
endorsed.

Whereupon the same was, this day at 11:12 o'clock AM filed, ordered  
to record, indexed and with the foregoing and this certificate has been duly recorded  
in my office. This NOV 22, 1982.

*John T. Robertson*, Clerk

NOV 15

Case No. 2023-00246  
Dogwood Corners LLC  
Response to Staff's Second Request for Information

**STAFF DR 2-8:**

Refer to Dogwood Corners response to Staff's First Request, Item 34 and Item 35. Confirm that the two spreadsheet tables provided in response to these questions show distances to the new substation location, not the substation location originally anticipated in the Application and Site Assessment Report. If these distances are still based on the originally planned substation location, update the two tables as necessary to reflect the new substation location.

**Response:** Please refer to the attached, updated spreadsheets showing distances to the new substation location for both residential and non-residential structures within 2,000 feet of the Project boundary line. The distances in this spreadsheet also reflect associated minor changes to one inverter, panel and fence distances.

**Witness:** Megan Stahl

Number	Structure Type	Landowner	Parcel ID	Address	Distance to Closest Project Fence (ft)	Distance to Closest Panel (ft)	Distance to Closest Inverter (ft)	Distance to Substation (ft)
1	Church	Dogwood Christian Church	135-00 00 032.00	5005 DOGWOOD KELLY RD	784.2	851.3	1,300.2	4,375.9
2	Church	New Zion Baptist Church	135-00 00 054.00	7410 GREENVILLE RD	1,904.6	1,938.8	2,724.1	7,391.1
3	Business	LIVINGSTON, WILLIAM J	153-00 00 020.00	8485 GREENVILLE RD	75.0	140.1	468.1	4,232.5
4	Church	NEW, BARREN CHURCH (Structure 2)	153-00 00 030.00	5012 DOGWOOD KELLY RD	343.4	375.7	749.6	4,218.6
5	Church	NEW, BARREN CHURCH (Structure 1)	153-00 00 030.00	5012 DOGWOOD KELLY RD	505.8	541.4	930.4	4,347.1



Case No. 2023-00246  
Dogwood Corners LLC  
Response to Staff's Second Request for Information

**STAFF DR 2-9:**

Refer to the Site Assessment Report, Appendix D, Noise Assessment pages 1 and 7.

Update the conclusion that the distance from the substation and transformers is so far away from the Sound Receptor 95 there will not be additional operational noise based upon the new substation location.

**Response:** The proposed substation has been relocated from the west side of the project area to the east side of the project area. As such, receptor R35 is now the closest receptor to the proposed substation location, approximately 1,100 feet away. The substation will not cause an increase in background noise levels at the closest receptor (R35).

**Witness:** Shane Kelley, Stantec Consulting Services, Inc.