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

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

RESPONSE TO DEFICIENCY LETTER

Dogwood Corners LLC ("Dogwood Corners"), by counsel, hereby provides its response to the Siting Board Staff's letter issued September 7, 2023, in which it suggests that the application in this matter had a filing deficiency. Dogwood Corners respectfully requests the Siting Board Staff reconsider its determination that the application materials do not meet the minimum filing requirements for an application.

I. The filed application materials meet the minimum statutory requirements.

In its letter, the Siting Board Staff indicated that there was a deficiency in the application materials submitted by Dogwood Corners based on KRS 278.706(2)(d). The Siting Board Staff stated: "Certificate of Compliance does not acknowledge the project will be in compliance with the Christian County ordinance that is in effect on the date the application was filed."

KRS 278.706(2)(d) merely requires the following:

> A statement certifying that the proposed plant will be in compliance with all local ordinances and regulations concerning noise control and with any local planning and zoning ordinances. The statement shall also disclose setback requirements established by the planning and zoning commission as provided under KRS 278.704(3).

Dogwood Corners' Certificate of Compliance, which was attached to the application as Attachment C, meets the requirement of the first sentence of KRS 278.706(2)(d). The Certificate of Compliance states:

> [T]he proposed facility as planned will be in compliance with any and all local ordinances and regulations concerning noise control and will also be in compliance with any and all applicable local planning and zoning ordinances that were valid and existed on the date the application is filed, pursuant to KRS 278.710(1)(e).

This statement is consistent with the minimum filing requirement set forth in KRS 278.706(2)(d).[1] To the extent that the Siting Board, its Staff, and its consultant have questions about how the project will be in compliance with any and all applicable local planning and zoning ordinances, they may ask questions of Dogwood Corners during the processing of the case. But Dogwood Corners submits that the Siting Board Staff should deem the filed materials to meet the minimum filing requirements of the statute.

II. Christian County's admission demonstrates that the purported ordinance does not meet the requirement of KRS 278.706(2)(d).

As stated in Section 4 of Dogwood Corners' application, the document identified as Christian County Ordinance No. 22-004 is void *ab initio* because the County failed to follow the strict requirements of KRS Chapter 100. In fact, Christian County readily admits that there was no hearing on or recommendation by the planning commission, as required by KRS 100.207.[2] This supports Dogwood Corners' position that there is no valid ordinance with setback requirements for Christian County.

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[1] As indicated in the Dogwood Corners' Response filed on September 6, there are no setback requirements established by the planning and zoning commission, and thus, no setbacks were required to be disclosed. Dogwood Corners nevertheless submitted a copy of a purported ordinance, which is invalid.

[2] *See* Complaint at ¶¶ 17-18 (attached hereto as Exhibit A); Answer at ¶ 7 (attached hereto as Exhibit B)(admitting the allegations of paragraphs 17 and 18 of the Complaint.

Even if one were to accept Christian County's position with regard to the purported ordinance, there are no "local planning and zoning ordinances" by which KRS 278.706(2)(d) would apply. Christian County has argued multiple times that the purported ordinance is not related to planning and zoning. In its Answer in Christian Circuit Case No. 22-CI-1010, it stated that the purported ordinance "is not a zoning ordinance."[3] In its Response to Dogwood Corners' Motion for Judgment on the Pleadings, it stated: "Christian County Fiscal Court did not adopt this ordinance pursuant to planning and zoning statues of KRS Chapter 100."[4] The County repeated this statement in its subsequent Brief.[5]

As stated above, the filing requirement in KRS 278.706(2)(d) mandates a certification that the project will be in compliance "with any local ***planning and zoning*** ordinances." (Emphasis added.) Under either Dogwood Corners' or Christian County's interpretation of the statute, there are no applicable local planning and zoning ordinances. This is one of several reasons why Dogwood Corners' statement in its certification that "the proposed facility as planned will be in compliance with any and all local ordinances and regulations concerning noise control and will also be in compliance with any and all applicable local planning and zoning ordinances that were valid and existed on the date the application is filed" is accurate.

III. Conclusion

For the foregoing reasons, Dogwood Corners respectfully requests the Siting Board Staff reconsider its deficiency determination and find that the application materials filed in this case meet the minimum filing requirements.

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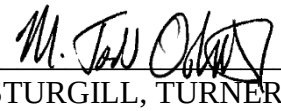
[3] *See* Answer at ¶ 5.
[4] *See* Defendant's Response to Plaintiff's Motion for Judgment on the Pleadings at 3. The entire set of briefing on the Motion for Judgment on the Pleadings is collectively attached hereto as Exhibit C.
[5] *See* Defendant's Brief in Support of the Validity of Ordinance No. 22-004 at 3.

Respectfully submitted,



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ATTORNEYS FOR DOGWOOD CORNERS, LLC

COMMONWEALTH OF KENTUCKY
CHRISTIAN CIRCUIT COURT
CIVIL ACTION NO. 22-CI-_____
(*Electronically Filed)*

DOGWOOD CORNERS LLC PLAINTIFFS

v.

CHRISTIAN COUNTY FISCAL COURT,

DEFENDANT

PETITION FOR DECLARATORY JUDGMENT

Comes Plaintiff Dogwood Corners LLC, by and through counsel, and for its Petition for Declaratory Judgment in this civil action pursuant to KRS 418.040, et seq., states as follows:

The Parties

1. Plaintiff Dogwood Corners LLC ("Dogwood Corners") is a limited liability company organized under the laws of Delaware and authorized to do business in Kentucky. Dogwood Corners' principal place of business is 106 Isabella Street Suite 400, Pittsburgh, Pennsylvania 15212.

2. Defendant Christian County Fiscal Court is Christian County's legislative body, as defined by KRS 100.111. Its principal place of business is 150 North Provident Way, Hopkinsville, Kentucky 42240.

Jurisdiction and Venue

3. This Court has subject matter jurisdiction over Dogwood Corners' action seeking declaratory judgment against Defendant under KRS 418.040, *et seq*. and CR 57 as there is an actual, justifiable controversy between the parties.

4. Venue is proper in this court because all of the events giving rise to this action occurred in Christian County, Kentucky.

Pertinent Facts

5. Dogwood Corners seeks to construct a solar energy generating facility on real property located in Christian County.

6. Pursuant to KRS 67.083, a fiscal court is authorized to adopt ordinances related to "Planning, zoning, and subdivision control according to the provisions of KRS Chapter 100."

7. On November 29, 2022, the Christian County Fiscal Court purported to adopt an Ordinance Relating to the Establishment Of Minimum Setback, Screening, and Decommissioning Requirements For Solar Energy System Installations in Christian County, Kentucky ("Purported Ordinance"). A draft copy of this Purported Ordinance is attached hereto as Exhibit A.

8. The Purported Ordinance attempts to regulate land use in Christian County for only Solar Energy Systems as defined in the Purported Ordinance.

9. Section 2 of the Purported Ordinance attempts to set minimum setback requirements for Solar Energy Systems.

10. Section 2 of the Purported Ordinance attempts to authorize the Fiscal Court to grant a deviation from the setback requirements if certain findings are made.

11. Section 3 of the Purported Ordinance attempts to require minimum site controls and landscape buffering for Solar Energy Systems.

12. Section 4 of the Purported Ordinance attempts to establish certain decommissioning requirements.

13. The Purported Ordinance is a zoning regulation, as defined in KRS 100.203, which includes regulations related to "[m]inimum or maximum areas or percentages of areas, courts,

yards, or other open spaces or bodies of water which are to be left unoccupied, and minimum distance requirements between buildings or other structures."

14. Pursuant to KRS 67.080, in order to adopt a valid zoning regulation, Christian County Fiscal Court must follow the procedure set forth in KRS 100.207.

15. KRS 100.207 states that, prior to the adoption of a zoning regulation by a legislative body, "the planning commission shall prepare the text and map of all zoning regulations and shall hold at least one (1) public hearing." After the planning commission's hearing, "the planning commission shall submit, along with their recommendation, a copy of the approved zoning regulation text" to the Fiscal Court.

16. Christian County's planning commission—known as Community & Development Services ("CDS")—is a joint planning commission comprised of members appointed by Christian County and municipalities within the County.

17. CDS did not hold a public hearing on the Purported Ordinance.

18. CDS did not make a recommendation to the Christian County Fiscal Court regarding the Purported Ordinance.

19. KRS 100.217 states that no zoning regulation may have legal effect until a board of adjustments is appointed.

20. Christian County Fiscal Court has not created a board of adjustments pursuant to KRS 100.217.

21. A board of adjustments is vital to the statutory scheme for planning and zoning. This board is solely authorized to grant variances, which are defined in KRS 100.111 as "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 . . . ."

22. Under the statutory scheme of KRS Chapter 100, only a board of adjustments has the authority to grant variances.

23. Substantive provisions of the Purported Ordinance, including but not limited to the 2,000-foot setback of Solar Energy Systems to any residences and rights of way, have no rational relationship to the protection of health, safety, and welfare.

24. Substantive provisions of the Purported Ordinance, including but not limited to the 2,000-foot setback of Solar Energy Systems to residences and rights of way, can be established through less restrictive means and still address legitimate concerns of the Fiscal Court

25. Substantive provisions of the Purported Ordinance, including but not limited to the 2,000-foot setback of Solar Energy Systems to residences and rights of way, do not address issues raised by public comments presented at Fiscal Court meetings.

26. Christian County does not regulate any other component of land use for similar types of facilities.

COUNT I

27. Dogwood Corners adopts the preceding paragraphs as if fully restated herein.

28. The Purported Ordinance is invalid because the procedure required by KRS 67.080 and set forth in KRS Chapter 100 was not followed.

29. Accordingly, Dogwood Corners requests a judgment declaring that the Purported Ordinance is invalid and has no legal effect.

COUNT II

30. Dogwood Corner adopts the preceding paragraphs as if fully restated herein.

31. In order to preserve its rights and out of an abundance of caution, Dogwood Corners pleads Count II as an alternative action, in case the Circuit Court does not agree with the positions stated above.

32. The Purported Ordinance is arbitrary and capricious because there is no rational connection between action and purpose of authorizing legislation.

33. The Purported Ordinance is arbitrary and capricious because Christian County does not have similar land use restrictions for similar land uses.

34. The Purported Ordinance is unreasonable, arbitrary and oppressive, as its substantive provisions eliminate the viability of any Large Scale Ground Mounted Solar Energy System in Christian County, as defined by the Purported Ordinance.

35. Accordingly, if the Court does not determine that the Purported Ordinance is invalid because it fails to comply with KRS 67.080 and KRS Chapter 100, Dogwood Corners requests a judgment declaring that the Purported Ordinance is invalid and has no legal effect because it is in violation of Kentucky Constitution Section 2 and other Kentucky law as being arbitrary, capricious, unreasonable, or oppressive.

36. Dogwood Corners respectfully reserves the right to amend or supplement this pleading upon resolution by the Court of the Declaratory Judgment action contained herein.

WHEREFORE, Dogwood Corners requests (a) a judgment declaring that Purported Ordinance is invalid for failing to comply with the requirements of KRS 67.080 and KRS Chapter 100; (b) alternatively, a judgment that the Purported Ordinance is invalid as a violation of Kentucky law for being arbitrary, capricious, unreasonable, or oppressive; (c) a speedy hearing, as authorized by CR 57; and (d) all other equitable or legal relief to which Dogwood Corners is entitled.

Respectfully submitted,

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

DOGWOOD CORNERS, LLC PLAINTIFF

v. **ANSWER**

CHRISTIAN COUNTY FISCAL COURT DEFENDANT

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The Defendant, Christian County Fiscal Court ("Christian County"), by and through counsel, and for their Answer to the Plaintiff's Complaint, states as follows:

FIRST DEFENSE

The Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. Christian County is without knowledge or information sufficient to form an opinion or belief as to the truth or falsity of the allegations contained in paragraph 1 of the Complaint and therefore deny same.

2. Christian County admits the allegations contained in paragraphs 2, 5, 6, 7, and 16 of the Complaint.

3. Christian County admits so much of the allegations contained in Paragraphs 3 and 4 of the Complaint that this Court is the appropriate jurisdiction and venue. All other allegations in Paragraphs 3 and 4 of the Complaint are denied.

4. With regard to the allegations contained in paragraphs 8-12 of the Complaint, the Ordinance in question is a written document that speaks for itself and so much of Plaintiffs' negative characterization of the Ordinance is denied.

5. With regard to the allegations in paragraph 13, the ordinance is an ordinance to conserve natural resources authorized KRS 67.083(3)(h), as well as KRS 67.083(3)(m) regarding the regulation of commerce for the protection and convenience of the public, and not a zoning ordinance as characterized by the Plaintiff.

6. The allegations contained in paragraphs 14, 15, 19, 21, 22, and 35 of the Complaint are legal conclusions and/or legal assertions which are to be determined by the Court. Until the Court makes such determinations, Christian County denies all allegations contained therein.

7. Christian County admits the allegations of paragraphs 17 and 18 of the Complaint, but affirmatively state a hearing by CDS was not required nor was a recommendation.

8. Christian County denies the allegations contained in paragraphs 20, 23, 24, 25, 26, 28, 29, 32, 33, 34, and the request for relief of the Complaint.

9. Paragraphs 27, 30, 31, and 36 of the Complaint do not require a response.

10. Christian County denies every allegation and contests every demand for relief not specifically admitted herein and any affirmative allegation not admitted herein is denied.

THIRD DEFENSE

The actions of Christian County were justified and were not arbitrary.

FOURTH DEFENSE

Christian County is entitled to sovereign immunity, governmental immunity, and/or legislative immunity.

FIFTH DEFENSE

Christian County reserves the right to raise any and all separate defenses that may become evident during discovery and during other proceedings in this action.

SIXTH DEFENSE

The provisions of KRS 67.083(3)(h) and 67.083(3)(m) authorize the adoption of the ordinance in question and is a bar to the Plaintiff's Complaint.

WHEREFORE, the Defendant, Christian County Fiscal Court, prays for relief as follows:

A. Dismissal of the Complaint with prejudice;

B. An award of reasonable attorney's fees and court costs herein expended;

C. Trial by jury on all issues so triable; and

D. All other relief to which they may be entitled.

/s/ Harold Mac Johns

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 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

DOGWOOD CORNERS, LLC PLAINTIFF

v.

CHRISTIAN COUNTY FISCAL COURT DEFENDANT

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

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,

67.080, 100.203, 100.207, and 100.217.[1] 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.

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

[1] Ordinance No. 22-004 is attached to the *Petition for Declaratory Judgment* as Exhibit A.

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 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

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 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

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 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).[2] 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. Shawk*, 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

[2] 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.

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.

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

> 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 Bellafonte Land Inc., supra* (Court voided the amended zoning

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).

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.

Respectfully submitted,

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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:

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

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 statues 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

DOGWOOD CORNERS, LLC PLAINTIFF

v.

CHRISTIAN COUNTY FISCAL COURT DEFENDANT

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

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

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.

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*,

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).[1] *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).

[1] 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.

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

> **(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

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

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

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

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.[2] 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.[3]

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 Count 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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[2] 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**.**

[3] 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**.

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").[4] 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

[4] Ky Acts 2002, chapter 365.

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).

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 breeches 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.

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

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.

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

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.

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 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

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.

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

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;

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 statues 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.

Importantly, pursuant to KRS 278.718,

> 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 ordnances 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

> 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

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

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.

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CERTIFICATE OF SERVICE

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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