COMMONWEALTH OF KENTUCKY

BEFORE THE ELECTRIC GENERATION AND TRANSMISSION SITING BOARD

In the Matter of:

ELECTRONIC APPLICATION OF LYNN BARK ENERGY CENTER, LLC FOR A CERTIFICATION OF CONSTRUCTION FOR AN UP TO 200 MEGAWATT MERCHANT ELECTRIC SOLAR GENERATING FACILITY IN MARTIN COUNTY, KENTUCKY	))))))	Case No. 2024-00105

LYNN BARK ENERGY CENTER, LLC'S
MOTION FOR DEVIATION FROM SETBACK REQUIREMENTS

Comes now Lynn Bark Energy Center, LLC ("Lynn Bark" or "Applicant"), by counsel, and requests the Kentucky State Board on Electric Generation and Transmission Siting ("the Board") grant a deviation from the setback requirements of KRS 278.706(2)(e), as allowed under KRS 278.704(4), for its proposed Lynn Bark merchant solar electric generating facility ("the Project"). In support of this motion, Applicant states as follows:

I. STATUTORY AUTHORITY

1. KRS 278.706(2)(e) establishes setback requirements for merchant generating facilities, such as the Project, by requiring that "all proposed structures or facilities used for generation of electricity [be] two thousand (2,000) feet from any residential neighborhood, school, hospital or nursing home facility." Because Martin County has no planning and zoning ordinances governing relevant setback requirements, these statutory setback requirements apply. KRS 278.704(4) authorizes the Board to grant a deviation from setback requirements to allow a shorter distance 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, 278.218, and 278.700 to 278.716 at a distance closer than [statutorily prescribed]."

II. PROPERTIES WITHIN 2,000 FEET OF THE PROJECT

2. **Exhibit A** to this Motion shows in solid green line a buffer distance of 2,000 feet from the Project's outer boundary ("Project Site"). There are no schools, hospitals, churches or nursing homes within 2,000 feet of Applicant's proposed location of structures or facilities used for generating electricity.

3. KRS 278.700(6) defines "residential neighborhood" as "a populated area of five (5) or more acres containing at least one (1) residential structure per acre." There are two groupings of residences that have been identified as "residential neighborhoods," as shown in **Exhibit A**, that are within 2,000 feet of the Project Site. Using proposed boundaries, two Residential Neighborhoods have been identified; however, because the Project infrastructure will only occupy about 641 acres of the 1,514-acre Project Site, residences are located relatively far from the proposed locations of Project infrastructure. In fact, only five residences, all located in Residential Neighborhood 2, will be located within 2,000 feet of any Project infrastructure used for the generation of electricity. The two Residential Neighborhoods are as follows and as depicted in the chart attached hereto as **Exhibit B**:

- Residential Neighborhood 1 is to the northeast of the Project and includes 14 residences. The nearest proposed structures or facilities used for the generation of electricity are solar panel arrays located approximately **2,287 feet** away from the boundary of Residential Neighborhood 1.

- Residential Neighborhood 2 is located to the east of the Project and includes 11 residences. The nearest proposed structures or facilities used for the generation of

electricity are solar panel arrays located approximately **1,578 feet** away from the boundary of Residential Neighborhood 2.

As set forth in more detail in **Exhibit A** because the Project Area is atop a mountaintop reclaimed coal mine, there are also significant elevation differences between the Residential Neighborhoods within 2,000 feet (which sit at the base of the mountain) and the Project Site. The relatively high elevation of the Project Site further lessens impacts that are predicted from construction and operation of the Project upon any nearby residence.

III. REQUEST FOR DEVIATION

4. The Board should grant a deviation from the 2,000-foot setback requirement from Residential Neighborhoods because the Project "is designed to and, as located, would meet the goals of [the cited provisions in KRS Ch. 224 and 278] at a distance closer than those provided" by statute. KRS 278.704(4).

5. In the first 15 years of its history, the Board considered several requests from setback requirements.[1] Since 2020 when applications for construction certificates for solar facilities began to be filed, the Board has regularly considered and permitted deviations from the statutory setback requirements for merchant solar energy projects like the Project, subject to certain mitigation measures.[2]

6. To allow a deviation, the Board must make a finding that the proposed facility is designed to and, as located, would meet the goals of the designated statutes. (KRS 278.704(4)).

[1] *See* Case No. 2002-00149, *Application of Kentucky Mountain Power, LLC/Enviropower, LLC for a Merchant Power Plant Construction Certificate in Knott County, Kentucky near Talcum* (Order 9/5/2002); Case No. 2009-00530, *Application of ecoPower Generation-Hazard, LLC for a Certificate to Construct and Operate a Merchant Electric Generating Facility and a 69kV Transmission Line in Perry County* (Order 4/22/2010 denying deviation without prejudice and Order 5/18/2010 granting deviation request); Case No. 2014-00162, *Application of SunCoke Energy South Shore, LLC for a Certificate to Construct a Merchant Electric Generating Facility and Non-Regulated Transmission Line* (Order 2/20/2015).

[2] *See* Case No. 2020-00040, *Turkey Creek* (Order 9/23/2020); Case No. 2020-00043, *Glover Creek* (Order 9/23/2020); Case No. 2020-00190, *Horseshoe Bend* (Order 6/11/2021); Case No. 2020-00206, *AEUG Fleming* (Order 5/24/2021);

Included in the listed statutes are the setback requirements themselves, *i.e.*, KRS 278.706(2)(e). In the *ecoPower* decision, Case No. 2009-00530, the Board stated regarding the similar setback requirements found in KRS 278.704(2), that they "were enacted to afford some level of protection for persons occupying a property adjacent to a property where a merchant generating plant is to be constructed and operated."[3] Therefore, "it is the effects of the planned facility on adjoining residents that the Siting Board must consider when determining whether to grant a deviation pursuant to KRS 278/704(4)."[4] By its express words, KRS 278.704(4) simply requires a showing that the goals of the statutes cited therein can be met with facilities at a distance less than what is statutorily provided in KRS 278.706(2)(e).

7. In the circumstances presented by this Project, the question is whether the statutory goals are met even though some structures or facilities used for generating electricity will be closer to a Residential Neighborhood than 2,000 feet. For the reasons set forth below, and as more completely detailed in Lynn Bark Energy System's Application, filed concurrently herewith, the answer is yes, and the requested deviation should be granted.

IV. COMPLIANCE WITH STATUTORY GOALS

8. **KRS 224.10-280** requires submission of a Cumulative Environmental Assessment ("CEA") to the Kentucky Energy and Environment Cabinet ("the Cabinet") before beginning construction of an electric power plant. Applicant included a copy of its CEA as part of its

Case No. 2020-00208, *Northern Bobwhite* (Order 6/18/2021); Case No. 2020-00280, *Ashwood Solar I*, LLC (Order 6/21/2021); Case No. 2020-00272, *Flat Run Solar, LLC* (Order 10/7/2021); Case No. 2021-00029, *Martin County Solar Project, LLC* (Order 11/15/2021); Case No. 2020-00226, *Mt. Oliver Creek Solar, LLC* (Order 11/3/2021); Case No. 2020-00370, *Fleming Solar, LLC* (Order 11/24/2021); Case No. 2020-00244, *Caldwell Solar, LLC* (Order 4/8/2022); Case No. 2022-00274, *Bright Mountain Solar, LLC* (Order 3/6/2024); Case No. 2022-00272, *Hummingbird Solar, LLC* (Order 12/13/2023); Case No. 2022-00131, *Sebree Solar II, LLC* (Order 10/12/2023); and Case No. 2022-00115, *Thoroughbred Solar, LLC* (Order 4/10/2023).

[3] Case No. 2009-00530, *ecoPower* (Order 5/18/10 at 31).

[4] *Id.* at 32 (referring to the 1,000-foot standard, which is inapplicable here).

Application (Attachment H) and also submitted it to the Cabinet on contemporaneously herewith. Applicant's CEA includes a discussion of potential impacts and mitigation plans for air pollutants, water pollutants, wastes, and water withdrawal, which will protect nearby property owners from negative impacts from the Project. By submitting a CEA to the Cabinet, the goals of KRS 224.10-280 have been met. The elements of the CEA are briefly discussed as follows:

a. Regarding air pollutants, the CEA concludes that construction of the Project will result in minimal quantities of emissions. Further, because the Project will not produce any emissions during operation, no air permit is required for operation of the Project. Construction activities may release fugitive air pollutant emissions (dust and other suspended particles), but these emissions will be localized and temporary in nature. Impacts to air quality will be mitigated using Best Management Practices ("BMPs") such as wetting areas to reduce dust, covering loads, etc. Any emissions from the operation of the Project would be generated by worker vehicles and maintenance equipment and would be negligible.

b. Regarding water pollutants, the Project will employ BMPs and have a Storm Water Pollution Prevention Plan ("SWPPP") to avoid increased erosion and sedimentation. During operation, the Project is expected to have little to no impact to surface water. Additionally, the Project is not expected to negatively impact groundwater sources. While natural hydrology is expected to be altered during construction, no resources on or directly adjacent to the site have been designated as Kentucky special-use waters by the Division of Water ("DoW"), or require a special use or cold-water habitat designation from the DoW.

i. The Project will minimize impacts to surface waters during construction by adhering to the requirements of the general construction permit KYR10, issued by

the DoW. Additionally, the Project will minimize impacts by utilizing the existing landscape to avoid grading, when possible.

ii. The Project will minimize impacts from stormwater runoff by implementing BMPs, such as utilizing silt fences, creating temporary sediment basins and traps, and creating buffers around streams, wetlands, and open waters in and around the Project. Prior to the commencement of construction activities, the Applicant will develop a storm water pollution prevention plan ("SWPPP") to further minimize impacts to surface waters as a result of construction.

iii. After construction is completed, the Project will return all disturbed areas not occupied by facility components to its pre-construction state. Soil will be re-stabilized through re-seeding and all erosion controls will be inspected and maintained until the site is re-stabilized.

iv. Project operations may require the occasional use of fertilizers and herbicides. All such materials will be use in accordance with the manufacturer's instructions and in limited quantities near waters of the United States and Kentucky to avoid contaminating surface or ground waters.

v. Any hazardous materials used during construction, such as petroleum-based lubricants and hydraulic fluids, will be properly stored and used following proper techniques. The potential for leaks and spills of such materials will be minimized through utilization of BPMs and implementation of procedures to address any leaks or spills that do occur.

c. Regarding wastes, Applicant's CEA notes that Project construction is anticipated to generate minimal construction waste consisting primarily of wood crates and pallets, cardboard, miscellaneous packing materials, construction scrap, and general refuse. Sewage waste

will be generated from the portable toilets placed on the site during construction, but will be taken away from the site and properly disposed of by a licensed contractor. During operation, waste is only expected to be generated through maintenance activities. No adverse impacts from waste or wastewater treatment and disposal are anticipated. Waste materials will be recycled if possible, and non-recyclable solid materials will be removed from the Project Site and disposed of at a licensed solid waste disposal facility. Waste generated from hazardous materials, such as cleaning fluids, degreasers, herbicides, pesticides, oils, fuels, and lubricants will be stored on-site temporarily in small quantities. The Project will implement a SPCC, provide personal protective equipment to facility staff, and train facility staff in the handling, use, and clean-up of hazardous materials to minimize the risk of adverse environmental impacts from use of these materials.

d. Finally, regarding water withdrawal, construction and operation of Applicant's solar electric generating facilities are not anticipated to be water intensive. During construction, water will be used for site preparation purposes, such as dust control and grading activities. During operation, water will be used for vegetation management, such as screening vegetation installation and during extended periods of drought. It is anticipated that normal precipitation in the region will be sufficient to remove dust and debris from the solar panels, so panel washing generally will not be required. The Project plans to obtain water from several potential sources, including an on- or off-site groundwater well or an offsite water purveyor.

9. **KRS 278.010** sets forth definitions to be used for KRS 278.010 to 278.450, 278.541 to 278.544, 278.546 to 278.5462, and 278.990 — none of which are directly applicable to the Applicant or the Project. To the extent relevant,[5] Applicant has satisfied any goals of KRS 278.010

[5] As the first section in the chapter, KRS 278.010 may have been mistaken for a "purposes and goals" statement for Chapter 278. Or its inclusion in the KRS 278.704(4) list may have been to help discern the goals of the other Chapter 278 sections listed.

by preparing and presenting its Project proposal and Application in terms consistent with the statutory definitions.

10. **KRS 278.212** requires the filing of plans and specification for electrical interconnection with merchant electric generating facilities and imposes the obligation upon a merchant electric generating developer for any costs or expenses associated with upgrading the existing electricity transmission grid as a result of the additional load caused by the merchant electric generating facility. Applicant anticipates having an executed interconnect agreement with Kentucky Power Company, a wholly-owned subsidiary of American Electric Power, Inc. ("AEP") to connect to the existing transmission grid via the point of interconnection ("POI") at the existing Inez Substation. As designed and as located, Applicant's proposed Project therefore meets the goals of KRS 278.212.

11. **KRS 278.214** governs the curtailment of service and establishes the progression of entities whose service may be interrupted or curtailed pursuant to an emergency or other event. To the extent this section applies to the operation of Applicant's proposed generation or the Project, Applicant commits to following all appropriate and legally binding operating procedures. The Project is thus designed and located to meet the goals of KRS 278.214.

12. **KRS 278.218** governs certain transfers of utility assets having an original book value of $1 million or more. Applicant is not a utility as defined in KRS 278.010(3), and therefore, this statute does not apply to Applicant. However, to the extent Board approval may at some time be required for change of ownership or control of assets owned by Applicant or its parent company, Applicant will comply with the applicable rules and regulations that govern its operation.

13. **KRS 278.700 – KRS 278.716** governs the Board's jurisdiction and process. Applicant's application and timely participation in the present proceeding demonstrates that the

Project is designed to, and as located, would meet the goals of KRS 278.700 *et seq.*, including the allowance for deviation from setback requirements in KRS 278.704(4). Moreover, the mitigation measures discussed in the Application relative to noise, traffic, and other impacts of the proposed Project are additional steps Applicant has committed to take to minimize the effects of the Project on the potential Residential Neighborhoods discussed herein (as well as on the broader surrounding community). Finally, Applicant has selected a location for the Project that was previously a mountain-top surface coal mine site, returning land to a use that continues to support energy security. This is an additional aspect of the proposed Project that demonstrates "the proposed facility is designed to and, as located, meets the goals of KRS 224.10-280, 278.010, 278.212, 278.214, 278.216, 278.218, and 278.700 to 278.716 at a distance closer than [statutorily prescribed]."[6]

V. MITIGATION EFFORTS

14. The Acoustic Assessment Report attached in the Application to the Applicant's Site Assessment Report (Tab 12, at Exhibit E) concludes that noise associated with the Project during operation will be less than the ambient sound level in the area and less than the sound level in a very quiet, sparse suburban or rural area. (*Id.* at pp. 4, 6). The highest predicted operational sound level at a residence is 20 A-weighted decibels ("dBA") and will occur in the daytime when the Project's inverters are operating at full capacity (*Id.* at p. 6). Pile driving will be the loudest construction activity and may cause noise to increase above ambient sound levels at certain residences. However, the installation of each pile will occur very quickly and all piles should be installed within a 40-day period. (*Id.* at pp. 7-8). Further, given the Project's large area, residences will not experience the same or a constant noise level during the construction period. All other

[6] KRS 278.704(4).

construction activities are not expected to rise above ambient sound levels. (*Id.* at 9-10). Finally, the proposed site of the Project is located at the former site of a surface coal mine, situated on top of land elevated 1,080 feet. (**Exhibit A**). This elevation will ensure that sound levels are diminished to an even greater extent than is represented in the Acoustic Assessment.

15. The Glare Analysis Memorandum concludes that the solar arrays will not be visible to any of the residences, businesses, roads surrounding the Project. (Tab 12, at Exhibit G). This conclusion is due to the topographical setting, existing forest vegetation, and distances and elevation between the surrounding area and the Project infrastructure.

a. The Memo identified potential glare impacts from three solar arrays on one flight path from the Big Sandy Regional Airport. (*Id.* at p. 5). However, this glare will only be visible for 10 – 20 minutes per day in the morning during June and early July. Further, as returning planes change position for final approach, the glare should only be visible for a few moments. (*Id.* at p. 6).

16. As discussed in the Traffic Study included in the Applicant's Site Assessment Report (Tab 12 at Exhibit E), traffic will not be adversely impacted during construction or operation of the Project. Further, certain BMPs, such as ridesharing between construction workers,

traffic controls, and flexible work hours, can be implemented to minimize any impacts during peak hours. (*Id.* at p. 8).

VI. CONCLUSION

The Project as designed and including the proposed mitigation measures will protect residents in Residential Neighborhood 2 from any adverse impact that may result from the proposed Project infrastructure being located closer than 2,000 feet.

WHEREFORE, because the proposed Project as designed and located, with proposed mitigation measures would meet the goals of KRS 224.10-280, 278.010, 278.212, 278.214, 278.216, 278.218, and 278.700 to 278.716, at a distance closer to the two residential groupings than 2,000 feet, the Applicant respectfully requests a deviation from the setback requirements of KRS 278.706(2)(e).

Respectfully submitted,

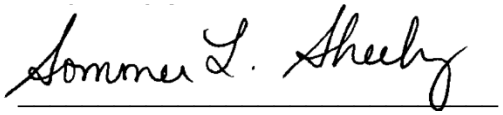

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EXHIBIT A

M:\US\Projects\S-U\Savion\Lynn_Bark_Solar_ArcGIS\Lynn Bark_041524.aprx\Neighborhood Map, REVISED: 04/25/2024, SCALE: 1:55,000 when printed at 8.5x11

Drawn By: Casey.Brotman

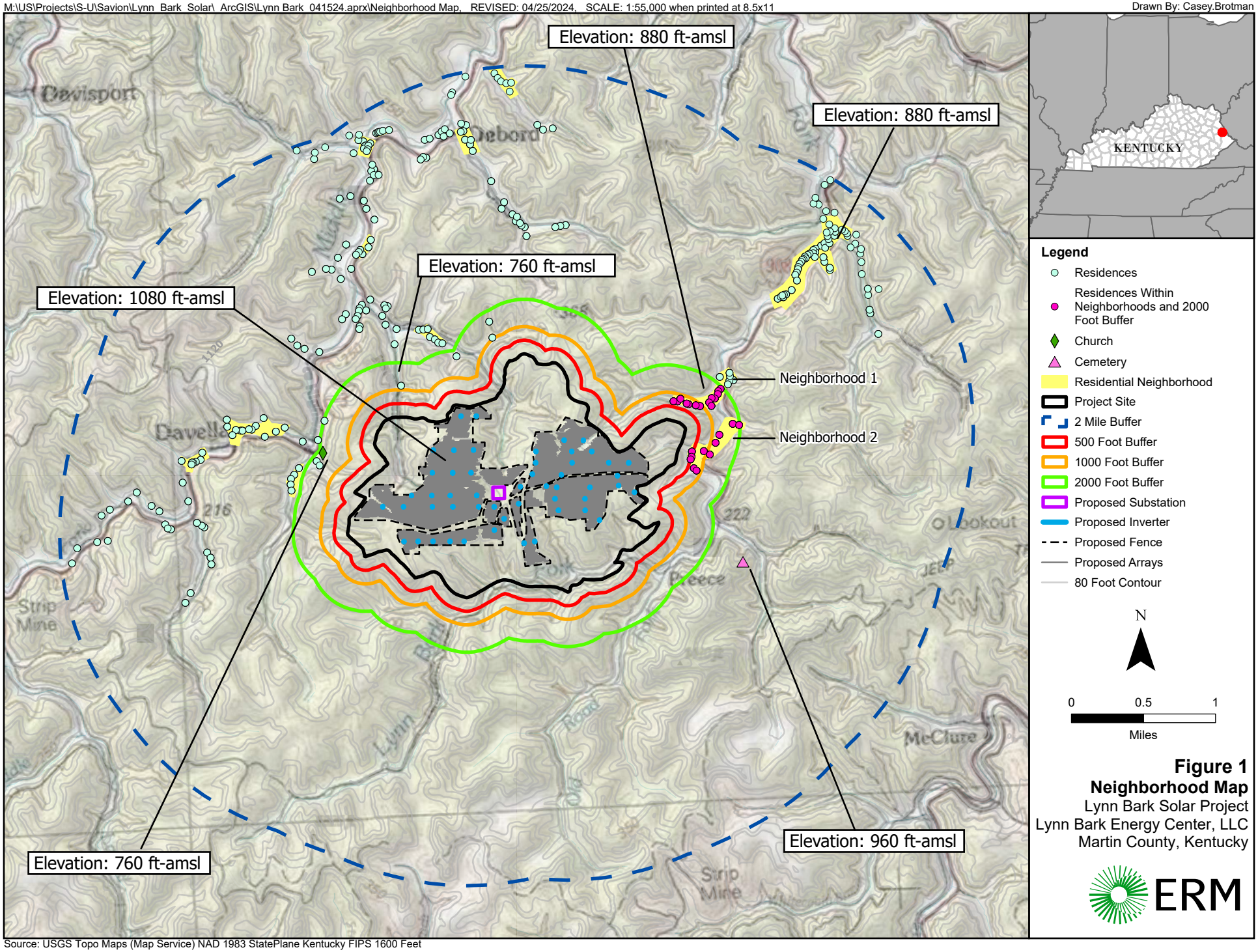

Figure 1
Neighborhood Map
Lynn Bark Solar Project
Lynn Bark Energy Center, LLC
Martin County, Kentucky

ERM

Source: USGS Topo Maps (Map Service) NAD 1983 StatePlane Kentucky FIPS 1600 Feet
No schools identified within the 2-mile buffer

EXHIBIT B

Distance (linear feet) from Residence (within neighborhood and within 2000ft) to Proposed Features

Feature	Neighborhood	Inverter	Panel	Substation
Resident	1	2778.67	2286.89	6954.25
Resident	1	2778.67	2286.89	6954.25
Resident	1	2778.67	2286.89	6954.25
Resident	1	2867.08	2381.11	7086.97
Resident	1	2867.08	2381.11	7086.97
Resident	1	2867.08	2381.11	7086.97
Resident	1	3027.59	2514.15	7352.76
Resident	1	3027.59	2514.15	7352.76
Resident	1	3027.59	2514.15	7352.76
Resident	1	3007.09	2518.68	7223.88
Resident	1	3007.09	2518.68	7223.88
Resident	1	3007.09	2518.68	7223.88
Resident	1	3060.06	2541.32	7406.97
Resident	1	3060.06	2541.32	7406.97
Resident	1	3060.06	2541.32	7406.97
Resident	1	3227.86	2695.43	7631.68
Resident	1	3227.86	2695.43	7631.68
Resident	1	3227.86	2695.43	7631.68
Resident	1	3330.67	2791.75	7765.17
Resident	1	3330.67	2791.75	7765.17
Resident	1	3330.67	2791.75	7765.17
Resident	1	3670.39	3113.83	8154.36
Resident	1	3670.39	3113.83	8154.36
Resident	1	3670.39	3113.83	8154.36
Resident	1	3675.92	3132.55	8123.98
Resident	1	3675.92	3132.55	8123.98
Resident	1	3675.92	3132.55	8123.98
Resident	1	3846.2	3305.42	8271.13
Resident	1	3846.2	3305.42	8271.13
Resident	1	3846.2	3305.42	8271.13
Resident	1	3931.43	3387.64	8373.64
Resident	1	3931.43	3387.64	8373.64
Resident	1	3931.43	3387.64	8373.64
Resident	1	4114.83	3573.19	8535.98
Resident	1	4114.83	3573.19	8535.98
Resident	1	4114.83	3573.19	8535.98
Resident	1	4197.57	3658.44	8598.64
Resident	1	4197.57	3658.44	8598.64
Resident	1	4197.57	3658.44	8598.64
Resident	1	4312.1	3773.34	8706.6
Resident	1	4312.1	3773.34	8706.6
Resident	1	4312.1	3773.34	8706.6
Resident	2	2270.11	1578.31	6905.32
Resident	2	2270.11	1578.31	6905.32
Resident	2	2270.11	1578.31	6905.32

Distance (linear feet) from Residence (within neighborhood and within 2000ft) to Proposed Features

Feature	Neighborhood	Inverter	Panel	Substation
Resident	2	2311.02	1632.38	6953.78
Resident	2	2311.02	1632.38	6953.78
Resident	2	2311.02	1632.38	6953.78
Resident	2	2339.15	1667.81	6982.85
Resident	2	2339.15	1667.81	6982.85
Resident	2	2339.15	1667.81	6982.85
Resident	2	2348.2	1692.02	6998.99
Resident	2	2348.2	1692.02	6998.99
Resident	2	2348.2	1692.02	6998.99
Resident	2	2398.22	1765.06	7069.28
Resident	2	2398.22	1765.06	7069.28
Resident	2	2398.22	1765.06	7069.28
Resident	2	2780.72	2119.07	7430.16
Resident	2	2780.72	2119.07	7430.16
Resident	2	2780.72	2119.07	7430.16
Resident	2	2985.6	2303.44	7628.08
Resident	2	2985.6	2303.44	7628.08
Resident	2	2985.6	2303.44	7628.08
Resident	2	3259.99	2608.24	7910.5
Resident	2	3259.99	2608.24	7910.5
Resident	2	3259.99	2608.24	7910.5
Resident	2	3470.77	2829.34	8111.89
Resident	2	3470.77	2829.34	8111.89
Resident	2	3470.77	2829.34	8111.89
Resident	2	4065.54	3434.68	8688.93
Resident	2	4065.54	3434.68	8688.93
Resident	2	4065.54	3434.68	8688.93
Resident	2	4269.03	3632.33	8900.86
Resident	2	4269.03	3632.33	8900.86
Resident	2	4269.03	3632.33	8900.86
Church	N/A	2,936.81	2204.71	6355.97