From: LARA-MPSC-Commissioners
To: Baldwin, Julie (LARA); Cole, Cathy (LARA)
Cc: Holley, Reka (LARA)
Subject: FW: INPUT - March 7 Questions from Staff
Date: Monday, April 1, 2024 10:42:05 AM

From: [redacted]
Sent: Friday, March 29, 2024 8:49 PM
To: LARA-MPSC-Commissioners <LARA-MPSC-commissioners2@michigan.gov>
Subject: INPUT - March 7 Questions from Staff

Hello,

Thank you for the opportunity to give input. I may have gone over board, however, I see nothing but roadblocks from township standpoint where the opposition has dug in their rhetoric!

1) While a lot of my questions were voiced by others on the call and in a document I added to the 'docket' additionally I would propose a very clear step by step print out of what the process will look like. Maybe in the form of a flow chart? I will however, add a few of my questions, I wasn't sure were asked.

a. If the project is approved by MPSC, who oversees the compliance – the state or the township?

b. If a township has already denied a project and it falls under the criteria stated in ACT 233 for siting, etc., can the project go directly to the MPSC?

c. The issue of stonewalling and delays has to be addressed if possible or be taken into consideration somehow on projects the MPSC will address. In our community, the newly elected township board is dragging their feet, delaying any movement, and using legal maneuvers to stop anything from going forward? For instance, our township just put a moratorium in place, which precludes the company from appealing to the Zoning Board of Appeals…..BACKGROUD - The public hearing was held and project denied on October 3 or 4th. Official minutes were not provided to the company until the first of December, the company then submitted a request for a Zoning Board of Appeals Hearing on December 22, 2023. ZBA hearing

will not be granted, the company was given their appeal fee back, and all under 'we have a moratorium so we can't hold a ZBA'. They will not be given their due process. With that being said, the company cannot proceed with legal remedies because they need to go to the Zoning Board of Appeals first.

2) The lessons of our township is that we have a project that is ready, with willing landowners. However, residents with opposition to any renewable energy siting have taken over the leadership in the township at every level from Township Board, Planning Commission and Zoning Board of Appeals. It is clear this group will do anything to delay the siting of any project. Even when and if this process gets put into place, they will attempt to stop it at every turn. They are working hard to get the ballot initiative approved for November election.

a. The township in 2022 and 2023 hired two types of experts – a sound expert (Ken Kaliski) and an engineer (Townley Engineering) because this type of project is really above the 'pay grade' of township officials within the rural setting. It was stated several times by the Planning Commission that they didn't have the expertise to review the plans and indicated they were 'volunteer', not full time help. Having the siting overseen by the State would alleviate this knowledge deficit:

i. Our township hired a sound expert suggested by Dr. Sarah Mills to review our ordinance as it relates to sound requirements. This expert did review the ordinance and interpret from the scientific perspective what it 'means' as this was put into place in 2015/6 before much was known about LEQ versus LMAX. This expert reviewed the site plan as it relates to our ordinance and found while there were a handful of houses with greater noise levels than in the ordinance, he felt they were not insurmountable. Now with the state siting, these will be in compliance.

ii. Our township hired an engineer to review the technical aspects of the site plan in relation to the ordinance.

3) I am not sure how to answer this question but to say past performance/actions of a township and/or company need to be taken into account. Frankly, in our case, our new leadership will not come to the table and discuss this project with the company. I look at it as this process gives the landowner back control of the decisions involving their land. I think the state working with the landowners who want to participate and leaving the township officials out of it would be glorious!

a. I don't understand the reasoning for the 1-time grant? It

should be given to a township or local authority only when there is cooperation. Is this given by the State or a requirement of the company attempting to site a project?

Respectfully submittted,

[redacted]

Comments from Michigan EIBC and United to MPSC on Siting Procedures

March 29, 2024

As the Michigan Public Service Commission ("Commission" or "MPSC") begins its process to develop procedures related to implementation of Public Act 233 ("PA 233"), the Michigan Energy Innovation Business Council ("Michigan EIBC")[1] and Advanced Energy United ("United"; collectively "Michigan EIBC/United")[2] appreciate the opportunity to provide comments in response to the first two stakeholder meetings held on March 7 and March 19, 2024. Although these comments are not directly in response to questions raised by MPSC Staff, we offer these comments in response to statements made by various local government officials (and others) and believe that these issues are directly salient to the fundamental issues raised during the stakeholder meeting and the questions asked by Staff.

Definition of Affected Local Unit of Government

At the stakeholder meetings, important questions were raised around: 1) which local units of government ("LUGs") need to have a compatible renewable energy ordinance ("CREO"); 2) in which LUGs, and therefore how many, public meetings need to be held; 3) which LUG's officials need to be contacted; 4) which LUGs are eligible for intervenor funding; and 5) which LUGs are eligible for community benefits. Fundamental to these issues, as laid out in PA 233, is the definition of "affected local unit of government." An "affected local unit of government" is the entity which needs to meet these requirements and which is afforded these benefits. As explained below, all these questions should be answered to harmonize with the Zoning Enabling Act ("ZEA," Public Act 110 of 2006, as amended), the Act that was amended as part of the initially tie-barred bill package.

To determine the definition of "affected local unit of government," it is important to consider the broader context of the ZEA. PA 233 amends Public Act 295 of 2008, but was enacted along with

[1] The Michigan Energy Innovation Business Council is a trade organization tasked with growing Michigan's advanced energy economy by fostering opportunities for innovation and business growth and offering a unified voice in creating a business-friendly environment for the advanced energy industry in Michigan.

[2] Advanced Energy United is a national business association representing leading companies in the advanced energy industry. United supports a broad portfolio of technologies, products, and services that enhance U.S. competitiveness and economic growth through an efficient, high-performing energy system that is clean, secure, and affordable.

Public Act 234 ("PA 234"), which amends the ZEA by incorporating PA 233's requirements. In fact, the original bills which became PA 233 and PA 234 (i.e., House Bills 5120 and 5121) were tie-barred. Those bills were tie-barred because HB 5120 (and thereby PA 233) was intended to affect the state's zoning laws. PA 234 ensures that PA 233 is effective by incorporating the changes in PA 233 into the ZEA. Thus, it is clear that PA 233 was intended by the Legislature to function within the context of the ZEA. It is only reasonable, therefore, to read and interpret its provisions in the zoning context and in the context of the legal determinations that have been made around the ZEA – in other words to harmonize the requirements in PA 233 with the ZEA.

Just as PA 233 speaks broadly about a "local unit of government" and an "affected local unit," the ZEA speaks broadly in its definitions of a Local Unit of Government and of a Legislative Body. The ZEA uses those terms to refer only to those LUGs or Legislative Bodies that have zoning authority over a project. Under the ZEA, there is no confusion in the zoning context as to which LUGs are implicated. A fundamental principle of zoning, so fundamental that it is stated twice in the ZEA, is that when a township has zoning authority, it divests a county of any zoning authority over the area of the township. *See MCL 125.3102(x) and MCL 125.3209*.

Likewise, in the context of the tie barred PA 233, the "affected local unit" therefore must be understood to mean the LUG with zoning authority over the project – otherwise it would not be an "affected" LUG in a zoning context. Understanding the term in this way clears up any confusion and Michigan EIBC/United urge the Commission to interpret the statute in alignment with this understanding.

Do multiple LUGs need a CREO?

As detailed above, an "affected local unit" in PA 233 is properly interpreted as an LUG with zoning authority. Under Michigan law, LUGs do not have overlapping zoning authority, and therefore there is arguably only one "affected" LUG for purposes of zoning approval unless a project overlaps multiple LUG zoning jurisdictional boundaries (such as a project that crosses into two townships). Thus, the entity that must have a CREO is clear: the entity with zoning jurisdiction over the affected land and, if a township has zoning authority, the county does not also need a CREO. In other words, a county only has a role in the creation of a CREO when it has the zoning

authority. The ZEA, in two places, plainly states that "the zoning jurisdiction of a county does not include the areas subject to a township zoning ordinance." There clearly is no county zoning role where a township has a zoning ordinance.[3]

During the March 7 stakeholder meeting, it was suggested that the word "each" in the statute could be read to require that both a county and township would need a CREO, as both might be "affected." This is not the best reading of the statute, because it does not harmonize the statute with the ZEA. If there is any ambiguity regarding the definition of "affected" or the use of "each," it is appropriate to read this statute and the ZEA harmoniously (*in pari materia*), and construct them in a way to avoid conflict. E.g. *City of Grand Rapids v Brookstone Capital, LLC*, 334 Mich App 452, 459–60; 965 NW2d 232 (2020). As explained below, that is to assume that "affected" jurisdictions are those that would have zoning authority over the land in question, and the word "each" is properly understood to refer to projects that are located on lands that cross from one zoning authority into another jurisdiction.

This interpretation also avoids the problematic construction that assumes a county or township could pass a police power ordinance to function as the CREO. Such an interpretation would be in conflict with existing Michigan law on zoning and police powers. Under those laws, only one entity has zoning authority, and all zoning activities must be implemented through that framework. Michigan's Supreme Court, decades ago, ruled that a zoning ordinance is one that regulates uses of land, and that the general ordinance authority regulates an "activity" rather than a use of land. See *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310; 471 NW2d 321 (1991). Because regulating land uses implicates fundamental property rights, zoning ordinances raise different due process concerns. Michigan's courts have repeatedly struck down general ordinances that attempt to effectively place zoning restrictions without going through the zoning ordinance process outlined in the ZEA. As such, a general ordinance, such as a policy power ordinance, is not an allowed end-run around the ZEA's ban on simultaneous township and county zoning.

[3] The exception would be for a project that spans multiple townships, if one township did not have zoning authority and, instead, the relevant county had zoning authority. In such a case, the county with zoning authority would need a CREO for the portion of the project on property that was not subject to township zoning authority.

There is another more practical problem with the idea that both the county and township would need a CREO. There may be cases where a township has zoning authority and is in favor of a project, but the county, which lacks zoning for the township under the ZEA, does not favor the project. Under ordinary zoning processes the township has authority to approve or reject the project, but the county lacks any such authority. But, under the scenario described by local entities on March 7, the new statute would have granted to the county new authorities because the county would need a CREO with which the project must comply. Nothing in PA 233, or the amendments to the ZEA in PA 234, can reasonably be read to expand the zoning jurisdiction of local governments. As such, the possible interpretation of the Act presented on March 7 (suggesting that there might be multiple "affected" jurisdictions over a single parcel of land) would effectively expand county zoning authority far beyond existing authority, and it runs headlong into the ZEA's statutory provisions divesting the county of any authority to exercise zoning powers *if* the township has zoning authority. Such an interpretation should be clearly avoided because there is nothing in the Act otherwise to suggest that it was intended to expand county zoning at the expense of existing zoning practices.

Implications for Community Benefits

The community benefits payment required under Section 227 of PA 233 mandates a host community agreement and the payment of this benefit by "the applicant for a certificate." The "certificate" referenced here is not a Special Land Use approval under a local zoning ordinance, but instead is defined in the Act as the certificate issued by the MPSC in lieu of that. The community benefits payment results only when a project is approved by the MPSC rather than by the local zoning process. In addition, this payment applies only to an "affected local unit," – i.e., an LUG that exercises zoning authority over the project -- which is *either* a township *or* a county, but not both.