

MEMO

SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

TO: Conway Township
FROM: Michael Homier and Leslie Abdo
DATE: April 11, 2024
RE: Legal Opinion re: Wind Energy Regulations

This legal opinion addresses the comments the Township received from the Livingston County Planning Commission regarding its draft wind ordinance.

I. State Legislation

The County’s comments largely relate to the Ordinance’s non-compatibility with the new state legislation. As the Township knows, Governor Whitmer signed into law House Bills 5120 and 5121, now known as Public Act 233 of 2023 (“PA 233”), which diminish local control over zoning for wind, solar, and battery storage facilities. Generally, PA 233 divests municipalities of their power to regulate these alternative energy projects *unless* the municipality adopts a “compatible” ordinance that is no more restrictive than the statute’s (industry-friendly) standards, which are set forth on **Attachment A**. If a municipality does not have a compatible ordinance, then the energy developer can circumvent local zoning and instead apply to the Michigan Public Service Commission for approval of the project. Although this involves some community input (like a public meeting held within the municipality), it does not require compliance with local zoning or siting requirements.

PA 233 applies to wind energy projects with a nameplate capacity of 100 megawatts or more.

The following flowchart depicts the two “routes” for approval of a wind facility under PA 233 – MPSC approval and local approval. (“Provider” in this chart means an electric provider or independent power producer.)

<p style="text-align: center;">Initial Local Unit Contact: Provider must “offer in writing to meet with the chief elected official of each affected local unit . . . to discuss the site plan.”</p>
<p style="text-align: center;">Meeting with Local Unit Chief Elected Official: Provider meets with chief elected official to discuss site plan (unless local unit declines) Local unit must provide notice of compatible ordinance <u>within 30 days</u> after this meeting.</p>

Next Step (Depending on Local Unit Action/Compatible Ordinance)	
No notice of compatible ordinance from local unit within 30 days (MPSC route)	Notice of compatible ordinance from local unit within 30 days (local route)
Provider must notify Clerk that a public meeting will be held in the local unit and provide site plan [at least 30 days before public meeting]	Provider must file application for approval with local unit, pursuant to compatible ordinance
Provider must publish notice of the public meeting [at least 14 days before public meeting]	Local unit must approve or deny application within 120 days (can be extended another 120 days with consent from provider)
Public meeting is held in local unit	Provider can <i>still</i> go to the MPSC if: <ul style="list-style-type: none"> • Local unit fails to timely approve or deny the application • The application complies with statute [226(8)] but local unit denies it • Local unit amends ordinance so that it is no longer compatible
Provider must include a summary of this public meeting in its application submitted to MPSC	
Approval proceeds at MPSC	
	MPSC’s review is whether the Provider supplied all of the information to the local unit.

Importantly, the provisions of PA 233 discussed above do not take effect until **November 29, 2024**. Thus, developers who apply for local approval before that date must comply with local zoning ordinances, even if the ordinance is not considered “compatible” under PA 233.

Also importantly, there are efforts underway to put a statewide referendum on the November 2024 ballot that would repeal PA 233. These efforts are in their early stages, so we do not yet know whether the question will reach the ballot.

II. Township Options Related to PA 233

At this time, the Township has two options:

1. Adopt a restrictive ordinance now, and amend later if needed.

The Township is legally permitted to adopt a wind energy ordinance now that places restrictions and safeguards on wind energy developments, even if it is not a “compatible” ordinance under PA 233. As noted above, PA 233 does not take effect until November 29, 2024, and it might be subject

to a referendum (or other legal challenges). Thus, there is a chance – although perhaps slim – that PA 233 will never take effect.

Further, if the Township adopts a wind energy ordinance in early 2024, that ordinance will apply to any applications received before November 29, 2024. There might be logistical or political reasons why an energy developer wishes to apply earlier in 2024, and having an ordinance in place would allow the Township to process those applications before the MPSC’s review is an option.

We caution, of course, that if PA 233 takes effect as drafted, then the Township will likely need to amend its ordinance to be “compatible” with PA 233 if it wants to avoid the MPSC having sole authority to approve the project. This could be done later in 2024.

2. Adopt a “compatible” ordinance now.

Alternatively, the Township could adopt a “compatible” ordinance now. That ordinance would need to reflect the (fairly permissive) standards in PA 233, which are listed in Attachment A.

It is unclear whether a compatible wind ordinance could go beyond the subjects listed in PA 233 (which are setback, fencing, height, noise, and lighting). For example, PA 233 does not address decommissioning bonds, complaint resolution procedures, or insurance requirements. The statute provides that a compatible ordinance cannot have “requirements . . . more restrictive than the provisions included in section 226(8).” This could be read to mean that the ordinance cannot have *any* restrictions other than those listed in section 226(8), or it could be read to mean that the requirements *for setback, fencing, height, noise, and lighting* cannot be more restrictive than those in the statute.

There is Michigan Supreme Court case law relating to marijuana ordinances holding that “an ordinance is not conflict preempted as long as its additional requirements do not contradict the requirements set forth in the statute.” *DeRuiter v Twp of Byron*, 505 Mich 130, 147; 949 NW2d 91 (2020). A township with additional restrictions (such as for decommissioning and insurance) could argue that those requirements “do not contradict” the requirements in PA 233. We cannot guarantee how a court would decide this issue under PA 233’s language.

If the Township wishes to adopt a “compatible” ordinance, the safest approach would be to include only the requirements in PA 233 and identify the zoning districts in which the use is permitted. The slightly riskier, but still defensible, approach is to adopt an ordinance with PA 233’s requirements *and also* other zoning requirements necessary to protect against possible adverse effects of the solar energy project.

III. Other LCPC Comments

The LCPC also had a few other comments regarding specific sections of the draft ordinance. We address each in turn below:

Section 6.24.C.2.c.1 & 2: Required Security Deposits - What entity determines the level of "sufficient funds"? This is not clearly explained.

- This is set forth in the decommissioning and road damage sections of the Ordinance. The Township could add a cross-reference to those sections to clarify.

Section 6.24.C.2.w: Insurance – This item should include a sentence that states the insurance carrier will inform within 30 days.

- We do not understand this comment. The ordinance requires proof of insurance at the time of application and, if the SLUP is approved, annually thereafter prior to the anniversary date of the SLUP. We feel this is appropriate.

Section 6.24.C.25.b: Decommissioning – Section mentions "third party financial consultant". This should be strictly a structural or mechanical engineer. A financial consultant does not have the necessary expertise.

- We are OK with changing this to a third-party engineer.

Please let us know if you have any questions or concerns.

ATTACHMENT A

For a wind energy facility, all of the following:

(i) The following minimum setback distances, measured from the center of the base of the wind tower:

Setback Description	Setback Distance
Occupied community buildings and residences on nonparticipating properties	2.1 times the maximum blade tip height to the nearest point on the outside wall of the structure
Residences and other structures on participating properties	1.1 times the maximum blade tip height to the nearest point on the outside wall of the structure
Nonparticipating property lines	1.1 times the maximum blade tip height
Public road right-of-way	1.1 times the maximum blade tip height to the center line of the public road right-of-way
Overhead communication and electric transmission, not including utility service lines to individual houses or outbuildings	1.1 times the maximum blade tip height to the center line of the easement containing the overhead line

(ii) Each wind tower is sited such that any occupied community building or nonparticipating residence will not experience more than 30 hours per year of shadow flicker under planned operating conditions as indicated by industry standard computer modeling.

(iii) Each wind tower blade tip does not exceed the height allowed under a Determination of No Hazard to Air Navigation by the Federal Aviation Administration under 14 CFR part 77.

(iv) The wind energy facility does not generate a maximum sound in excess of 55 average hourly decibels as modeled at the nearest outer wall of the nearest dwelling located on an adjacent nonparticipating property. Decibel modeling shall use the A-weighted scale as designed by the American National Standards Institute.

(v) The wind energy facility is equipped with a functioning light-mitigating technology. To allow proper conspicuity of a wind turbine at night during construction, a turbine may be lighted with temporary lighting until the permanent lighting configuration, including the light-mitigating technology, is implemented. The commission may grant a temporary exemption from the requirements of this subparagraph if installation of appropriate light-mitigating technology is not feasible. A request for a temporary exemption must be in writing and state all of the following:

(A) The purpose of the exemption.

(B) The proposed length of the exemption.

(C) A description of the light-mitigating technologies submitted to the Federal Aviation Administration.

(D) The technical or economic reason a light-mitigating technology is not feasible.

(E) Any other relevant information requested by the commission.

(vi) The wind energy facility meets any standards concerning radar interference, lighting, subject to subparagraph (v), or other relevant issues as determined by the commission.

(vii) The wind energy facility will comply with any more stringent requirements adopted by the commission. Before adopting such requirements, the commission must determine that the requirements are necessary for compliance with state or federal environmental regulations.

88477:00001:200444431-1

Conway Township Board Members,

I would like to take this opportunity to thank the officials and employees of the Conway Township. They have worked with me to teach me about my duties at the township as an employee. I never realized the coordination and background tasks that it took to run a township office.

I want to share my concerns with the way business is being handled within the office:

- In my opinion, there is no support for the staff amongst board members.
- I feel that some of the board members do not fully understand their job responsibilities and it appears that they either do not care, at worst or that they are disengaged, at best.
- Additionally, I feel that Board members are not clear on the daily responsibilities, interaction with township residents, nor the skills and education needed to adequately perform the duties of an elected official.
- Laws and rules are in place for a reason. If the board does not follow, why should anyone else. Examples:

1. Checks not deposited in a timely manner causing a resident to incur higher fees on the late payment.
2. A private business that is running out of the township office.
3. Petitions being signed in the office, during office hours.
4. Drinking on the job.
5. Separation of duties not followed. When it was brought to the official's attention, I was told it was a technicality.

When I stepped down as Deputy Treasurer, no one, other than the Clerk, asked why. I was the second person that stepped down within a two-year period of time. I would suggest exit interviews for anyone stepping down from a position. Exit interviews could identify potential organizational issues and lead to a better understanding of the work environment and ultimately lead to a better service of the community.

After seeing the treatment that was given to Elizabeth Whitt by some board members and the public, and fear of retribution, I wish to resign my position and not continue working in what I deem to be a stressful atmosphere. Elizabeth has always considered the benefits and needs of the residents, and she has supported the staff, which cannot be said about other board members.

My last day will be April 30. I will miss working with some of the staff and the residents of Conway Township.

Bill Grubb

From: Garrett Olson <golson@livingstonroads.org>
Sent: Thursday, April 11, 2024 2:56 PM
To: Bill Grubb
Cc: Jodie Tedesco
Subject: RE: Fowlerville/Mohrle Rehabilitation

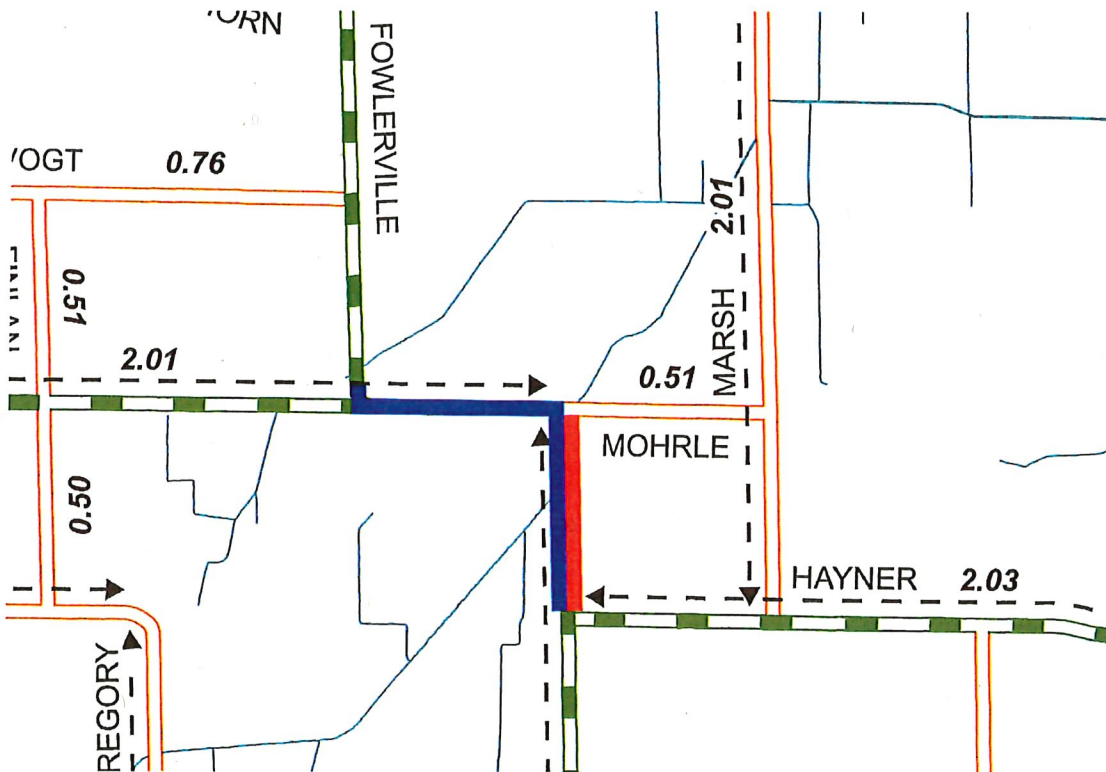
Hi Bill,

For the purpose of efficiency, I figured I would give you the numbers via email. If you would like an official estimate letter for either of these, please let me know. Prices are as follows:

Fowlerville – Hayner to Mohrle (Red Line) - **\$250,000**

Fowlerville/Mohrle – Hayner to 2nd Fowlerville Curve (Blue Line) - **\$600,000**

- Note: This includes paving back on the 2 tangents of the triangle at the second curve.



Give me a call with any questions.

Thank you,

Garrett Olson, P.E.
Construction Engineer
Livingston County Road Commission
3535 Grand Oaks Dr.
Howell, MI 48843
Office: (517) 546-4250
Direct: (517) 518-3004