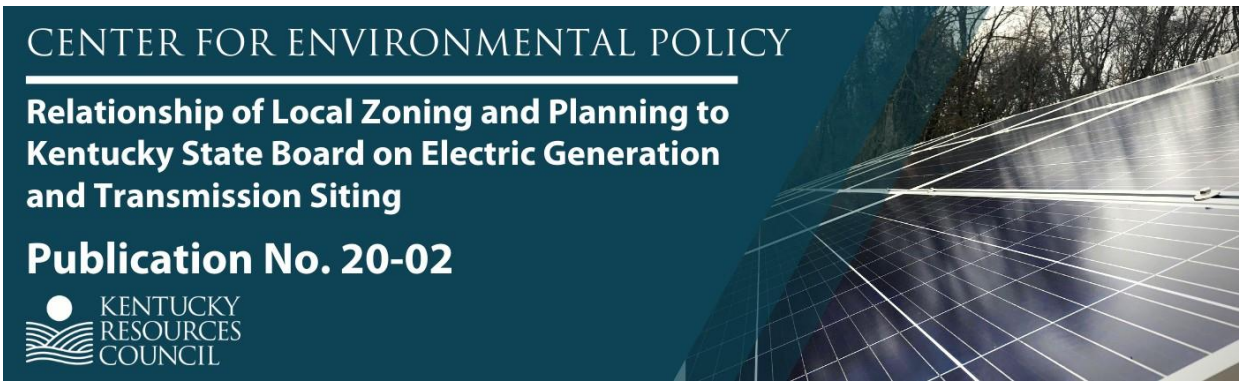

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Relationship of local zoning and planning to Kentucky State Board On Electric Generation And Transmission Siting[1]

With the recent increase in interest in siting utility-scale solar arrays in Kentucky, many communities with planning and zoning are considering adoption of specific provisions in zoning codes to address siting of solar arrays. In developing the recommendations for model solar zoning ordinances, coordination of review of solar arrays that are subject to the Kentucky State Board On Electric Generation And Transmission Siting ("Siting Board") with local zoning ordinances and review, is crucial. This briefing paper explores that relationship and offers some suggestions for communities considering adopting solar zoning ordinances.

Before beginning that exploration, there are two preliminary points regarding the scope of zoning and planning and solar arrays. First, if the solar array is being proposed by a utility regulated by the Public Service Commission, or a municipal utility, the solar project is exempt from local planning and zoning requirements under KRS 100.324:

> 100.324 Public utility facilities excepted -- Review of proposed acquisition, disposition, or change by commission.
>
> (1) All other provisions of this chapter to the contrary notwithstanding, *public utilities operating under the jurisdiction of the Public Service Commission*, except as specified in KRS 100.987, or the Department of Vehicle Regulation or Federal Energy Regulatory Commission, *any municipally owned electric system*, and common carriers by rail shall not

[1] This briefing paper is authored by Tom FitzGerald, Director, Kentucky Resources Council, Inc. It is not intended to give legal advice, but rather to provide background information to the public and local governments.

be required to receive the approval of the planning unit for the location or relocation of any of their service facilities. Service facilities include all facilities of such utilities and common carriers by rail other than office space, garage space, and warehouse space and include office space, garage space, and warehouse space when such space is incidental to a service facility. The Public Service Commission and the Department of Vehicle Regulation shall give notice to the planning commission of any planning unit of any hearing which affects locations or relocations of service facilities within that planning unit's jurisdiction.

(2) The nonservice facilities excluded in subsection (1) of this section must be in accordance with the zoning regulations.

(3) Upon the request of the planning commission, the public utilities referred to in this section shall provide the planning commission of the planning unit affected with information concerning service facilities which have been located on and relocated on private property.

KRS 100.324 (Italics added).

So, with respect to PSC-regulated utilities (which are co-ops or investor-owned utilities) and municipal utilities, (which are not regulated by the PSC but are also exempted from planning and zoning under KRS 100.324), a zoning ordinance might include a standing request from the planning commission for the information mentioned in KRS 100.324(3) with respect to all public utilities referred to in that statute.

Most of the large solar arrays that are anticipated to seek to locate in Kentucky in the next few years are classified as “merchant” power plants under the state Siting Board statutes. Unlike a utility that generates and/or distributes electricity to retail customers, a “merchant” plant generates electricity for sale into the wholesale market. For purposes of Kentucky’s Siting Board, a:

(1) "Merchant electric generating facility" means, except for a qualifying facility as defined in subsection (7) of this section, an electricity generating facility or facilities that, together with all associated structures and facilities:

(a) Are capable of operating at an aggregate capacity of ten megawatts (10MW) or more; and

(b) Sell the electricity they produce in the wholesale market, at rates and charges not regulated by the Public Service Commission;

KRS 278.700.

Under KRS 278.700, municipal utilities are not considered "persons" subject to the Siting Board review process unless the utility qualifies as a merchant electric generating facility by selling the electricity produced at wholesale rather than for their customers. The "qualifying facility" exempted from the definition of merchant electric generating facility is defined in that same statute as:

(1) "Qualifying facility" means a cogeneration facility as defined in 16 U.S.C. sec. 796(18)(b) which does not exceed a capacity of one hundred fifty megawatts (150MW) that is located on site at a manufacturer's plant and that uses steam from the cogeneration facility in its manufacturing process, or an industrial energy facility as defined in KRS 224.1-010 that does not generate more than one hundred fifty megawatts (150MW) for sale and has received all local planning and zoning approvals[.]

Most proposed merchant solar projects are *not* cogeneration facilities. The other category exempted from the Siting Board review process, "an industrial energy facility as defined in KRS 224.1-010," is a narrow subset of facilities that "produces transportation fuels, synthetic natural gas, chemicals, or electricity through a gasification process using coal, coal waste, or biomass resources, and costing in excess of seven hundred fifty million dollars ($750,000,000) at the time of construction." Thus, most proposed utility-scale merchant solar projects will be subject to the Siting Board review process.

<u>Interaction of Zoning And State Siting Process</u>

I. Introduction

Most of the merchant solar facilities will be larger than 10 MW in aggregate capacity, but some may be smaller. Below 10 MW, the state siting statute process does <u>not</u> apply so that any regulation of siting, such as setbacks, will have to come from local zoning regulations. With the typical ground-mounted solar array covering land at a ratio of 5-10 acres per 1 MW of

capacity, regulating the siting, construction, and decommissioning of large solar arrays of less-than 10 MW is both appropriate and beneficial.

For those merchant plants with an aggregate capacity of 10 MW or greater, no person can commence construction of a merchant electric generating facility until it has received a construction certificate for the facility from the Kentucky State Board on Electric Generation and Transmission Siting ("Siting Board"). The Board is comprised of 7 members – the 3 PSC Commissioners, the Energy and Environment Cabinet Secretary or designee, the Secretary of the Cabinet for Economic Development or designee, and two ad-hoc appointees appointed by the Governor from one or two counties, depending on whether the proposed merchant plant is in one or two counties. If only one county, one appointee shall be a resident, and the other, the planning commission head or county judge if there is no planning commission. If two counties, there is a process for selecting which county official and with county resident are ad hoc members. KRS 278.702.

The term "commence to construct" is defined in KRS 278.700 for purposes of the siting statutes as "physical on-site placement, assembly, or installation of materials or equipment which will make up part of the ultimate structure of the facility. In order to qualify, these activities must take place at the site of the proposed facility or must be site-specific. Activities such as site clearing, and excavation work will not satisfy the commence to construct requirements[.]

KRS 278.700(4).

KRS 278.718 provides that the state siting board requirements are intended to be supplemental to, and not to displace, the authority of local governments. While the threshold for when construction begins so as to trigger the siting board jurisdiction over a project, it would be appropriate for a zoning regulation to define what are allowed and prohibited activities related to actions on a property a proposed solar array. While site clearing and excavation do not trigger the need the construction certificate requirement, such activities can cause localized problems such as erosion, loss of tree canopy, and other things that zoning may want to limit until local approval is given. There is no need that the two processes begin at the same time for purposes of

zoning, and it is okay that the state siting process has a different beginning point of actual on-site construction rather than site disturbance.

The relationship of the state Siting Board process to other approvals is outlined in KRS 278.704, which requires a construction certificate from the Siting Board before "commencing to construct" but allows issuance of that certificate before state air, waste, or water permits are obtained (if needed).

II. Setbacks

The relationship of the state siting process to zoning begins in KRS 278.704(2), which provides setbacks as follows:

- Any exhaust stack or wind turbine must be 1,000 feet from an adjoining property boundary
- All proposed structures or facilities for generation of electricity must be 2,000 feet from any residential neighborhood, school, hospital, or nursing home facility.

These setback requirements can be waived by the Siting Board, as explained below.

There is no setback for merchant solar facilities requiring a certain distance from either property boundaries or existing structures on other properties.

KRS 278.704(3) provides that if the merchant plant is proposed to be located in a city or county with planning and zoning, the setback requirements from the property boundary, residential neighborhood, school, hospital, or nursing home facility **"may be established by the planning and zoning commission."** Any such setback shall "have primacy" over the setback requirements in the siting statute and shall not be waivable by the Siting Board, which under KRS 278.704(4) can waive the 1,000 / 2,000 foot-setbacks in the statute on 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 those provided in the statute."

Thus, it is important that any zoning ordinance contain those setbacks deemed necessary, in the zoning ordinance, since they will take precedent over the state default setbacks and cannot be overridden by the state Siting Board.

Notwithstanding the exemption from zoning regulation for utilities, KRS 278.216 does impose siting requirements on new electric generating units proposed by PSC-regulated utilities. For any such facility with over 10MW of capacity, the siting assessment required for merchant plants must be provided to the Public Service Commission and a "site compatibility certificate" must be obtained from the Commission. Unlike merchant facilities, a waivable setback of 1,000 feet from a property boundary is required under KRS 278.704(2) for utility-proposed solar arrays of over 10 MW.

III. Public Meetings And Hearings

Another area where coordination between planning and zoning and the state siting process is important is in the opportunity for a public meeting early in the process. Many communities, such as Louisville, obligate a person to hold a local public meeting before filing an application for a zone change or other zoning approvals.

KRS 278.704(6)-(8) require that, if requested,

> a merchant electric generating entity considering construction of a facility for the generation of electricity or a person acting on behalf of such an entity shall hold a public meeting in any county where acquisition of real estate or any interest in real estate is being considered for the facility. A request for such a meeting may be made by the commission, or by any city or county governmental entity, including a board of commissioners, planning and zoning, fiscal court, mayor, or county judge/executive. The meeting shall be held not more than thirty (30) days from the date of the request.

The purpose of the meeting under subsection (6) of this section is to fully inform landowners and other interested parties of the full extent of the project being considered, including the project time line. One (1) or more representatives of the entity with full knowledge of all aspects of the project shall be present and shall answer questions from the public.

(7) Notice of the time, subject, and location of the meeting under subsection (6) of this section shall be posted in both a local newspaper, if any, and a newspaper of general circulation in the county. Notice shall also be placed on the Web sites of the unregulated

(8) entity, and any local governmental unit. Owners of real estate known to be included in the project and any person whose property adjoins at any point any property to be included in the project shall be notified personally by mail. All notices must be mailed or posted at least two (2) weeks prior to the meeting.

(9)The merchant electric generating entity or a person acting on behalf of a merchant electric generating entity shall, on or before the date of the public meeting held under subsection (6) of this section, provide notice of all research, testing, or any other activities being planned or considered to:

(a) The Energy and Environment Cabinet;

(b) The Public Service Commission;

(c) The Transportation Cabinet;

(d) The Attorney General; and

(e) The Office of the Governor.

KRS 278.704(6)-(9).

A merchant generating facility is thus obligated under KRS 278.704(6) to hold a hearing <u>if requested</u> as early in the process as when that facility is "considering" acquisition of real estate or any interest in real estate for

the facility. Since there is no notice requirement for a merchant facility to notify the local officials who can request such a hearing *prior* to acquiring real estate, it would be advisable to include either in the zoning ordinance or as a stand-alone ordinance, a standing requirement that would require such notice by any merchant generating facility "considering acquisition of real estate or an interest in real estate for the purpose of construction of a merchant generating facility of 10 MW or greater."

KRS 278.706 requires that a public meeting be held at least ninety (90) days prior to submittal of an application for a construction certificate to the Siting Board, for the purpose of "informing the public of the project being considered and receiving comment on it. Notice of the meeting must be published and individual notice to all adjoining landowners must be provided at least two (2) weeks prior to the meeting.

KRS 278.706 outlines the requirements for a complete application for a construction certificate for merchant electric generating facilities. They include:

(a) The name, address, and telephone number of the person proposing to construct and own the merchant electric generating facility;

(b) A full description of the proposed site, including a map showing the distance of the proposed site from residential neighborhoods, the nearest residential structures, schools, and public and private parks that are located within a two (2) mile radius of the proposed facility;

(c) Evidence of public notice that shall include the location of the proposed site and a general description of the project, state that the proposed construction is subject to approval by the board, and provide the telephone number and address of the Public Service Commission. Public notice shall be given within thirty (30) days immediately preceding the application filing to:

1. Landowners whose property borders the proposed site; and

2. The general public in a newspaper of general circulation in the county or municipality in which the facility is proposed to be located;

(d) 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);

(e) If the facility is not proposed to be located on a site of a former coal processing plant and the facility will use on-site waste coal as a fuel source or in an area where a planning and zoning commission has established a setback requirement pursuant to KRS 278.704(3), a statement that the exhaust stack of the proposed facility and any wind turbine is at least one thousand (1,000) feet from the property boundary of any adjoining property owner and all proposed structures or facilities used for generation of electricity are two thousand (2,000) feet from any residential neighborhood, school, hospital, or nursing home facility, unless facilities capable of generating ten megawatts (10MW) or more currently exist on the site. If the facility is proposed to be located on a site of a former coal processing plant and the facility will use on-site waste coal as a fuel source, a statement that the proposed site is compatible with the setback requirements provided under KRS 278.704(5). If the facility is proposed to be located in a jurisdiction that has established setback requirements pursuant to KRS 278.704(3), a statement that the proposed site is in compliance with those established setback requirements;

(f) A complete report of the applicant's public involvement program activities undertaken prior to the filing of the application, including:

1. The scheduling and conducting of a public meeting in the county or counties in which the proposed facility will be constructed at least ninety (90) days prior to the filing of an application, for the purpose of informing the public of the project being considered and receiving comment on it;

2. Evidence that notice of the time, subject, and location of the meeting was published in the newspaper of general circulation in the county, and that individual notice was mailed to all owners of property adjoining the proposed project at least two (2) weeks prior to the meeting; and

3. Any use of media coverage, direct mailing, fliers, newsletters, additional public meetings, establishment of a community advisory

group, and any other efforts to obtain local involvement in the siting process;

(g) A summary of the efforts made by the applicant to locate the proposed facility on a site where existing electric generating facilities are located;

(h) Proof of service of a copy of the application upon the chief executive officer of each county and municipal corporation in which the proposed facility is to be located, and upon the chief officer of each public agency charged with the duty of planning land use in the jurisdiction in which the facility is proposed to be located;

(i) An analysis of the proposed facility's projected effect on the electricity transmission system in Kentucky;

(j) An analysis of the proposed facility's economic impact on the affected region and the state;

(k) A detailed listing of all violations by it, or any person with an ownership interest, of federal or state environmental laws, rules, or administrative regulations, whether judicial or administrative, where violations have resulted in criminal convictions or civil or administrative fines exceeding five thousand dollars ($5,000). The status of any pending action, whether judicial or administrative, shall also be submitted; and

(l) A site assessment report as specified in KRS 278.708. The applicant may submit and the board may accept documentation of compliance with the National Environmental Policy Act (NEPA) rather than a site assessment report.

(3) Application fees for a construction certificate shall be set by the board and deposited into a trust and agency account to the credit of the commission.

(4) Replacement of a merchant electric generating facility with a like facility, or the repair, modification, retrofitting, enhancement, or reconfiguration of a merchant electric generating facility shall not, for the purposes of this section and KRS 224.10-280, 278.704, 278.708, 278.710, and 278.712, constitute construction of a merchant electric generating facility.

KRS 278.706.

As one can see, there are **several** places where the state siting process does or could intersect with the local planning and zoning process.

First, the requirement for a public involvement program including a local public meeting, could be incorporated into the model ordinance in a manner consistent with the state statute, as discussed above.

Second, the application requires "[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 state law does not plainly state that the merchant plant must seek zoning approval before applying for the construction certificate. If the zoning ordinance has purely prescriptive requirements that do not require individualized project review, such a certification *could* be given prior to Siting Board review. If the local zoning process requires individualized review to set conditions, an applicant would have a more difficult time making such a certification without first getting zoning approval.

Clarification in a local zoning ordinance whether local approval is required prior to an application for a construction certificate from the state Siting Board would eliminate this ambiguity.

In any event, the application must include a statement disclosing setback requirements established by the planning and zoning commission as provided under KRS 278.704(3), so it is critical that such setbacks (and any process to vary them under certain circumstances, such as written consent of the adjoining property owner to closer setbacks) be set out in the zoning ordinance rather than being crafted on an individual project-specific basis.

A major requirement for the application for a construction certificate from the state Siting Board is a "site assessment report," required by KRS 278.706(2)(l) and whose contents must include, according to KRS 278.708, the following:

> (a) A description of the proposed facility that shall include a proposed site development plan that describes:
>
> 1. Surrounding land uses for residential, commercial, agricultural, and recreational purposes;
>
> 2. The legal boundaries of the proposed site;
>
> 3. Proposed access control to the site;

4. The location of facility buildings, transmission lines, and other structures;

5. Location and use of access ways, internal roads, and railways;

6. Existing or proposed utilities to service the facility;

7. Compliance with applicable setback requirements as provided under KRS 278.704(2), (3), (4), or (5); and

8. Evaluation of the noise levels expected to be produced by the facility;

(b) An evaluation of the compatibility of the facility with scenic surroundings;

(c) The potential changes in property values and land use resulting from the siting, construction, and operation of the proposed facility for property owners adjacent to the facility;

(d) Evaluation of anticipated peak and average noise levels associated with the facility's construction and operation at the property boundary; and

(e) The impact of the facility's operation on road and rail traffic to and within the facility, including anticipated levels of fugitive dust created by the traffic and any anticipated degradation of roads and lands in the vicinity of the facility.

(4) The site assessment report shall also suggest any mitigating measures to be implemented by the applicant to minimize or avoid adverse effects identified in the site assessment report.

(5) The board shall have the authority to hire a consultant to review the site assessment report and provide recommendations concerning the adequacy of the report and proposed mitigation measures. The board may direct the consultant to prepare a separate site assessment report. Any expenses or fees incurred by the board's hiring of a consultant shall be borne by the applicant.

(6) The applicant shall be given the opportunity to present evidence to the board regarding any mitigation measures. As a condition of approval for an application to obtain a construction certificate, the board may

require the implementation of any mitigation measures that the board deems appropriate.

KRS 278.708.

The criteria for Siting Board approval of a construction certificate application again references compliance with planning and zoning:

278.710 Granting or denial of construction certificate -- Policy of General Assembly -- Transfer of rights and obligation.

(1) Within one hundred twenty (120) days of receipt of an administratively complete application, or within one hundred eighty (180) days of receipt of an administratively complete application if a hearing is requested, the Board shall, by majority vote, grant or deny a construction certificate, either in whole or in part, based upon the following criteria:

(a) Impact of the facility on scenic surroundings, property values, the pattern and type of development of adjacent property, and surrounding roads;

(b) Anticipated noise levels expected as a result of construction and operation of the proposed facility;

(c) The economic impact of the facility upon the affected region and the state;

(d) Whether the facility is proposed for a site upon which existing generating facilities, capable of generating ten megawatts (10MW) or more of electricity, are currently located;

(e) Whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed;

(f) Whether the additional load imposed upon the electricity transmission system by use of the merchant electric generating facility will adversely affect the reliability of service for retail customers of electric utilities regulated by the Public Service Commission;

(g) Except where the facility is subject to a statewide setback established by a planning and zoning commission as provided in KRS 278.704(3) and except for a facility proposed to be located on a site of a former coal processing plant and the facility will use on-site waste coal as a fuel source, whether the exhaust stack of the proposed merchant electric

generating facility and any wind turbine is at least one thousand (1,000) feet from the property boundary of any adjoining property owner and all proposed structures or facilities used for generation of electricity are two thousand (2,000) feet from any residential neighborhood, school, hospital, or nursing home facility, *unless a different setback has been requested and approved under KRS 278.704(4). If a planning and zoning commission has established setback requirements that differ from those under KRS 278.704(2), the applicant shall provide evidence of compliance.* If the facility is proposed to be located on site of a former coal processing plant and the facility will use on-site waste coal as a fuel source, the applicant shall provide evidence of compliance with the setback requirements provided in KRS 278.704(5);

(h) The efficacy of any proposed measures to mitigate adverse impacts that are identified pursuant to paragraph (a), (b), (e), or (f) of this subsection from the construction or operation of the proposed facility; and

(i) Whether the applicant has a good environmental compliance history.

(2) When considering an application for a construction certificate for a merchant electric generating facility, the board may consider the policy of the General Assembly to encourage the use of coal as a principal fuel for electricity generation as set forth in KRS 152.210, provided that any facility, regardless of fuel choice, shall comply fully with KRS 224.10-280, 278.212, 278.216, and 278.700 to 278.716.

(3) A person that has received a construction certificate for a merchant electric generating facility shall not transfer rights and obligation under the certificate without having first applied for and received a board determination that:

(a) The acquirer has a good environmental compliance history; and

(b) The acquirer has the financial, technical, and managerial capacity to meet the obligations imposed by the terms of the approval or has the ability to contract to meet these obligations.

KRS 278.710 (Italics added).

The language again suggests that setbacks should be clearly established in the zoning regulations rather than being established on a case-by-case basis.

The question again arises whether zoning approval must be obtained first, since the Siting Board must consider under (e) "Whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed." The zoning ordinance should clarify whether project review under the zoning ordinance precedes or can follow the state Siting Board review.

Finally, there is an opportunity to request a more formal hearing on an application, provided for in KRS 278.712.