Renewable energy in Michigan: Many questions remain

On Nov. 28, 2023, Gov. Whitmer signed into law two bills—now Public Acts 233 and 234 of 2023—that will preempt townships (and other local governments) from control over the siting of certain renewable energy wind, solar and battery storage facilities. The new laws replace local control with a state-controlled statutory framework and grant new siting authority over these facilities to the Michigan Public Service Commission (MPSC). What is the new process? And will townships still play a role? The following is intended to provide an overview of these new laws—with the understanding that the answers provided are to the best of our knowledge at this time.

PAs 233 and 234 leave many gray areas, which will hopefully be clarified over the upcoming months during implementation through the state agency rule-making process or technical amendments—rather than by trial and error impacting Michigan's communities. Townships should consult their legal counsel regarding the regulation of renewable energy facilities under this new legislation.

What type and size of renewable energy facilities does PA 233 regulate?

PA 233 amends Section 13 of the Clean and Renewable Energy and Energy Waste Reduction Act (MCL 460.1013, *et seq.*) by adding a new Part 8, which sets forth **a regulatory process for the construction of certain wind, solar and energy storage facilities**. Part 8 regulates construction of "utility-scale energy facilities," which includes:

- any solar energy facility with a nameplate capacity of 50 megawatts or more
- any wind energy facility with a nameplate capacity of 100 megawatts or more
- any energy storage facility with nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more

It is important to note that "construction" is not limited to new facilities. Under the law, construction is any substantial action taken constituting the placement, erection, expansion or repowering of these facilities. This definition clearly intends to govern the location and construction of new

utility-scale energy facilities and the expansion or repowering of existing facilities. While townships must abide by the regulatory framework in Part 8 for construction of these larger, utility-scale energy facilities, smaller sized projects are not included and remain subject to local zoning regulatory authority.

To determine when Part 8 controls, it is essential to calculate nameplate capacity. Nameplate capacity means the designed full-load sustained generating output of an energy facility—even if components of the energy facility are located on different parcels, *whether contiguous or noncontiguous*. When determining nameplate capacity, the energy must share a single point of connection to the grid. This limitation will be particularly important when considering the facilities' nameplate capacity where developers try to include noncontiguous parcels to reach the preemptive number of megawatts.

Is PA 233 now in effect?

No. PA 233 becomes effective one year after the legislation was signed—**Nov. 29, 2024**. This gives townships a short window to:

- review compliance with the regulatory process set forth in PA 233
- determine what course of action makes sense for the township
- make any needed revisions to current ordinances or master plans
- adopt any new ordinances

This timeframe will go by fast, so townships should begin discussion of this regulatory process right away.

So, how will these facilities be regulated? Do townships have any authority?

PA 233 provides a new regulatory framework for an electric provider or independent power producer to pursue a state certificate from the MPSC for the construction of a utility-scale energy facility. Generally, the **developer can choose** to either pursue a state certificate through the MPSC, or to propose construction outside of PA 233 under a local zoning ordinance or in a community where no local zoning exists.

There are, however, a couple exceptions to this developer's choice:

- A local unit of government with zoning jurisdiction may request that the MPSC require a developer to go through the state certificate process for construction. For various reasons, it may be more palatable for a local unit to require use of the state approval process even when the developer may want to go under its local zoning ordinance for approval.

Public Act 233 of 2023 replaces local control over utility-scale renewable energy facilities with a state-controlled statutory framework, and grants new authority over these facilities to the Michigan Public Service Commission. Many questions, and concerns, remain over this legislative takeover of local zoning authority.

- Even if the developer decides to pursue a state certificate for construction, the legislation may direct them down a different path under a severely restricted local approval process. If all affected local units timely notify the developer that they have **a compatible renewable energy ordinance** (CREO), the developer **must** start down this alternate path for local approval.

Inside a CREO

A CREO is an ordinance that provides for the development of utility-scale energy facilities within the local unit of government. This ordinance cannot be more restrictive than the requirements included in Section 226(8) of PA 233, which delineates separate siting regulations for each of the three types of renewable energy facilities (wind, solar and energy storage).

- For **solar energy facilities**, it addresses setbacks, fencing, height, sound and dark sky lighting.
- For **wind energy facilities**, it addresses setbacks, sound, light mitigation, shadow flicker, height, radar interference or other relevant issues determined by the MPSC.
- For **energy storage facilities**, it addresses setbacks, compliance with national fire protection standards, sound and dark sky lighting.

The regulations for all three facilities also provide for any more stringent requirements adopted by the MPSC that are necessary for compliance with state or federal environmental regulations.

What does this mean for current township ordinances? Most current township zoning ordinances with renewable energy facility provisions are more detailed or limiting than the new requirements in Section 226(8). If the ordinance is more stringent than the new requirements, then it will not qualify as a CREO and the developer can simply bypass the local unit and seek a state certificate. In addition, if your township has a moratorium on the development of utility-scale energy facilities, it is considered not to have a CREO.

Public meetings in affected local units

Both processes under PA 233—if a developer goes through the state or through a local unit with a CREO—start with the same requirement: the developer proposing to obtain a state certificate must hold a **public meeting in each affected local unit**. An "affected local unit" is defined as a unit of local government (township, county, city and village) in which all or part of a proposed energy facility will be located. For example, if the proposed utility-scale energy facility straddles two townships in two different counties, there would need to be four public meetings; one in each township and one in each county.

There is one exception for these public meetings. If a public meeting is held in a township, it is considered to be held in each village located within the township. This exception would only impact projects located in a village.

Overall, it might have made more sense if the "affected local unit" was defined by zoning jurisdiction since the only unit really affected or preempted is the governmental unit that exercises zoning jurisdiction over the area of the project. That, however, is not what the statutory language provides.

At least 60 days before a public meeting, a developer is required to *offer* to meet with the chief elected official, or their designee, for each affected local unit to discuss the site plan. The act, however, does not define "chief elected official." Other statutes (i.e., the Michigan Planning Enabling Act and State Construction Code Act) define the chief elected official in a township as the supervisor, and so it may be fair to assume the same is true here. A future technical amendment may clarify this definition. If within 30 days following the meeting to discuss the site plan, the chief elected official of each affected local unit notifies the developer that the local unit has a CREO, the developer **must** then file for local approval with *each affected local unit*.

Unfortunately, this process becomes somewhat convoluted and cumbersome. It is not enough for the township to simply have a CREO—each other affected local unit must also have their own CREO in order to require the developer to go through the local application process.

Let's look at an example. If a proposed project straddles two townships in the same county, then each township *and* the county must timely notify the developer that they *each* have a CREO. If this occurs, the developer must go through the approval process with both townships and the

county. Therefore, even if your township has a CREO, it will be dependent on other affected local units to determine whether your local CREO process can be used to consider the project. PA 233 then sets out the framework to consider the developer's project under a local application process using the CREO.

The MPSC application process—including intervenor funds for locals

If all of the affected local units do not timely notify the developer that they have a CREO, then the process to apply for an MPSC certificate continues at the state level. This process picks back up with the public meeting and requires that at least 30 days before a meeting, the developer shall notify the clerk of the affected local unit(s) of the time, date, location and purpose of the meeting and provide a copy of the site plan or the web address where a site plan is available for review. At least 14 days before the public meeting, the developer must publish notice of the meeting. The law states that the notice must be published in a newspaper of general circulation in the affected area or in a "comparable digital alternative." It is unclear what is meant in the statute by a comparable digital alternative, and we will likely receive future clarification from the MPSC. The MPSC is required to make rules regarding the format and content of the notice.

While proponents of the legislation tout that the public meeting gives communities and residents a voice, unfortunately, the statute provides no requirements that the developer or MPSC take any of those comments into account in the application process. There is no direction in the statute as to what role the MPSC will play in the public meeting, or if MPSC representatives even need to attend. It appears from the statute that the meetings are simply a "check box" on the developer's way to file an application with the MPSC. The MPSC may address additional meeting requirements in future rule-making.

Once the developer has prepared a site plan and has held this public meeting, it can then submit an application to the MPSC. The MPSC application process is spelled out in detail in PA 233. Some of the highlights are as follows:

The developer must submit to the MPSC an application as specified in Section 225(1) of the act and a site plan as specified in Section 224. Under the new law, the MPSC may also promulgate rules that could include additional site plan and application requirements.

When the developer files an application with the MPSC, it must grant to each affected local unit an amount determined by the MPSC up to $75,000 per unit, not to exceed $150,000 in total. Each affected local unit must deposit the grant in a **local intervenor compensation fund** to be used to cover costs associated with participation in the contested case proceeding on the application for a certificate. The application is treated as a contested case under the Administrative Procedures Act and each affected local unit, participating property owner or nonparticipating property owner may intervene by right. This funding to intervene is an incentive for a local unit to simply go through the state certificate process and use the developer's funds to intervene in the process.

MTA opportunities to learn more

As township leaders, planning and zoning officials, and residents continue to learn more about the new renewable energy facility siting laws, we know that questions and concerns will also continue. That's why MTA has planned numerous educational opportunities in the upcoming months, connecting you with MTA legal counsel and allowing you to listen, learn and get your questions answered, to the extent possible, on "Renewable Energy Siting: What's Next?" Join us:

- **Jan. 17 at noon, "Now You Know" lunchtime webinar**—Get an overview of the legislation, how it impacts your township's existing ordinances, public safety and infrastructure considerations, and more—all in just one hour. Cost is just $25; register online at https://bit.ly/NYKmta. Can't make it live? A recording will be available after the webinar; watch MTA publications for details on availability.
- **Jan. 23**—Join us for **MTA's 2024 Capital Conference** in Lansing for legislative and educational updates, including the latest on renewable energy. The day's agenda also includes lunch with lawmakers, as well as general and breakout sessions on important issues that impact townships around the state. Turn to the inside back cover for a registration form, or visit www.michigantownships.org (look under "Advocacy") to register and for additional details. Let your voice be heard!
- **April 22-25**—Our **2024 Annual Conference & Expo**, held at the Grand Traverse Resort, includes several sessions on renewable energy in Michigan, including more from MTA Legal Counsel on the siting legislation and what it means for your township. Read all about the township event of the year in the registration brochure, included in **this** issue of *Township Focus*, as well as on MTA's website. Registration opens Jan. 3. We looking forward to seeing you in April!

Among the items necessary for granting of a certificate to construct a utility-scale renewable energy facility, the Michigan Public Service Commission must determine that the public benefits of the proposed facility justify its construction, and the proposed facility will not unreasonably diminish farmland.

The MPSC must grant or deny the certificate to construct the utility-scale energy facility within one year after a complete application is filed with the commission. When making its decision on the application, the MPSC must consider feasible alternative developed locations if the site is undeveloped land, as well as consider the impact on local land use, including the percentage of land within the local unit dedicated to energy generation. The MPSC may also condition the certificate on:

- establishing and maintaining vegetative ground cover
- meeting or exceeding pollinator standards established by the "Michigan Pollinator Habitat Planning Scorecard for Solar Sites"
- providing for community improvements in the affected local unit
- providing for proper care of the property during construction and operation of the facility

Among other **items necessary for the grant of the certificate**, the MPSC must determine that:

- the public benefits of the proposed energy facility justify its construction
- the proposed energy facility will not unreasonably diminish farmland, including, but not limited to, prime farmland and, to the extent that evidence of such farmland is available in the evidentiary record, farmland dedicated to the cultivation of specialty crops
- the facility will meet the facility standards contained in Section 226(8) (this is the same section that provides the standards for a CREO)

A benefit to locals when the developer uses the MPSC certificate process is that the developer must enter into a **host community agreement with each affected local unit** agreeing that upon commencement of any operation, the energy facility owner must pay the affected local unit $2,000 per megawatt of nameplate capacity located within the affected local unit. If, for example, a 100-megawatt project is approved by the MPSC in your township, when the facility begins operation, both the township and the county would each get $200,000. The payment may only be used as determined by the affected local unit for police, fire, public safety, or other infrastructure. It may also be used for other projects as agreed to by the local unit and the applicant. If the local unit refuses to enter into the host community agreement, then the money gets distributed to community-based organizations.

How does the approval process work if all affected local units timely notify the developer that they each have a CREO?

If each affected local unit has a CREO and notifies the developer within 30 days following the site plan review discussion with each chief elected officer, then the developer must file for approval with each local unit. The filing would take the form of an application that is required to contain most of the same requirements as the MPSC application. This would include, among other things, a **decommissioning plan** as set out in PA 233. A local unit may also require other application information necessary to determine compliance with the CREO. Again, the CREO is very limited and cannot be more restrictive than the standards in Section 226(8).

The local unit is required to approve or deny the application within 120 days after receiving it, unless the applicant and local unit jointly agree to extend the deadline by up to another 120 days. There is nothing in the statute that addresses tolling for an incomplete application. This is another gray area. It could be argued that the local unit would not accept an application for filing that is incomplete so no timeline would start until a complete application is filed. It is unknown at this time how such an argument would be viewed by the courts or the MPSC.

PA 233 provides that the developer may abandon the local approval process and return to the MPSC certificate application process if:

- an affected local unit fails to timely approve or deny an application
- the application complies with the requirements of Section 226(8), but an affected unit denies the application

- an affected local unit amends the zoning ordinance after the chief elected official notifies the developer that it has a CREO, and the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those in Section 226(8)

Once again, it appears that the second basis above limits the CREO to nothing more than what is in Section 226(8). If a local unit denies the application for any reason other than noncompliance with Section 226(8) standards, then the developer can go back to the state certificate process. When the process returns to the MPSC, the developer does not have to hold the public meeting in the affected local units or, more importantly, provide the money to the affected local units for the intervention funding. This works to punish the local units by depriving them of the funding to participate in the contested proceedings before the MPSC.

Remember, at a minimum, there will be a township CREO application and a county CREO application; if either fails to properly process the application, the developer may return to the MPSC process. **Each of the local units is reliant on the other and needs to cooperate among themselves to be successful with the CREO approach.**

Additionally, if the MPSC approves a developer for a certificate after the process is returned to the MPSC as provided above, then the local unit is considered to no longer have a CREO, unless the MPSC finds that the local unit's denial of the application was reasonably related to the developer's failure to provide information required for the application.

Be aware of pitfalls

At first impression, there are many pitfalls to be aware of in trying to retain local control though a CREO. Among other items already discussed, it is unclear if the developer can be required to provide a local host community agreement of $2,000 per megawatt if the application is not processed through the MPSC. There is much discussion with legal and planning professionals about using a noncompliant zoning ordinance that incentivizes the developer to use a local process instead of going through a CREO or the state certificate process. This noncompliant ordinance might include such things as a required host community agreement, control over where facilities can be sited, a cap on the overall amount of land in the township that can be used for this purpose, a timeline for action on an application, and better decommissioning standards. There is also risk with going this route, and it should not be undertaken without guidance from legal counsel.

What purpose does PA 234 serve?

PA 234, part of the renewable energy package along with PA 233, amends the Michigan Zoning Enabling Act (MZEA) to subject a zoning ordinance to Part 8 of the Clean and Renewable Energy and Energy Waste Reduction Act (MCL 460.1221 through 460.1232). Part 8 contains all of the regulations in PA 233 as discussed above.

PA 234 also subjects a zoning ordinance to the following requirement: "A renewable energy project that receives special land use approval under Section 502 **on or after January 1, 2021,** is considered to be a prior nonconforming use and the special land use approval shall not be revoked or modified if substantial construction has occurred or if an expenditure equal to 10% of the project construction costs or $10,000.00, whichever is less, has been made."

This provision alters nonconforming use vested rights established by case law or as otherwise contained in a local zoning ordinance. It creates a very low threshold for a renewable energy project. It is also problematic that it does not define what a renewable energy project is under the MZEA.

It should also be understood that PA 234 becomes effective prior to PA 233, on Feb. 13, 2024.

What's next

MTA, local government attorneys, renewable energy experts and others are continuing to wade through this legislation, seeking answers, consensus and clarification as communities grapple with the effects of the new law. MTA is working with its legal counsel to prepare a sample compatible renewable energy ordinance and application. Watch MTA publications for availability, and please consult your local attorney for guidance specific to your township. MTA will continue to advocate for Michigan's townships, and assist its member townships in navigating the renewable energy path forward.

Robert E. Thall, MTA Legal Counsel
Bauckham, Thall, Seeber, Kaufman & Koches, PC

Watch MTA's "Renewable Energy " webpage (click on "MTA On the Issues" under the "Advocacy" tab on www.michigantownships.org) for additional guidance and information.