Navigating Local Permitting Roadblocks to Renewable Energy Deployment in Pennsylvania

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(By **Anna Jewart**)

Over the past several years, developers have targeted the vast rural and undeveloped lands of Pennsylvania for renewable energy development. Yet, Pennsylvania lags behind the rest of the country in terms of renewable energy deployment. Beyond well-reported issues involving grid-interconnection and permitting backlogs, those seeking to develop renewable energy in the Keystone State often experience deal-killing roadblocks early on during local land use permitting.

Pennsylvania law recognizes that effective use of zoning power typically requires expertise and knowledge of local conditions, making it uniquely suited to local regulation. Outside the broad framework established by the Pennsylvania Municipalities Planning Code, 53 P.S. §10101, *et seq.*, ("MPC") and rare statutory exceptions, the two-thousand-plus municipalities in Pennsylvania are each free to determine if and how to regulate land use matters within their borders. This means that unlike most areas of the law, the rules may change entirely the moment you cross a municipal line.

This decentralized legal framework creates challenges for renewable development, which has faced significant *NIMBY*-ism over the past several years. In response, many municipalities have sought to make renewable development untenable or even impossible through adoption of onerous land use regulations. While many states have expressly limited municipal discretion in renewables siting through adoption of state-wide permitting or statutory protections, Pennsylvania has not.

However, generally applicable land use jurisprudence does help protect against unreasonable local regulation. First, municipalities cannot expressly prohibit renewable energy uses. Ordinances that attempt to do so are *de jure* exclusionary, and unconstitutional. Second, an ordinance that appears to permit a use, but under conditions that it cannot in fact be accomplished may be found to be *de facto* exclusionary. Ordinances often attempt to make renewable development impossible through the imposition of high setbacks, minimum lot sizes, or lot coverage restrictions. Others restrict renewables to zoning districts unsuitable for these uses or impose prohibitions on the use of prime agricultural soils or steep slopes, further limiting the land available. Exclusionary zoning ordinances may be challenged through a "substantive validity" challenge brought before the municipal governing body or zoning hearing board pursuant to the MPC, or one may petition the municipality for a voluntary amendment.

A third manner in which municipalities may seek to restrict renewable development is through the imposition of onerous application requirements. These may include the submission of environmental studies, interconnection studies, or detailed plans and designs not readily available at the early phase of development during which local land use approval processes occur. Others require third-party permitting prior to approval, which might not be practical or legally possible. Ordinances that attempt to duplicate or supplant county, state, or federal regulations may be challenged under a preemption theory, and established land use jurisprudence directs that a lack of third-party permitting is not grounds for denial but should be imposed as a condition of approval. Challenges to these types of provisions can generally be brought in the same manner as a challenge to an exclusionary ordinance.

An increasingly popular fourth way in which municipalities try to limit, or profit from, renewable energy development is through the imposition of high "application", "impact", or "host benefit" fees. Municipalities increasingly attempt to impose five or even six figure "application" fees for solar and wind applications. Others have sought to have developers pay a yearly fee per megawatt hours generated. Municipal fees are required to be reasonably related to the administrative costs associated with them. Excessive fees may be challenged. While other states have implemented authorization for renewable energy "community benefit agreements" or "impact fees" payable to the host municipality, Pennsylvania has not. As creatures of statute, municipalities lack the authority to exceed the powers granted to them by the General Assembly and cannot, as the law stands today, require a developer to pay out a yearly fee.

The fifth most common way in which municipalities attempt to limit or restrict renewable development applies to those that have not adopted a local zoning ordinance. Many municipalities without a zoning ordinance adopted pursuant to the MPC have adopted “standalone” ordinances with zoning-type restrictions on renewables. These ordinances often purport to be adopted pursuant to the municipal enabling act under which the municipality was created, such as the Second Class Township Code, 53 P.S. §65101-§70105. Pennsylvania courts have long held that the regulation of land use must be done within the guardrails of the MPC, and case law further indicates that statutes like the Second Class Township Code do not on their own authorize the regulation of uses not expressly addressed therein. As they fall outside the parameters of the MPC, standalone ordinances may be challenged as either procedurally or substantively defective in the local court of common pleas.

As it stands today, successful renewables deployment in Pennsylvania depends in part on developers’ ability to weave through a wide array of local regulations intended to dissuade development. While this is an uphill battle, it can be won with proper planning and coordination. Review of local regulations should occur prior to execution of any lease or lease option agreement and should be monitored closely for changes as development progresses. Often, adverse ordinance provisions are reactionary or adopted in response to political pressure and fears, which can be calmed through positive engagement and education. Therefore, public engagement is key, and permitting risks can be mitigated by early outreach to local stakeholders, including municipal officials, solicitors, and neighboring property owners.

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