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THE ROLE OF LOCAL GOVERNMENT IN THE ENERGY TRANSITION

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§ 31.01 Introduction*

At a national level, public support for renewable energy generation has increased significantly. National approval, however, does not necessarily translate into local support. Local governments have long enjoyed considerable freedom to regulate traditional energy sources, such as oil and gas, under their police powers. At the behest of residents concerned about its impacts, local governments are similarly exercising their authority to restrict renewable development under zoning, siting and other land use ordinances, efforts that may undermine renewable portfolio standards and other state energy transition policy goals. This chapter will focus on local land use regulation of the most common forms of renewable energy development—utility-scale wind and utility-scale solar projects. In this context, this chapter will address: (1) the differing state statutory philosophies regarding the division of regulatory responsibility between state and local governments, (2) the types of local government procedural and substantive land use requirements being imposed on wind and solar projects, and (3) case law themes and trends evolving around the country in response to this new regulatory landscape.

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§ 31.02 Local Versus State Land Use Jurisdiction

Land use siting decisions are typically considered quintessentially local matters. However, over the years many states have carved out legislative exceptions to this general rule, delegating decision-making authority over where certain uses of land may be located to state-level agencies and limiting or prohibiting their local regulation. Other states have created hybrid or joint regulatory regimes, where local land use regulation is permitted, but only in conjunction with an additional level of state oversight or the imposition of statutory limits on what regulations municipalities can impose. Typically, these uses are ones deemed to be important to society, yet unpopular with neighbors. Many states are now creating similar frameworks which remove or limit local government involvement in renewable energy land use decisions.

[1] Exclusive Local Jurisdiction

In several states, exclusive local regulation of renewable energy siting remains in place, even for utility-scale solar and wind projects. Alabama, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Pennsylvania, Texas, and Utah have not materially altered their traditional land use siting processes for utility-scale renewables.¹

Some states retain local land use regulation of renewables, but statutorily protect against unreasonable restrictions. For example, Indiana bars local ordinances that prohibit or unreasonably restrict the use of solar energy systems, except to preserve or protect public health and safety, but has not adopted similar protections for wind energy systems.² In January 2023, Illinois Governor J.B. Pritzker signed into law House Bill 4412, which retains local land use jurisdiction over commercial wind and solar energy facilities, but establishes uniform regulations and prohibits certain bans or moratoria.³ He stated that the legislation was necessary so that projects are not held “hostage” by local opponents, but he remained opposed to statewide controls.⁴

¹Del. Code Ann. tit. 29, § 80-8060; Ga. Code Ann. § 36-66-1 et seq.; Haw. Rev. Stat. § 46-4; Idaho Code § 67-6504 et seq.; Kan. Stat. Ann. § 12-741 et seq.; Mich. Comp. Laws § 125.3101 et seq.; Miss. Code Ann. § 17-1-1 et seq.; Mo. Rev. Stat. § 89.010 et seq.; Mont. Code Ann. § 76-2-201 et seq.; 53 Pa. Stat. and Cons. Stat. Ann. § 10101 et seq.; Tex. Loc. Gov't Code Ann. § 7-A-211; Utah Code Ann. §§ 10-9a-501, 17-27a-501.

²Ind. Code § 36-7-2-8.

³Pub. Act 102-1123, 20 Ill. Comp. Stat. 5/5-12020.

⁴See Kevin Bessler, “Pritzker Flips on Support of Local Control over Wind Farm Siting Decisions,” *Center Square* (Jan. 25, 2023).

[2] Joint Local and State Jurisdiction

Several states have established systems in which state-level siting approval is required for utility-scale projects, but local- or county-level land use regulations apply or must be considered. In Colorado, both local- and state-level entities are engaged in wind energy siting decisions. Utility-scale developments must receive a certificate of public convenience from the Public Utilities Commission; however, a utility may not construct or install a facility unless it complies with local zoning rules.⁵ Public utilities and power authorities must obtain local permits prior to issuance of a certificate and must notify the affected local governments of plans to site any major facility. Alaska requires a certificate of convenience and necessity issued by the Regulatory Commission in order to operate as a utility in the state, but municipal land use ordinances may still apply.

The amount of local involvement in these joint regimes varies. Tennessee requires wind energy facilities with a capacity over 1 megawatt (MW) or over 200 feet in height to obtain a certificate of public convenience and necessity from the Public Utility Commission in addition to local approval.⁶ Local governments are authorized to establish conditions and criteria for the construction, operation, and redevelopment of wind energy facilities.⁷ Local regulation of utility-scale solar is also permitted.⁸ Kentucky requires state-level approval for electric generation facilities in excess of 10 MW, but requires all public utility projects to conform with local comprehensive plans, and projects are subject to review by local planning commissions.⁹ In Nebraska, solar and wind generators typically must be approved by the Power Review Board, and counties and municipalities are expressly authorized to regulate wind and solar development.¹⁰

In Virginia, solar developers of projects over 5 MW must negotiate a siting agreement with the relevant locality,¹¹ and applicants may be required to file for other local land use approvals. A certificate of public convenience and necessity is required from the Corporation Commission for all energy development projects over 150 MW. Permit by rule approval from the

⁵Colo. Rev. Stat. § 40-5-1010.

⁶Tenn. Code Ann. § 65-17-104.

⁷*Id.* § 65-17-105.

⁸*Id.* §§ 7-51-2202, 66-9-207.

⁹Ky. Rev. Stat. Ann. § 278.700 et seq.

¹⁰Neb. Rev. Stat. §§ 66-913, 70-1014.01.

¹¹Va. Code Ann. § 15.2-2316.7.

Commission is required for projects between 5 and 150 MW.¹² Both processes require proof of compliance with local requirements and approvals.

Vermont requires developers to apply for a certificate of public good from the Public Utility Commission, but municipalities are permitted to establish certain requirements for solar developments, such as screening. Municipalities located near proposed projects are provided notice of applications and developers must submit a local impact assessment.¹³ Municipalities may make recommendations to the Commission, but their ordinances may not prohibit or have the effect of prohibiting installation of these facilities.

In 2020, New York passed the Accelerated Renewable Energy Growth and Community Benefit Act,¹⁴ which vests the Office of Renewable Energy Siting with responsibility for permitting “major renewable energy facilities,” including facilities of at least 25 MW, but requires consultation with local municipalities regarding the requirements of local law. The Office may set aside local laws on a case-by-case basis if it finds that they are unreasonably burdensome.

In comparison, in 2021 the Ohio General Assembly passed Senate Bill 52 (SB 52), which reinstated county-level approval over certain large wind and solar projects. Ohio’s Power Siting Board previously had exclusive jurisdiction over wind farms 5 MW or greater and large wind or solar farms over 50 MW. SB 52 allows municipalities and counties to prohibit large wind and solar projects, in addition to being able to regulate small wind and solar farms.¹⁵ County-level approval is required prior to approval by the Board, and county and municipal government representatives or their designees are ad hoc voting members of the Board for any solar and wind project.¹⁶

[3] Optional State Jurisdiction

A few states have adopted systems in which developers can opt into state-level permitting. In 2022, the California legislature adopted Assembly Bill 205 (AB 205) in response to denials, prohibitions and moratoria placed on renewable energy projects by local governments under its previous local regulatory framework. AB 205 granted the Energy Commission authority to issue certificates for solar, onshore wind, and thermal energy facilities

¹²*Id.* §§ 10.1-1197.8, 56-265.2(A)(1); Va. Admin. Code § 15-40-20.

¹³30 Vt. Stat. Ann. § 248; 24 Vt. Stat. Ann. §§ 2291(28), 4412(6), 4414(15).

¹⁴NY Exec. Law § 94-c.

¹⁵Ohio Rev. Code Ann. §§ 303.58, 303.213, 713.081, 4906.01 et seq.

¹⁶*Id.* §§ 4906.02(A)(2), .021.

over 50 MW, which are issued in lieu of and supersede any approval required by any another agency. Oregon also allows developers to opt into state-level siting through its Energy Facility Siting Council for projects under 50 MW, which otherwise would be regulated locally.¹⁷

Washington vests the Energy Facility Site Evaluation Council with siting authority for facilities over 350 MW. Smaller facilities may opt into the state review process. The Council is comprised of representatives from multiple state agencies, and a representative appointed by the county in which the proposed facility is located. Local governments have jurisdiction over smaller projects that choose not to go through the state approval process.¹⁸ The Council must work with local governments where the project is proposed to be sited “in order to provide for meaningful participation and input during siting review and compliance monitoring.”¹⁹

[4] State Jurisdiction over Certain Projects; Local Jurisdiction over Others

Some states regulate the siting of all renewable developments, whether wind, solar, or otherwise, above a certain megawatt limit at the state level, and allow local or county regulation of any facility below that limit. Others differentiate between wind and solar facilities—typically regulating the siting of large-scale wind projects at the state level, while allowing local regulation of larger solar developments.

North Carolina vests siting authority over all solar developments with municipalities, but prohibits the construction of any wind energy facility with a capacity of 1 MW or greater without a permit from the Department of Environmental Resources.²⁰ The Department is required to hold a public hearing in each county impacted by the project, but the county itself does not have jurisdiction over permitting. The Oklahoma Wind Energy Development Act,²¹ as amended, requires that wind developers submit an intent to construct to the Corporation Commission, and provide the Commission with copies of notices to the relevant local government authorities with jurisdiction over land use decisions. The Act requires a public hearing, subject to public notice, in the county in which the facility is to be located. On the other hand, utility-scale solar siting is regulated at the local land use level.

¹⁷Or. Rev. Stat. § 469.300 et seq.

¹⁸Wash. Rev. Code §§ 80.50.020, 80.50.060.

¹⁹*Id.* § 80.50.060.

²⁰N.C. Gen. Stat. § 143-215.115 et seq.

²¹Okla. Stat. tit. 17, § 160.11 et seq.

Arizona requires that any energy facility generating over 100 MW obtain a certificate of environmental compatibility from the Power Plant and Transmission Line Siting Committee. The Committee is required to consider compliance with local zoning; projects under 100 MW are not subject to state-level permitting and are handled at the local level.²² Other states also require state-level approval based on anticipated megawatt production, including Iowa (25 MW),²³ Rhode Island (40 MW),²⁴ South Carolina (75 MW),²⁵ and South Dakota (100 MW).²⁶

In some states, municipalities retain jurisdiction over smaller renewable facilities, but are statutorily prohibited from unduly restricting them. Florida vests primary siting authority for any electrical generating facility over 75 MW with the Siting Coordination Office.²⁷ Local governments retain jurisdiction over smaller facilities, although the state requires that solar facilities be a permitted use in all agricultural land use categories and zoning districts within unincorporated areas of counties, and that local governments amend their land development regulations to promote the use of floating solar facilities.²⁸

Massachusetts vests siting authority with the Energy Facilities Siting Board for facilities over 100 MW.²⁹ Local governments retain zoning authority over smaller projects; however, the Massachusetts Zoning Act prohibits ordinances from banning or unreasonably regulating the installation of solar energy systems.³⁰ Nevada's Public Utilities Commission issues permits for renewable energy facilities over 70 MW, and local authorities are statutorily prohibited from unreasonably restricting wind development.³¹ New Hampshire regulates facilities over 30 MW through the Siting Evaluation Committee, but allows developers to opt into the Committee's process for facilities between 5 MW and 30 MW.³² Municipalities are prohibited from adopting unreasonable ordinances regarding renewable energy

²²Ariz. Rev. Stat. §§ 9-462.01, 9-468, 11-811, 40-360.06.

²³Iowa Code Ann. §§ 476A.1 et seq., 476.41-.49.

²⁴R.I. Gen. Laws §§ 42-98-1 et seq., 45-24-27 et seq.

²⁵S.C. Code Ann. §§ 6-29-310 et seq., 58-33-10 et seq.

²⁶S.D. Codified Laws § 49-41B-25.

²⁷Fla. Stat. Ann. §§ 403.501-.518.

²⁸*Id.* §§ 163.3205, .32051.

²⁹Mass. Gen. Laws ch. 164, § 69 et seq.

³⁰*Id.* ch. 40A, §§ 3, 17.

³¹Nev. Rev. Stat. §§ 278.250 et seq., 704.820 et seq.

³²N.H. Rev. Stat. Ann. § 162-H-1 et seq.

generation.³³ Wisconsin's Public Service Commission regulates the siting of facilities over 100 MW, and prohibits local regulation of facilities over that size.³⁴ Local governments may regulate smaller facilities, but are generally prohibited from imposing restrictions on wind stricter than those adopted by the Commission.³⁵

[5] Exclusive State or Local Jurisdiction over Certain Projects; Non-Exclusive State and Local Jurisdiction over Others

Some states have created regulatory structures in which the state has exclusive jurisdiction over some projects, and municipalities have non-exclusive authority over others. Maine's Department of Environmental Protection possesses primary siting authority for grid-scale and small-scale wind developments;³⁶ however, municipalities are authorized to review and approve energy siting projects if certain conditions are met.³⁷ Any development identified as having a substantial effect upon the environment requires state approval under the Site Location of Development Law.³⁸ Wyoming requires that any wind or solar energy facility obtain a permit from the local county commissioners, subject to certain minimum standards.³⁹ Wind facilities with more than 20 turbines and solar facilities over 30 MW or with surface disturbance over 100 acres are required to obtain a permit from the Industrial Siting Council.⁴⁰

Minnesota provides its Public Utility Commission with jurisdiction over wind facilities over 5 MW, with counties assuming jurisdiction over facilities less than 5 MW and the option of assuming jurisdiction over facilities up to 25 MW subject to certain standards set by the Commission. The Commission is required to consider county restrictions, which may exceed those established by the state.⁴¹ Solar facilities over 50 MW require a site permit from the Commission, and smaller solar facilities are regulated

³³*Id.* §§ 674:17, :63.

³⁴Wis. Stat. § 196.491.

³⁵Wis. Admin. Code ch. PSC 128; Wis. Stat. § 66.0401; Wis. Stat. §§ 66.031, .032; *see* State *ex rel.* Numrich v. City of Meqon Bd. of Zoning Appeals, 626 N.W.2d 366 (Wis. Ct. App. 2001).

³⁶Me. Stat. tit. 35-A, §§ 3401–3459; *id.* tit. 38, §§ 481–490.

³⁷*Id.* tit. 30-A, § 3001 (grants general ordinance enactment authority to Maine municipalities and counties).

³⁸*Id.* tit. 38, §§ 481–490.

³⁹Wyo. Stat. Ann. §§ 18-5-502, -504.

⁴⁰*Id.* § 35-12-102.

⁴¹Minn. Stat. ch. 216F.

at the local level.⁴² New Mexico allows local governments to regulate renewable energy siting, but requires additional approval by the Public Regulation Commission for projects over 300 MW.⁴³ North Dakota's Public Service Commission has jurisdiction over wind generation developments over 500 kilowatts (KW), but local regulations still apply and may exceed certain state-mandated setbacks.⁴⁴

[6] Exclusive State Jurisdiction

A few states have express or de facto exclusive state-level regulation of renewable energy siting. West Virginia's Public Service Commission has sole authority to regulate all generation of electrical energy for service to the public.⁴⁵ Although local zoning of solar or wind is not preempted, the vast majority of counties have not implemented any zoning controls.⁴⁶ Connecticut's Siting Council retains exclusive jurisdiction over siting renewable energy facilities over 1 MW.⁴⁷ While municipal zoning commissions or inland wetland agencies may issue orders regulating the proposed location of facilities, the Council can modify or revoke those orders.⁴⁸ In Maryland, developers must obtain a certificate of public convenience and necessity from the Public Service Commission for utility-scale projects, including those under 70 MW, and local regulation is entirely preempted.⁴⁹

§ 31.03 Typical Ordinance Provisions

Despite vast geographical and political differences between the states, local jurisdictions tend to place similar types of restrictions on renewables. Typically, municipalities or counties will regulate: how utility-scale uses are permitted; where they are located; area and bulk requirements such as setbacks, maximum heights, minimum lot sizes, and maximum lot coverage restrictions; environmental or impact considerations such as noise, glare, stormwater, soil impact, aesthetics, and traffic; and decommissioning requirements.

⁴²*Id.* ch. 216E.

⁴³N.M. Stat. Ann. §§ 3-21-1, 62-9-3.

⁴⁴N.D. Cent. Code § 49-22-01 et seq.

⁴⁵W. Va. Code § 24-2-11c.

⁴⁶*Id.* § 150-30-1.

⁴⁷Conn. Gen. Stat. Ann. §§ 16-50j, -50k; *see also* FairwindCT, Inc. v. Conn. Siting Council, No. CV 116011470S, 2012 WL 5201357 (Conn. Super. Ct. Oct. 1, 2012).

⁴⁸Conn. Gen. Stat. Ann. § 16-50x.

⁴⁹Md. Code Ann. Pub. Util. § 7-207.

[1] How Utility-Scale Renewables Are Authorized

Zoning and other land use regulations in most states generally authorize specific uses in three ways: as a “use by right” via an administrative approval; through conditional use, special exception, or special permit by which the local zoning board, planning commission, or governing body grants approval following a public hearing; or via variance approval where the use is not otherwise expressly permitted but a zoning board or similar entity grants approval nonetheless, typically due to some hardship or the unique physical characteristics of the land in question.

[a] Use by Right/Administrative Approval

Very few municipalities allow utility-scale renewables by right. Due to the large footprint of solar and wind farms,⁵⁰ as well as their contentious nature, it is more typical for municipalities to permit these uses in a manner that allows for greater oversight and public engagement. However, a few municipalities do allow certain uses, typically solar, as a use by right in some or all zoning districts.⁵¹

[b] Conditional Use/Special Exception/Special Use

Most local governments tend to authorize utility-scale wind and solar by conditional use, special exception, or special permit.⁵² Some states that prohibit unreasonable restriction of renewable uses have concluded that a requirement that a developer obtain special use approval is not an unreasonable burden.⁵³ Other common regulations, as discussed below, are typically incorporated into the special permit criteria.

[c] Variances

Even where municipalities completely exclude or do not provide for utility-scale solar or wind, most jurisdictions allow developers to seek a variance where the applicant can show hardship or practical difficulties linked to the land in question.⁵⁴ A variance authorizes a party to use property in

⁵⁰See Harry Stevens, “We Need an Area the Size of Texas for Wind and Solar. Here’s How to Halve It,” *Wash. Post* (May 10, 2023).

⁵¹See, e.g., Town of Bethany Beach, Delaware Code of Ordinances, Ch. 484, Solar Energy Systems; Town of Readfield Maine, Solar Ordinance (June 8, 2021).

⁵²See, e.g., Tehama Cnty., Cal., Code of Ordinances § 17.83.030; Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6; Gloucester, Mass., Zoning Code § 5.22; Arbor Charter Twp., Mich., Zoning Ordinance §§ 74-604, -618; Fremont, Neb., Zoning Ordinance § 11-613.01 et seq.

⁵³See *PLH LLC v. Town of Ware*, No. 18 MISC 000648 (GHP), 2019 WL 7201712 (Mass. Land Ct. Dec. 24, 2019) (requiring special permit approval for uses protected under Mass. Gen. Laws ch. 40A, § 3, is not per se improper).

⁵⁴See § 31.04[4], *infra*.

a manner prohibited by the ordinance.⁵⁵ Use variances may be sought to place utility-scale projects in municipalities or zoning districts in which they are not permitted. Dimensional variances may be sought to obtain relief from stringent ordinance standards such as setbacks or height limits.

[2] Zoning District Limitations

Some municipalities have attempted to completely prohibit utility-scale renewable developments in all or certain districts, with varying degrees of success depending on the protections in place under state law. For example, in 2019 the Board of Supervisors of San Bernardino County, California, banned the development of utility-oriented renewable energy projects in all rural living land use districts, or within the boundaries of existing community plans.⁵⁶ Washington County, Colorado, imposed a temporary moratorium on processing applications for wind and solar power generation facilities for unincorporated portions of the county in 2020.⁵⁷ Challenges to the validity of these moratoria or bans are discussed further in § 31.04[2].⁵⁸

Utility-scale solar and wind uses tend to be limited to industrial⁵⁹ or agricultural districts.⁶⁰ Some municipalities permit utility-scale facilities in rural residential districts as well.⁶¹ Ironically, many others prohibit renewable uses in agricultural districts.⁶² Municipalities sometimes create solar or wind overlay districts.⁶³ Some make exceptions, facially or in application,

⁵⁵See, e.g., *Madison Cnty. Coal. for Scenic Pres. LLC v. Zoning Bd. of Adjustment of Madison Cnty.*, 957 N.W.2d 33 (Table) (Iowa Ct. App. 2021).

⁵⁶San Bernardino Cnty. Resolution No. 2019-17, “Amendment of the Renewable Energy and Conservation Element of the County General Plan” (Feb. 28, 2019).

⁵⁷Washington Cnty., Colo., Resolution 64-2020 (Mar. 24, 2020); see also Palmyra, Mo., City Code § 401.020.

⁵⁸The Alabama legislature has granted certain counties, Baldwin, Cherokee, Dekalb, and Etowah, the express authority to regulate wind siting within unincorporated areas. See Ala. Code §§ 45-2-262, -10-260.01, -28-260.01, 25-260.02. In 2013, Baldwin County banned large wind turbines and wind farms in those areas. When asked about the ban, a Baldwin County Commissioner was quoted as saying “I have had dozens of emails from around the country from people that say, ‘You don’t want this in your backyard.’” Drew Thompson, “Another Hurdle for Wind Energy in Alabama,” *Nat’l Review* (Aug. 6, 2013).

⁵⁹See, e.g., Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6; Anaconda-Deer Lodge Cnty., Mont., Zoning Ordinance art. XIII.

⁶⁰See, e.g., City of Grand Island, Neb., Municipal Code § 36-103.

⁶¹See, e.g., Gloucester, Mass., Zoning Code § 5.22.

⁶²See, e.g., Arbor Charter Twp., Mich., Zoning Ordinance § 74-618.

⁶³See, e.g., Peabody, Mass., Zoning Ordinance § 7.11; Boulder City, Nev., Zoning and Subdivision Ordinance ch. 19.

to zoning district restrictions in order to allow such uses for municipal purposes.⁶⁴

[3] Area and Bulk Requirements

Most land use regulations contain “area and bulk” requirements, which regulate matters such as setbacks from other uses or lot lines, maximum height, minimum lot size, maximum lot coverage, or other characteristics that impact the physical shape and placement of a use. These types of regulations can have a significant impact on how and where renewable uses may be sited.

[a] Setbacks

Setbacks for wind energy facilities are often significant, with many exceeding 1,000 feet⁶⁵ or greater than up to two-times their height.⁶⁶ Some ordinances have imposed setbacks up to five-times the height of the facility or over 3,200 feet from lot lines or rights-of-way, with even greater setbacks from certain structures.⁶⁷ Setbacks for solar facilities tend to be between 50 and 150 feet, typically subject to buffering or screening requirements.⁶⁸ Some municipalities may impose varying setbacks depending on the district in which the use is proposed,⁶⁹ or require setbacks from other renewable energy developments.⁷⁰

[b] Maximum Height

Some municipalities have placed height limits on wind facilities that essentially preclude their development, resulting in the need to obtain a

⁶⁴Such carve-outs for municipal use facilities, whether for small, community, or utility-scale facilities, may lead to their own set of problems and litigation. *See, e.g.,* Panek v. Town of Southington, 61 Conn. L. Rptr. 154 (Conn. Super. Ct. 2016); Drummeey v. Town of Falmouth, 25 N.E.3d 907 (Mass. App. Ct. 2015); Town of Falmouth v. Town of Falmouth Zoning Bd. of Appeals, 34 Mass. L. Rptr. 408 (Mass. Super. Ct. 2017).

⁶⁵*See, e.g.,* Kosciusko Cnty., Ind., Ordinance No. 75-1 § 3.29.

⁶⁶*See, e.g.,* Tehama Cnty., Cal., Code of Ordinances § 17.83.070; Aurora, Colo., City Code § 146-1287; Yuma Cnty., Colo., County Code § 5-104-I; LaSalle Cnty., Ill., County Code § 7.1-4RR; Mason Cnty., Ill., Resolution 2009_1; Plymouth Cnty., Iowa, County Code § 6.10; Osage Cnty., Kan., County Code § 17-103(9); Arbor Charter Twp., Mich., Zoning Ordinance § 74-604; Santa Fe Cnty., N.M., County Code § 10.16.

⁶⁷*See, e.g.,* Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6.

⁶⁸Town of Rockport, Me., Solar Farm Ordinance (Nov. 3, 2020); Dauphin Cnty., Lower Swatara, Pa., Solar Energy Zoning Amendment (May 2023); Athens Twp., Crawford Cnty., Pa., Ordinance No. 2021-02; Covington Twp., Lackawanna Cnty., Pa., Ordinance No. 2023-01.

⁶⁹*See, e.g.,* Blue Earth Cnty., Minn., Zoning Ordinance § 24-334.

⁷⁰*See, e.g., id.,* Winfield Twp., Butler Cnty., Pa., Ordinance No. 2023-1.

variance.⁷¹ Height limits on wind facilities may include restrictions on maximum swept areas.⁷² Some municipalities impose height limits on wind facilities that can be exceeded if approval is granted from the relevant municipal body.⁷³ Others place hard limits on wind facility height, often between 80⁷⁴ and up to at least 600 feet.⁷⁵ Height limits on solar facilities typically range between 10 and 25 feet.⁷⁶

[c] Minimum Lot Size and Maximum Lot Coverage

Municipalities frequently impose minimum lot sizes for both utility-scale solar and wind developments.⁷⁷ Minimum lot sizes for utility-scale wind tend to range between 10 and 50 acres.⁷⁸ Similarly, some municipalities have included minimum total acreage provisions, with at least one municipality requiring the total acreage of all properties used for a single commercial generation facility to be a minimum of 300 acres.⁷⁹ Many municipalities limit maximum impervious surface, buildable area, and lot coverage for both solar and wind developments.⁸⁰ Maximum lot coverage is often capped at 25% to 50%, and typically includes the foundation systems and mechanical equipment, access roads and parking.⁸¹ However, some municipalities include the solar panels in impervious material calculations,⁸² or limit the number of facilities allowable on a single parcel.⁸³

⁷¹See, e.g., *In re AWA Goodhue Wind, LLC*, No. A11-2229, 2012 WL 2369004 (Minn. Ct. App. June 25, 2012) (discussed at § 31.04[8], *infra*).

⁷²See, e.g., Victorville, Cal., Code of Ordinances art. 13, “Wind Energy Conversion System Regulations.”

⁷³See, e.g., Tehama Cnty., Cal., Code of Ordinances § 17.83.050; Gloucester, Mass., Zoning Code § 5.22.

⁷⁴See, e.g., Plumstead Twp., Bucks Cnty., Pa., Zoning Ordinance; City of Meadville, Crawford Cnty., Pa., Zoning Ordinance Draft (Feb. 18, 2022).

⁷⁵See, e.g., Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6.

⁷⁶See, e.g., Town of Rockport, Me., Solar Farm Ordinance (Nov. 3, 2020); Blue Earth Cnty., Minn., Zoning Ordinance § 24-334; Athens Twp., Pa., Ordinance No. 2021-02.

⁷⁷See, e.g., Twp. of Kidder, Clarion Cnty., Pa., Ordinance No. 192 of 2022.

⁷⁸See, e.g., Gloucester, Mass., Zoning Code § 5.22.

⁷⁹See, e.g., Twp. of Kidder, Carbon Cnty., Pa., Ordinance No. 192 of 2022.

⁸⁰See, e.g., Concord, N.H., Zoning Ordinance § 28-5-53.

⁸¹See, e.g., Twp. of Kidder, Clarion Cnty., Pa., Ordinance No. 192 of 2022.

⁸²See, e.g., Oil Creek, Crawford Cnty., Pa., Draft Ordinance No. 1 of 2022.

⁸³See, e.g., Tehama Cnty., Cal., Code of Ordinances § 17.83.040; Elk River, Minn., Zoning Ordinance § 30-804.

[4] Environmental Considerations

In addition to area and bulk regulations, utility-scale renewables are often subject to the same or similar environmental regulations imposed upon traditional energy developments. These include requirements related to environmental impact, noise, glare and lighting, stormwater, and erosion and sedimentation control. Many of these regulations may be highly technical, or in the alternative, highly subjective.

[a] Environmental Impact Regulations, Studies, and Analyses

Many ordinances require some form of environmental analysis or compliance with environmental performance standards. These may include limitations on location relative to wetlands, steep-slopes, forests, or historic or preserved lands.⁸⁴ Regulations related to clear-cutting of trees and vegetation preservation are also common.⁸⁵ For wind facilities in particular some municipalities require analyses related to impacts on endangered and threatened species.⁸⁶ The requirement that a general “environmental impact study” be performed is common.

[b] Noise Limits and Acoustical Studies

Maximum noise level limits are frequently found in ordinances regulating both solar and wind developments.⁸⁷ Decibel limits ranging between 32 dBA⁸⁸ and 60 dBA⁸⁹ are common for wind energy facilities. Some municipalities have imposed noise limits on solar facilities as low as 15 dBA.⁹⁰ Acoustical studies are often required.⁹¹

⁸⁴See, e.g., Peabody, Mass., Zoning Ordinance § 7.11; Arbor Charter Twp., Mich., Zoning Ordinance § 74-618.

⁸⁵See, e.g., Gloucester, Mass., Zoning Code § 5.22.

⁸⁶See, e.g., Arbor Charter Twp., Mich., Zoning Ordinance § 74-604.

⁸⁷See, e.g., Santa Cruz Cnty., Cal., Code of Ordinances ch. 12.24; Victorville, Cal., Code of Ordinances art. 13, “Wind Energy Conversion System Regulations”; Kosciusko Cnty., Ind., Ordinance No. 75-1 § 3.29.

⁸⁸See, e.g., Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6.

⁸⁹See, e.g., Arbor Charter Twp., Mich., Zoning Ordinance § 74-604; City of Gladstone, Mo., Code § 6,167.010(c)(5); City of Raymore, Mo., City Code § 420.070; City of Grand Island, Neb., Municipal Code § 36-103; Lincoln Cnty., N.M., Ordinance No. 2017-04.

⁹⁰See, e.g., Jefferson Hills Borough, Allegheny Cnty., Pa., Zoning Ordinance.

⁹¹See, e.g., City of Grand Island, Neb., Municipal Code § 36-103.

[c] Glare, Lighting, and Shadow Flicker

Regulations restricting glare from solar facilities are common, as are restrictions on artificial lighting of both solar and wind facilities.⁹² Shadow flicker prohibitions on wind facilities are frequently imposed.⁹³ Restrictions on artificial light on wind facilities may come into conflict with Federal Aviation Administration regulations.⁹⁴

[d] Stormwater, Erosion, and Protection of Prime Soils

Protections against stormwater runoff and erosion are frequently imposed, particularly upon solar facilities. These provisions may include protections for downstream or down-hill properties, and require compliance with stormwater management best practices.⁹⁵ Many municipalities prohibit or restrict renewable energy development on prime agricultural soils.⁹⁶

[5] Aesthetics, Property Values, and Traffic

Many ordinances place aesthetic requirements on both wind and solar facilities. These regulations may include screening, color blending, or prohibitions on advertising.⁹⁷ Protections against the visual impact of these uses on neighboring properties often go hand in hand with regulations aimed at protecting property values. Montgomery County, Indiana, requires the developer to provide a “property value guarantee” to all landowners within two miles of a turbine to pay the landowner the property value loss after the turbines are erected or to purchase the property at fair market value.⁹⁸ Submission of a traffic study and limitations on truck travel are also often required.⁹⁹

⁹²See, e.g., Kosciusko Cnty., Ind., Ordinance 75-1, § 3.29; Gloucester, Mass., Zoning Code § 5.22.

⁹³See, e.g., Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6; Gloucester, Mass., Zoning Code § 5.22.

⁹⁴See, e.g., FAA Advisory Circular 70/7460-1M, Obstruction Marking and Lighting.

⁹⁵See, e.g., Blue Earth Cnty., Minn., Zoning Ordinance § 24-334.

⁹⁶See, e.g., Santa Clara Cnty., Cal., Ordinance No. NS-1200.331; Arbor Charter Twp., Mich., Zoning Ordinance § 74-681.

⁹⁷See, e.g., Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6; Arbor Charter Twp., Mich., Zoning Ordinance §§ 74-604, -681; City of Grand Island, Neb., Municipal Code § 36-103; Concord, N.H., Zoning Ordinance § 28-5-53.

⁹⁸See, e.g., Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6.

⁹⁹See, e.g., Upper Tulpehocken Twp., Berks Cnty., Pa., Zoning Amendment (June 14, 2022).

[6] Maintenance and Decommissioning¹⁰⁰

Maintenance, abandonment, and decommissioning requirements are also common.¹⁰¹ Most ordinances require that facilities not operated for a continuous period of six¹⁰² or 12 months be considered abandoned, and subject to removal.¹⁰³ Most also require submission of and adherence to a specific decommissioning plan, which may include bonding or other financial security.¹⁰⁴

§ 31.04 Case Law Trends¹⁰⁵

Although regulation of utility-scale renewables varies from state to state, the issues that result in litigation have, thus far, tended to follow certain trends or center around similar issues. While the specific jurisdictional schemes may differ, the inherent conflict between statewide renewable energy generation goals and local opposition to renewables is trending towards universal.

[1] Preemption

The tension between state and local regulation of a use typically involves the contention that the state regulatory regime supersedes or “preempts” the local ordinance. Although the types of preemption and the standards for determining the same can vary from state to state, ultimately these cases revolve around the issue of the state legislature’s intent.¹⁰⁶ Generally speaking, preemption can occur in one of three ways—express preemption, preemption by conflict, or implied preemption. In the first category, statutes may explicitly state that the authority of local governments is completely, or, more often, partially restricted.¹⁰⁷ Conflict preemption occurs when a local ordinance is inconsistent with a specific state statutory

¹⁰⁰Santa Clara Cnty., Cal., Ordinance No. NS-1200.331.

¹⁰¹See, e.g., Tehama Cnty., Cal., Code of Ordinances § 17.83.110; Peabody, Mass., Zoning Ordinance § 7.11.

¹⁰²See, e.g., Kosciusko Cnty., Ind., Ordinance 75-1, § 3.29.

¹⁰³See, e.g., Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6; Arbor Charter Twp., Mich., Zoning Ordinance §§ 74-604, -618.

¹⁰⁴See, e.g., Montgomery Cnty., Ind., Code of Ordinances ch. 159, art. 6; Town of Rockport Me., Solar Farm Ordinance (Nov. 3, 2020); Shade Twp., Somerset Cnty., Pa., Ordinance No. 2022-1 (May 5, 2022).

¹⁰⁵While some of the cases discussed herein are unreported and therefore non-precedential, they have been selected for inclusion due to their demonstrative value as to the facts and issues that often result in litigation for utility-scale renewable developers. In addition, some may be cited for persuasive value under the relevant state rules.

¹⁰⁶See, e.g., *Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Twp.*, 32 A.3d 587 (Pa. 2011); *Quesada v. Herb Thyme Farms, Inc.*, 361 P.3d 868 (Cal. 2015).

¹⁰⁷See, e.g., *Hoffman*, 32 A.3d 587; *Quesada*, 361 P.3d 868.

or regulatory requirement.¹⁰⁸ Implied preemption arises when a state regulatory regime is so comprehensive as to evidence a legislative intent to completely preempt the field.¹⁰⁹ As statewide regulation of utility-scale renewables continues to develop, courts will inevitably need to consider whether it preempts local regulation of the same topics.

With respect to express preemption of utility-scale renewables, state statutes may place readily ascertainable limits on local regulation by, for example, establishing the maximum setbacks local governments may impose, or mandating that a use be permitted in specific zoning districts.¹¹⁰ While also express, many state statutes are more subjective, and more generally restrict local government authority, and therefore also could fall into the category of conflict preemption. For example, New Jersey's Municipal Land Use Law (MLUL) was amended in 2009 to include "solar or photovoltaic energy facility or structure," as an "inherently beneficial use."¹¹¹ An inherently beneficial use is one "universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare."¹¹² In *Dalessio v. Township of Upper Deerfield*,¹¹³ the appellate division of the New Jersey Superior Court was asked to consider, in part, whether the township had adopted ordinances that contravene the designation of solar facilities as an inherently beneficial use under the MLUL. The ordinance at issue added sections to the township zoning code establishing a minimum lot area of 20 contiguous acres, setbacks between 100 and 1,000 feet, a 15-foot height limit, and a 50% maximum lot coverage for all renewable energy facilities. The court found that these ordinance restrictions did not conflict with the MLUL.

In a similar vein, in Massachusetts, Mass. Gen. Laws ch. 40A, § 3, states in part that "[n]o zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to the public health, safety or welfare." In *Tracer Lane II Realty, LLC v.*

¹⁰⁸See, e.g., *Hoffman*, 32 A.3d 587.

¹⁰⁹See, e.g., *id.*

¹¹⁰Illinois's recent adoption of House Bill 4412, for example, prohibits counties from establishing regulations of commercial wind and solar facilities that are more restrictive than the statewide siting requirements specified within the law (for example setbacks, height limits, and fencing requirements), and sets forth certain additional prohibitions on what municipalities can and cannot regulate. H.B. 4412, 2022 Ill. Legis. Serv. P.A. 102-1123.

¹¹¹N.J. Stat. Ann. §§ 40:55D-1 to -163.

¹¹²*Id.* § 40:55D-7.

¹¹³2011 WL 6260662 (N.J. Super. Ct. App. Div. Dec. 16, 2011).

City of Waltham,¹¹⁴ the Massachusetts Supreme Judicial Court interpreted this provision as a matter of first impression. At issue was whether section 3 protected ancillary structures, in that instance an access road, as well as the principal structure, and whether the city's refusal to allow an access road in a residential zone unreasonably regulated the installation of solar energy systems. The court concluded the access road, which would service a solar farm in another municipality, was part of the solar energy system and therefore covered by the statute. While it found the interests advanced by the township regulations to be legitimate, the court held that they unduly restricted solar energy systems by permitting large scale systems on only approximately 2% of the municipal land area.¹¹⁵

In *Board of County Commissioners of Washington County v. Perennial Solar, LLC*,¹¹⁶ the Maryland Court of Appeals grappled with whether recent amendments to the Maryland Public Utilities Article implicitly preempted local regulation of renewable energy siting. Under Maryland law, preemption by implication occurs when the legislature "acted with such force that an intent by the State to occupy the entire field must be implied."¹¹⁷ The primary indicia of whether the legislature intended to preempt an entire area is the "comprehensiveness with which the General Assembly has legislated in the field."¹¹⁸ In *Perennial Solar*, objecting neighbors and the county board of commissioners appealed the county board of zoning

¹¹⁴187 N.E. 3d 1007 (Mass. 2022).

¹¹⁵*Accord* *Kearsarge Walpole LLC v. Lee*, No. 21 MISC 000449 (KTS), 2022 WL 4938498 (Mass. Land Ct. Oct. 4, 2022) (Although city bylaws authorized a large-scale ground-mounted solar photovoltaic overlay district comprising approximately 2% of total municipal land mass, and permitted smaller-scale solar outside the overlay, the ban of large-scale solar facilities in the rural residential district violated Mass. Gen. Laws ch. 40A, § 3). Multiple other challenges have been brought against local treatment of solar development under Mass. Gen. Laws ch. 40A, § 3. In *ASD Three Rivers MA Solar LLC v. Planning Board of Town of Wilbraham*, No. 19 MISC 000089 (DRR), 2021 WL 1248959 (Mass. Land Ct. Apr. 5, 2021), the court overturned a local planning board's denial of a special use permit for a solar development. Although the court determined regulation of solar developments by means of a special permit process was not prohibited, it held the review by the municipality must be limited and narrowly applied in a way that is not unreasonable and is not designed or employed to prohibit the use. The court found the board's treatment of the application constituted an unreasonable regulation of the installation of solar energy systems in violation of Mass. Gen. Laws ch. 40A, § 3. See also *PLH LLC v. Town of Ware*, No. 18 MISC 000648 (GHP), 2019 WL 7201712 (Mass. Land Ct. Dec. 24, 2019) (requiring special permit approval for uses protected under Mass. Gen. Laws ch. 40A, § 3, is not per se improper).

¹¹⁶212 A.3d 868 (Md. 2019).

¹¹⁷*Id.* at 871 (quoting *Bd. of Cnty. Comm'rs of Washington Cnty. v. Perennial Solar, LLC*, 196 A.3d 933 (Md. Ct. Spec. App. 2018)).

¹¹⁸*Id.* at 873–74 (quoting *Howard Cnty. v. Potomac Elec. Power Co.*, 573 A.2d 821, 828 (Md. 1990)).

appeals' approval of a special exception and a variance for the development of a 10 MW solar energy generating system on two contiguous farms totaling 86 acres. The solar developer asserted that the zoning ordinance was preempted by implication by the Maryland Public Utilities Article¹¹⁹ and that the Maryland Public Service Commission (PSC) possessed exclusive jurisdiction to approve the type of project proposed by the developer.

On appeal, the Maryland Court of Appeals noted the legislature's adoption of a renewable energy portfolio standard (RPS), which included targets for electricity from solar generation, and greenhouse gas emissions legislation. The legislature delegated to the PSC authority to implement RPSs, as well as the exclusive authority to regulate generating stations through the issuance of certificates of public convenience and necessity. The approval process for a certificate is extensive and includes notice to and recommendations from impacted local governments, local public hearings, and consideration of local land use interests. Based on this comprehensive statutory scheme, the court concluded that the legislature's intent to preempt local government zoning approval authority over generating stations was clear. In support of this conclusion, the court also cited to several secondary factors—(1) the pervasive nature of state administrative regulation; (2) the lack of express statutory authorization of state-local concurrent jurisdiction, the court noting the legislature's recent rejection of a statutory amendment requiring compliance with local planning and zoning ordinances; (3) the same aspects of the field sought to be regulated by the local government are addressed in state legislation; and (4) a “two-tiered” regulatory process would engender chaos and confusion.¹²⁰

[2] Exclusionary Zoning

Although a municipality may not be preempted by statute from the initial exercise of regulatory authority over renewables, application of state case or statutory law may invalidate ordinances that impose express or de facto bans, near bans, or other unreasonable restrictions on solar and wind projects. The extent to which an ordinance may bar a particular type of residential, commercial, industrial, energy, or other use from the municipality's boundaries will vary, depending on a particular state's exclusionary zoning jurisprudence.¹²¹

¹¹⁹Md. Code Ann. Pub. Util. § 7-207.

¹²⁰See *Perennial Solar*, 212 A.3d at 881–82.

¹²¹To the extent there is no specific case or statutory law addressing renewables in a particular state, practitioners should refer to the generally applicable exclusionary zoning principles within their specific jurisdiction.

In *Zimmerman v. Board of County Commissioners of Wabaunsee County*,¹²² the Kansas Supreme Court addressed an exclusionary zoning challenge brought by landowners and intervening wind-rights owners who had entered into contracts on their properties. After the county zoning administrator was contacted by a company desiring to build a wind farm in the county, the board of commissioners adopted a temporary moratorium on the acceptance of conditional use permit applications for wind farm projects. After several extensions of the moratorium and modifications to the county's comprehensive plan, the board of commissioners eventually adopted a resolution prohibiting commercial wind energy conversion systems, defined to include systems exceeding 100 KW or 120 feet in height, throughout the county. The resolution did permit small wind energy systems under these limits "solely to reduce on-site consumption of purchased utility power."¹²³ The landowners and wind-rights owners brought a number of procedural and substantive validity challenges, which were dismissed by the district court.

The supreme court concluded that the prohibition on commercial wind farms was valid. Among the factors considered by the court were the board's findings regarding aesthetics, which the Kansas courts have recognized as a valid zoning matter, impacts on the remaining endangered Tallgrass Prairie ecosystem, detrimental effects on prairie chickens and other flora and fauna, incompatibility with the rural, agricultural character of the county, and adverse impacts on property values and tourism.¹²⁴ The court rejected the challengers' contention that a county-wide ban of commercial wind farms was unreasonable per se, observing that the county still permits small wind energy systems, subject to limits as to parcel size, density, spacing, setback distances, blade height, and advertising.¹²⁵

[3] No Express Provision for Renewable Uses

At the time of their adoption, zoning ordinances are a snapshot of what the drafters understand to be the then-existing universe of potential land uses. However, new uses arrive on the scene and existing ones morph and expand in ways not anticipated, frequently leaving applicants (and impacted neighbors and local governments) struggling with how to categorize and process a use application.

When a zoning ordinance does not specifically mention wind or solar energy facilities, a renewables developer's first option typically will be to

¹²²218 P.3d 400 (Kan. 2009).

¹²³*Id.* at 407.

¹²⁴*See id.* at 408.

¹²⁵*See id.* at 422.

examine whether the proposed use fits within a broader, more general use classification authorized in the zoning district in which the property is located. Although it should be cautioned that these decisions are highly reliant on the specific ordinance definitions of the use terms at issue, the following are examples of how these efforts have been addressed by the courts.

In *Haggerty v. Borrego Solar Systems, Inc.*,¹²⁶ a property owner entered into a lease with a developer to install 2,058 solar panels on her property, which was located in a low-density residential zoning district. The Massachusetts Superior Court affirmed the town planning board's approval of the special permit and site plan for the project on the basis that the use fell within the town bylaw's definition of "electric generating or distribution station or substation," a use which was authorized in that district. Conversely, in *Woods v. Fayette County Zoning Board of Adjustment*,¹²⁷ the Iowa Court of Appeals affirmed a lower court decision that a proposal to construct three wind turbines on agriculturally zoned property did not fall within the definition of "electrical and natural gas transmission and regulating facilities," on the basis that no evidence was presented as to the "transmission" or "regulating" capacities of the project.

"Essential service" is a use frequently, and often broadly, authorized in multiple zoning districts. The definition can vary greatly, but typically includes reference to water, sewer, gas, electrical, and similar facilities. The definition may or may not use the term "public utility," and may limit the use to services provided by public utilities or governmental entities. In *West Beekmantown Neighborhood Ass'n v. Zoning Board of Appeals of Town of Beekmantown*,¹²⁸ the Appellate Division of the New York Supreme Court affirmed the approval by the town zoning board of appeals of a conditional use to construct a wind farm on a 700-acre parcel located in a residential district as an essential service. The ordinance defined "essential service" in part as "[e]rection, construction, alteration, operation or maintenance by municipal agencies or public utilities of . . . electrical or gas substations . . . and similar facilities that provide essential use and services, an [sic] general (unidentified) public has a legal right to demand and receive."¹²⁹ Objecting petitioners asserted the developer was neither a municipal agency nor a public utility. However, in affirming the conditional use approval, the court noted that the term public utility was not defined, and it was "undisputed

¹²⁶33 Mass. L. Rptr. 663 (Mass. Super. Ct. Worcester Cnty. 2016).

¹²⁷913 N.W.2d 275 (Iowa Ct. App. 2018).

¹²⁸53 A.D.3d 954 (N.Y. App. Div. 2008).

¹²⁹*Id.* at 956 (alterations in original).

that the wind turbines that [the developer] intends to construct will generate energy, a useful public service, and will be subjected to regulation and supervision by the Public Service Commission.”¹³⁰

Depending on the size and scope of a renewable development, it may also qualify as an “accessory use” to the principal use on a property. Most ordinances typically authorize such uses if they are “customarily incidental” or “subordinate” to the principal use. In *Hamby v. Board of Appeals of the Area Plan Commission of Warrick County*,¹³¹ the applicants sought approval of a wind tower to provide alternative power to their residence located in a residential district. Although initially framed as a height variance case, on appeal the issue was whether the tower qualified as an accessory use. Objectors contended that even if the tower was incidental or subordinate to the principal use, it was not customary. The court rejected this argument, concluding that the term should not be construed so as to prevent the implementation of new technologies in residential districts.¹³²

The Pennsylvania Commonwealth Court reached the same conclusion in *Tink-Wig Lake Forest Property Owners Ass’n v. Lackawaxen Township Zoning Hearing Board*.¹³³ There, neighboring property owners filed an appeal with the township zoning hearing board, challenging the issuance of a zoning permit for the construction of a 55-foot-high wind turbine, intended for private use, on residentially zoned property. Objectors asserted that the use could not be “customary” because this was the first such application the township had received, a contention rejected by the board. Affirming the dismissal of the appeal, the court agreed that “some new uses, such as solar panels, outdoor fireplaces and wind turbines, take the place of other uses that were at one time in fashion.”¹³⁴

[4] Variances

When local ordinance restrictions are too onerous, or where they prohibit or do not provide for utility-scale renewables at all, developers may need to seek variances to accomplish their plans. Litigation over variances

¹³⁰*Id.* (citation omitted); see also *Wind Power Ethics Grp. v. Zoning Bd. of Appeals of Town of Cape Vincent*, 60 A.D.3d 1282 (N.Y. App. Div. 2009) (wind-powered generators qualified as a public utility and were permitted in an agricultural residential district).

¹³¹932 N.E.2d 1251 (Ind. Ct. App. 2010).

¹³²*Id.* at 1255.

¹³³986 A.2d 935 (Pa. Commw. Ct. 2009).

¹³⁴*Id.* at 941. The court, in what was arguably dicta, also affirmed the board’s decision on the basis that the wind turbine was an essential service, even though the zoning ordinance definition of the term referenced “public utility services.” See *id.* at 942–43.

from dimensional or bulk and area requirements such as setbacks and height limits for wind farms are not uncommon.¹³⁵

In Maryland, a two-part test applies to variances—whether the property is unique from the surrounding properties, causing the zoning provision at issue to impact the property disproportionately, and whether “practical difficulty and/or unnecessary hardship” results from that impact. In *Dan’s Mountain Wind Force, LLC v. Allegany County Board of Zoning Appeals*,¹³⁶ the applicant for a 17-turbine wind farm sought a variance from an ordinance requiring turbines to be set back 2,000 feet from any residential structure and no less than three times the turbine height. The applicant noted many factors limited where the turbines could be placed: topography; property boundaries; proximity of existing dwellings; stream channels; protected habitats; wetlands and more. The county board of zoning appeals denied the variance requests. On appeal the court of special appeals considered the standards applicable to the “area” variances sought by the applicant. The court found the board erred in several ways in its application of the uniqueness factor to the properties at issue. The court also determined that the board improperly applied an “unnecessary hardship” test. There are two types of variances: use variances, which allow a use not permitted in that district, and dimensional or “area” variances from area, height, density, setback, or similar requirements. The court concluded the board should have applied the less stringent “practical difficulty” standard under Maryland law. The case was remanded for the board to review the applications under the correct legal framework.

The Michigan Court of Appeals reached a similar conclusion in *Pegasus Wind, LLC v. Tuscola County*.¹³⁷ An applicant applied for variances from the Tuscola Area Airport Zoning Board of Appeals for construction of 33 wind turbines within the airport zoning area in excess of the applicable 400-foot height limit. The board denied the variances and was reversed by the circuit court. The applicant then filed additional height variance applications to construct eight more turbines, which were also denied. The court concluded the “practical difficulties” standard, as opposed to the more stringent “unnecessary hardship” standard, applied to the nonuse

¹³⁵See also *Behrends v. Jackson Cnty.*, No. A22-0797, 2022 WL 17956776 (Minn. Ct. App. Dec. 27, 2022) (relating to variances from access road restrictions).

¹³⁶182 A.3d 252 (Md. Ct. Spec. App. 2018). *Dan’s Mountain* was decided prior to the Maryland Supreme Court’s decision in *Perennial Solar*, discussed in § 31.04[1], above.

¹³⁷988 N.W.2d 17 (Mich. Ct. App. 2022).

variances sought by the applicant.¹³⁸ The court noted the requirement that the applicant demonstrate a unique circumstance inherent in the property, applied by the board, was not an element of the practical difficulty test but of the unnecessary hardship test. The court therefore concluded that financial difficulties asserted by the applicant could be used to support the nonuse variance. Following a thorough discussion of the variance elements and record before the board, the court reversed and remanded for proceedings consistent with its opinion. However, the Michigan Supreme Court has granted the board's application for leave to appeal to consider the appellate panel's interpretation of the "practical difficulty" test, as well as what constitutes a "self-created hardship," which would preclude the granting of a variance.¹³⁹

[5] Challenges Based on Alleged Detrimental Impacts

As discussed in § 31.03, ordinance provisions range from express and objective (i.e., bulk and area requirements) to subjective and vague (e.g., aesthetic and general health, safety, and welfare requirements). While an applicant may already face an uphill battle in proving its proposed use does not run afoul of objective ordinance provisions, challenges based on alleged failure to comply with subjective regulations intended to protect neighboring properties from detrimental impacts are particularly common. As articulated by the Massachusetts Land Court in *Summit Farm Solar, LLC v. Planning Board for the Town of New Braintree*:

Notwithstanding the inoffensiveness of ground-mounted solar arrays in terms of traditional impact issues such as noise, traffic, shadow and odor that arise when new commercial or industrial facilities are proposed, the proliferation of solar energy facilities has raised concerns among some neighbors to such facilities and municipalities because of the large amount of real estate they often occupy and because of their visibility. Commercial solar energy facilities generate no noise, no odor, and virtually no additional traffic, and cast no long shadows, but a moderately sized facility will take up as much as ten or even twenty-five acres of land that otherwise might be devoted to farming or open space. This has led to disputes like the one presently before the court¹⁴⁰

For solar and wind facilities, environmental or community impact concerns are frequently raised by objectors or by the regulating agency itself. In some instances, state statutes may require consideration of environmental

¹³⁸The court noted the Michigan Airport Zoning Act, Mich. Comp. Laws §§ 259.431 et seq., does not distinguish between "use" and "nonuse variances"; however, the Michigan Zoning Enabling Act, Mich. Comp. Laws §§ 125.3101 et seq., does. See *Pegasus*, 988 N.W.2d at 24.

¹³⁹*Pegasus Wind, LLC v. Tuscola Cnty.*, 990 N.W.2d 371 (Mich. 2023).

¹⁴⁰No. 18 MISC 000367 (HPS), 2022 WL 522438, at *1 (Mass. Land Ct. Feb. 18, 2022).

concerns.¹⁴¹ In others, local ordinances require their review. In almost all instances, however, applicants can expect “nuisance” or general health, safety, and welfare concerns to be raised by objectors to their projects.

[a] Applicant Versus Objector Burdens

While many ordinances address issues such as noise, shadow flicker, impact on property values or agriculture, or other general health safety and welfare considerations, jurisdictions vary as to who must prove compliance, or nonconformance with the same. Typically, an applicant bears the burden of proving compliance with specific criteria, while objectors often bear the burden of establishing that the proposed use would be detrimental to public health, safety, and welfare.¹⁴²

[b] Noise

Objectors often raise concerns regarding noise generated by wind facilities. In Pennsylvania, this led to a full-blown battle of the experts and an appeal to the state Commonwealth Court. In *Atlantic Wind, LLC v. Zoning Hearing Board of Penn Forest Township*,¹⁴³ the court considered, in part, whether the township zoning hearing board erred in finding the applicant for a wind-farm failed to demonstrate compliance with a 45 decibel (dBA) noise limit measured at the exterior of an occupied dwelling on another lot. At the public hearing before the board, the applicant presented the testimony of an acoustical engineer who conducted predictive modeling for the project and issued a report concluding that sound levels would comply with the 45 dBA limit. The ordinance was silent as to what metric should be used to establish compliance with the sound limits. Consequently, the applicant’s engineer utilized what he testified to be the most common metric and only standard available to assess wind turbine sound levels, the International Electrotechnical Commission Standard 61400-11. Objectors to the project put forth the testimony of an acoustical expert who reviewed the applicant’s report and opined that the metric used was not proper. By the alternate metric, the objectors’ expert testified that the project was projected to exceed the 45 dBA limit. The board ultimately concluded the applicant failed to supply information necessary to demonstrate compliance with the noise limit and voted to deny the application. On appeal the court analyzed the sufficiency and adequacy of the board’s findings

¹⁴¹ See, e.g., *Brander v. Town of Warren Town Bd.*, 847 N.Y.S.2d 450 (Sup. Ct. 2007) (town board failed to adequately review, analyze, and mitigate potential environmental impacts in review of special use permits for a wind power project).

¹⁴² See, e.g., *Innovative 55, LLC v. Robeson Cnty.*, 801 S.E.2d 671 (N.C. Ct. App. 2017); *Ecoplexus Inc. v. Cnty. of Currituck, Bd. of Comm’rs*, 809 S.E.2d 148 (N.C. Ct. App. 2017).

¹⁴³ 272 A.3d 994 (Table) (Pa. Commw. Ct. 2022).

and conclusions of law and looked at the substantive application of one modeling metric over the other. The court noted the ordinance was silent as to what metric should be used to determine whether the 45 dBA limit would be met and held that if the ordinance intended for applicants to apply a specific metric, it should have stated the same. Therefore, because the ordinance did not contain the requirement the board ascribed to it, the court held the board's conclusion had no basis in law and remanded the case to the board to make findings of fact and conclusions of law consistent with its opinion.¹⁴⁴

Noise related arguments may also be raised before state agencies engaged in siting decisions. In *Town of Forest v. Public Service Commission of Wisconsin*,¹⁴⁵ the Public Service Commission denied an application for a certificate of public convenience and necessity based on modeling which indicated the proposed 102.5 MW wind energy facility would exceed a nighttime noise limit of 45 dBA set forth in the state public utility code.¹⁴⁶ The applicant successfully petitioned the commission to reopen its decision and proposed a compliance plan to operate turbines in reduced noise modes to meet the noise limits. The town, which had been permitted to intervene in the proceedings, argued the compliance plan could only be used as a mitigation tool once the project was operational, and could not be relied upon to ensure initial compliance for siting purposes. The commission determined that the applicant demonstrated compliance with the noise limit 95% of the time, which it found to be sufficient. The town appealed and challenged the commission's decision. Following a lengthy circuit court decision, remand, and reopening of its proceedings, the commission notified the parties that it intended to amend its prior decision to remove the 95% compliance standard and address any complaints concerning alleged noncompliance with the noise standards at the time any noncompliance was alleged. Further appeal by the town was dismissed as barred by claim preclusion.

[c] Preservation of Agricultural Land and Soils

The tendency of utility-scale solar and wind to be sited in rural areas leads to concerns regarding the loss of prime farmland or preservation of

¹⁴⁴When technical issues such as sound modeling arise, disputes as to proper prediction modeling or the applicability of different calculations such as what occurred in *Atlantic Wind*, are not uncommon. See, e.g., *Friends of Lincoln Lakes v. Bd. of Env'tl. Prot.*, 989 A.2d 1128 (Me. 2010) (finding that the board's determination that a wind energy facility met the applicable sound level although the prediction model used by applicant was not designed specifically for wind turbines).

¹⁴⁵926 N.W.2d 510 (Wis. Ct. App. 2019).

¹⁴⁶Wis. Admin. Code § PSC 128.14(3)(a) (measured at the outside wall of a nonparticipating residence or occupied community building).

the agricultural character of an area. In *Matter of Impact Power Solutions, LLC*,¹⁴⁷ the county board of commissioners voted to deny a conditional use application for a 1 MW community-solar farm proposed to be built within an agricultural zoning district on grounds that the use was incompatible with the county comprehensive plan, which instructed that only “limited” space within the A-40 district be used for solar uses, and that solar uses must be situated in a way that reduces conflict with adjacent land uses. The Minnesota Court of Appeals held the board’s decision was supported by sufficient evidence and that its concerns were relevant to the public health, safety or general welfare of the area. Conversely, a year earlier in *Matter of United States Solar Corp.*,¹⁴⁸ the same court found that a county board’s decision to deny a conditional use permit for a 5 MW solar farm on the grounds that it was to be sited on prime agricultural soil was not legally sufficient. In that case, the county zoning ordinance did not include any consideration of agricultural soils. Issues surrounding the use of agriculturally-zoned land have been raised, to varying degrees, in several other states as well.¹⁴⁹

[d] Other General Health Safety Welfare/Nuisance Considerations

A variety of other matters regarding the “general health, safety, and welfare” of the community in which a facility is proposed may arise, whether permitting is conducted at a state or local level. Some of these concerns include stray voltage,¹⁵⁰ aesthetics, lighting or shadow flicker, damage to property values, or impacts on endangered or threatened species.

¹⁴⁷No. A21-0925, 2022 WL 1448223 (Minn. Ct. App. May 9, 2022).

¹⁴⁸No. A20-1043, 2021 WL 2909044 (Minn. Ct. App. July 12, 2021).

¹⁴⁹See, e.g., *Save Panoche Valley v. San Benito Cnty.*, 158 Cal. Rptr. 3d 719 (Ct. App. 2013) (considering the county’s proposed cancellation of agricultural land under the state Land Conservation Act of 1965 to facilitate solar power development); *Seminole Tribe of Fla. v. Hendry Cnty.*, 106 So. 3d 19 (Fla. Ct. App. 2013) (challenging rezoning of county land from general agriculture to planned unit development for purpose of constructing a natural gas power plant and solar energy farm); *Frederick Cnty. v. Legore Bridge Solar Ctr., LLC*, No. 1249, 2020 WL 6892007 (Md. Ct. Spec. App. Nov. 24, 2020) (challenging 20 MW solar project on land zoned for agricultural use).

¹⁵⁰See, e.g., *Minn. Solar, LLC v. Carver Cnty. Bd. of Comm’rs*, No. A17-0504, 2017 WL 6418179 (Minn. Ct. App. Dec. 18, 2017) (upholding county denial of a conditional use application for a solar farm based in part on the potential for stray voltage and its possible impact on neighboring dairy cows); *Matter of Nokomis Energy, LLC*, Nos. A21-0062, A21-0106, 2021 WL 6010077 (Minn. Ct. App. Dec. 20, 2021) (County improperly ignored applicant’s proposed conditions aimed at allaying concerns regarding stray voltage, Court reversed and remanded).

Objectors often allege multiple environmental defects or detriments. In *Appeal of Mary Allen*,¹⁵¹ the New Hampshire Site Evaluation Committee was tasked with considering a revised application for the development of a wind farm. After the committee denied the original application, the state amended the statute governing the committee's review of site and facility applications¹⁵² and the applicant submitted a revised application. Following a site visit and 13 days of hearings, it held there was a substantial change between the applications, and the proposed project would not have an unreasonable adverse effect on the health, safety, or aesthetics of the region. Objectors appealed, arguing in part that there was insufficient evidence in the record to support the finding that the project would not have an unreasonable adverse impact on aesthetics, public health, and safety. In essence, the objectors contested the committee's decision to credit the applicant's experts and reports over their own. Specifically, they challenged findings regarding sound assessment, shadow flicker assessment, visual impact, impact on property values, and the economic feasibility of certain mitigation records. As noted by the New Hampshire Supreme Court, the state legislature delegated broad authority to the committee to consider potential significant impacts and benefits of a project. When faced with competing expert witnesses it was free to accept or reject that testimony in whole or in part. The court found sufficient evidence supported all of the committee's findings, and that the additional mitigation measures and conditions would address any remaining concerns and ensure regulatory compliance.

The Wyoming Supreme Court recently addressed a wind farm's mitigation of nuisances. In *Monaghan Farms, Inc. v. Board of County Commissioners of Albany County*,¹⁵³ the county board of commissioners approved a wind energy conversion system permit application to construct a wind farm. In an appeal by nearby property owners, the court considered, in part, whether the board's approval of the permit was arbitrary and capricious, or constituted a taking of the objectors' private property in violation of the Wyoming Constitution.¹⁵⁴ After considering the need for a separate conditional use approval and the sufficiency of the board's written findings, the court considered whether the board lacked a rational basis for finding that nuisances from the project would be minimized as required by the county zoning regulations.

¹⁵¹186 A.3d 897 (N.H. 2018).

¹⁵²N.H. Rev. Stat. Ann. § 162-H:10(VII).

¹⁵³2023 WY 31, 527 P.3d 1195.

¹⁵⁴Wyo. Const. art. 1, § 32.

The objecting neighbors raised a number of potential nuisance issues, arguing the board lacked a rational basis for finding potential impacts were “adequately addressed.”¹⁵⁵ The objectors asserted visual and light impacts, citing a study that found that turbines half the height of what was proposed could be visible for up to 36 miles.¹⁵⁶ The applicant had submitted a visual impact assessment and agreed to bury collection lines, design operations and maintenance buildings with rural and agricultural elements, design lighting to face downward, and paint turbines a non-reflective white color. While the board acknowledged the inevitable effect on the viewshed, it found the applicant’s commitment to work with the Federal Aviation Administration (FAA) for approval of aircraft detection lighting systems to limit periods of illumination would mitigate the impact.¹⁵⁷ The court held that the board’s findings that visual impacts had been adequately addressed were not arbitrary or capricious.

The objectors also contested the board’s findings regarding shadow flicker impacts (the effect of the sun shining through rotating blades casting a moving shadow).¹⁵⁸ The applicant had provided a shadow flicker assessment technical report which predicted that a nearby nonparticipating landowner could be expected to experience 18 hours and 26 minutes of flicker per year. Noting the zoning regulations did not mention or contain a standard for shadow flicker, the county staff report determined the amount of flicker would be minimal and well within acceptable industry standards. The court concluded that the board’s finding that the applicant sufficiently addressed the impact of general nuisances, including shadow flicker, was not arbitrary and capricious.¹⁵⁹

Finally, the objectors challenged the board’s findings related to noise.¹⁶⁰ The zoning regulation required that noise associated with wind operations not exceed 55 dBA at the property line. The applicant had provided an acoustical assessment which concluded that sound levels will fall below ambient levels and be compliant with the 55 dBA limit. The objectors filed a contradicting technical memorandum. The county staff report found noise would fall within acceptable limits during construction and operation, and

¹⁵⁵ *Monaghan Farms*, 2023 WY 31, ¶ 45.

¹⁵⁶ *See id.* ¶ 46.

¹⁵⁷ FAA requirements for wind turbine lighting are an issue for many developments. In some states, legislatures have attempted to develop statutes limiting lighting impacts. *See* Shannon Najmabadi, “Lawmakers Crack Down on Wind-Turbine Lights That Flash All Night,” *Wall St. J.* (Apr. 30, 2023).

¹⁵⁸ *See Monaghan Farms*, 2023 WY 31, ¶ 52.

¹⁵⁹ *Id.* ¶ 55.

¹⁶⁰ *See id.* ¶ 56.

the board imposed additional conditions on the applicant. Again, the court held the board's conclusions were not arbitrary and capricious.¹⁶¹

[6] Spot Zoning

The common law of many jurisdictions prohibits “spot zoning,” defined as the singling out of a small area of land for different treatment than that accorded to similar surrounding land.¹⁶² Spot zoning claims typically involve challenges by those opposed to the development of land to the zoning map or rezoning of a specific property. In a somewhat novel spot zoning case, opponents of a proposed wind energy project in Lycoming County, Pennsylvania filed a spot zoning validity challenge to a county zoning ordinance text amendment. In *Plaxton v. Lycoming County Zoning Hearing Board*,¹⁶³ the wind energy developer initially sought approval of a special exception for a 70.5 MW wind-powered electric-generating, transmitting, and interconnecting facility as a “public service use.” Ultimately, the zoning hearing board denied the special exception on the basis that the proposed project would generate adverse impacts not normally generated by a public service use. The county board of commissioners subsequently adopted an ordinance text amendment authorizing wind energy facilities as a use by right in several zoning districts, including the district in which the project was to be located. The developer applied for, and the zoning officer issued, a permit for the project. An objector challenged the ordinance amendment on the basis that it constituted illegal spot zoning and “special legislation,” defined as an ordinance that is “unjustly discriminatory, arbitrary, unreasonable and confiscatory in its application” and aimed at preventing the lawful use of land.¹⁶⁴ The Pennsylvania Commonwealth Court rejected these challenges, pointing out that the developer’s property was not rezoned in a manner subjecting it to unjustifiable disparate treatment from nearby land. Instead, the amendment treated all land within certain zoning districts alike and did not prevent the lawful use of land.¹⁶⁵

[7] Procedural Issues

In addition to issues regarding compliance with the substantive requirements of a zoning or other land use ordinance, there are certain procedural

¹⁶¹*Id.* ¶ 60.

¹⁶²*See, e.g.*, Appeal of Kates, 393 A.2d 499 (Pa. Commw. Ct. 1978).

¹⁶³986 A.2d 199 (Pa. Commw. Ct. 2010).

¹⁶⁴*Id.* at 210.

¹⁶⁵*See id.*; *see also* Nextsun Energy, LLC v. Fernandes, No. 19 MISC 000230-RBF, No. 19 MISC 000564-RBF, No. 19 MISC 000322-RBF, 2021 WL 669059 (Mass. Land Ct. Feb. 22, 2021) (zoning bylaw authorizing large-scale ground-mounted solar photovoltaic on operational cranberry bogs not spot zoning).

requirements that come into play. Issues such as standing, sufficiency of public notice, or biases of the deciding body interplay with constitutional rights to due process, statutory requirements and other issues.

[a] Standing

A frequent issue in land use proceedings is the right of an individual or organization other than the applicant to participate as a party, usually in opposition to the approval or other relief sought by the applicant. Although the applicable standards can vary from state to state, typically one seeking party standing must establish that they are adversely impacted, or “aggrieved,” in a manner beyond the public generally.

The Wyoming Supreme Court’s decision in *Northern Laramie Range Foundation v. Converse County Board of County Commissioners*,¹⁶⁶ is illustrative of the standards applied to those seeking party status in the context of a renewables project. There, a developer sought approval of a two-phased wind energy project, consisting of 62 turbines, support structures and transmission lines. In separate proceedings, the county board of commissioners and the state industrial siting council approved the project. On appeal, the court addressed the legal standing of several entities opposed to the project. Under applicable precedent, a land use litigant must be “aggrieved or adversely affected in fact by an agency action” and must show an “injury or potential injury by ‘alleg[ing] a perceptible, rather than speculative, harm resulting from agency action.’”¹⁶⁷ Applying this standard, the court found that a ranch owning land bordering the project had standing and was aggrieved. As a result, the court also concluded that a foundation, of which the ranch’s owner was a member, possessed organizational standing. Another individual, whose property was “near” but not “adjacent” to the project, expressed concerns about the traffic impacts on her property. The court concluded that she and the organization of which she was a member also possessed standing. However, the court denied standing to an organization that did not own property adjacent to the project but asserted that the “project will thwart its purposes.”¹⁶⁸

Other jurisdictions have granted party status to individuals residing within one mile of a solar energy project, *Mammoth Solar, LLC v. Ehrlich*,¹⁶⁹

¹⁶⁶2012 WY 158, 290 P.3d 1063.

¹⁶⁷*Id.* ¶ 24 (alteration in original) (quoting *Hoke v. Moyer*, 865 P.2d 624, 628 (Wyo. 1993)).

¹⁶⁸*Id.* ¶ 35.

¹⁶⁹196 N.E.3d. 221 (Ind. Ct. App. 2022).

and one-half mile of wind turbine project, *In re Broad Mountain Development Co.*¹⁷⁰

[b] Bias

By its very nature, local government is the most accessible form of government for members of the general public. Community support for, or frequently opposition to, land use projects, often vociferous and emotional and coming from friends and neighbors, has the potential to influence the opinions and actions of local decision makers. This can result in allegations that local government officials were impermissibly biased in rendering their decisions on utility-scale renewable projects.

In *Dellinger v. Lincoln County*,¹⁷¹ property owners sought a conditional use permit for the installation of a solar farm. Following a protracted procedural history involving an initial application, appeal to the North Carolina Court of Appeals, and multiple remands, the county board of commissioners voted 4–1 to deny the application. Prior to the vote, applicants’ and objectors’ motions to recuse two different commissioners were denied. The commissioner for which the applicants sought recusal admitted that he had assisted in opposing the project, contributed financially to that opposition, and expressed his opinion on the project to others. The court of appeals was asked, in part, to consider whether the lower court erred by holding that the applicants’ due process rights to an impartial hearing were not prejudiced by the participation of the commission member the applicant had moved to recuse. The court observed that governing bodies sitting in a quasi-judicial capacity are performing as judges and must be neutral and impartial.¹⁷² The party seeking recusal must overcome a presumption of honesty and integrity by demonstrating actual bias. Bias has been defined as a predisposition to decide a cause or an issue in a certain way that does not leave the mind perfectly open to conviction.¹⁷³ The court found the applicants clearly demonstrated the commissioner’s bias based upon his active opposition to the specific application at issue. Therefore, under the statute in place at the time of the decision, the court held the commissioner was biased, and that his continued advocacy and involvement in the proceedings was sufficient to require a reversal and remand.¹⁷⁴

Alleged bias in favor of a development can also be raised by objectors and may, even if unsubstantiated, lead to a costly and time-consuming

¹⁷⁰17 A.3d 434 (Pa. Commw. Ct. 2011).

¹⁷¹832 S.E.2d 172 (N.C. Ct. App. 2019).

¹⁷²*See id.* at 178.

¹⁷³*See id.*

¹⁷⁴*See id.* at 179.

appeal. In *Burton v. Board of Zoning Appeals of Madison County*,¹⁷⁵ an applicant submitted special use and variance applications to site a 120 MW solar project on land zoned for agriculture. One county board member voluntarily recused herself and did not vote on the applications because a friend owned land to be used in the project. However, on subsequent applications related to the same project she participated in the hearings and voted in favor of the applications. On appeal, objectors argued the board member's consideration and vote on the second round of applications were invalidated by a conflict of interest. The court observed that in Indiana a member of a board of zoning appeals is disqualified and may not participate in a hearing or decision if the member is "(1) biased or prejudiced or otherwise unable to be impartial; or (2) has a direct or indirect financial interest in the outcome of the hearing or decision."¹⁷⁶ However, even if a member is biased, the court presumes the board will act properly and without prejudice, regardless of whether the member is recused. A court will not interfere with the administrative process in absence of a demonstration of actual bias, and the burden of proving the same is on the party seeking to invalidate the decision. Finding no evidence of actual bias, the court affirmed approval of the subsequent applications.

[c] Open Meetings

In addition to the obligation to hold unbiased proceedings, most states require land use decisions to occur at open meetings, usually subject to public notice and public comment. Public meeting obligations may be present in states with exclusively local, exclusively state, or hybrid siting schemes.¹⁷⁷ In some instances, public hearing requirements may be strict, in others, the deciding body may have more discretion as to when and how to hold public hearings or obtain public comments.¹⁷⁸ Errors, intentional or unintentional, involving public notice or public hearing requirements

¹⁷⁵174 N.E.3d 202 (Ind. Ct. App. 2021).

¹⁷⁶*Id.* at 213–14 (quoting Ind. Code § 36-7-4-909(a)).

¹⁷⁷*See, e.g.*, Okla. Stat. tit. 17, § 160.11 et seq.; Md. Code Ann. Pub. Util. § 7-207; 53 Pa. Cons. Stat. § 10101 et seq.

¹⁷⁸*See, e.g.*, *Martha A. Powers Tr. v. Bd. of Env'tl. Prot.*, 15 A.3d 1273 (Me. 2011); *Concerned Citizens to Save Roxbury v. Bd. of Env'tl. Prot.*, 15 A.3d 1263 (Me. 2011) (finding the board did not abuse its discretion in declining to hold a public hearing on an application for permits to construct a wind energy facility on grounds that the voluminous record before the board included numerous written comments, studies, and information sufficient to meet the relevant statutory requirements); *Friends of the Boundary Mountains v. Land Use Regul. Comm'n*, 40 A.3d 947 (Me. 2012) (commission did not abuse its discretion in refusing to conduct a new public hearing on an amended application).

occur frequently, and may be subject to challenge under state law. However, minor errors generally will not invalidate the underlying action.¹⁷⁹

In *Matter of Frigault v. Town of Richfield Planning Board*,¹⁸⁰ the state Open Meetings Law¹⁸¹ required the town planning board to take action on an application for a six-turbine wind facility at a public meeting subject to public notice. At the time of the meeting, attendance exceeded the maximum occupancy for the advertised location, so the town attorney moved the meeting to a nearby church.¹⁸² A note was placed on the door of the original meeting location and the meeting commenced approximately one hour later than scheduled.¹⁸³ The board granted the application. The challengers alleged the relocation of the meeting constituted a violation of the Open Meetings Law.¹⁸⁴ The court disagreed, finding the board met the requirement that it make all reasonable efforts to ensure meetings are held in an appropriate facility that can adequately accommodate members of the public.¹⁸⁵ The court noted that a technical violation of the statute rendered the resolutions issued by the board not void, but voidable upon good cause shown.¹⁸⁶ The court concluded the decisions of the board were not void under the Open Meetings Law, but ultimately annulled the decision on other grounds.¹⁸⁷

Another key aspect of public meetings and hearings is the availability and sufficiency of public participation and comment. Whether sufficient time and opportunity was provided by the relevant agency may be grounds for litigation. For example, in *Roberts v. Manitowoc County Board of Adjustment*,¹⁸⁸ the Wisconsin Court of Appeals held the board's five-minute time limit for individual presentations was not arbitrary or capricious.¹⁸⁹

¹⁷⁹See, e.g., *Nextsun Energy, LLC v. Fernandes*, No. 19 MISC 000230-RBF, No. 19 MISC 000564-RBF, No. 19 MISC 000322-RBF, 2021 WL 669059 (Mass. Land Ct. Feb. 22, 2021) (advertising that a public hearing on an ordinance would be held on Wednesday, December 18, 2018, when the day in question was in fact a Tuesday was not an error that justified invalidating the ordinance approved at that hearing).

¹⁸⁰107 A.D.3d 1347 (N.Y. App. Div. 2013).

¹⁸¹N.Y. Pub. Off. §§ 103, 104.

¹⁸²See *Frigault*, 107 A.D.3d at 1351.

¹⁸³See *id.*

¹⁸⁴See *id.* at 1349–50.

¹⁸⁵See *id.* at 1351–52.

¹⁸⁶See *id.*

¹⁸⁷See *id.* at 1352.

¹⁸⁸721 N.W.2d 499 (Wis. Ct. App. 2006).

¹⁸⁹As analyzed by the court, the board also properly published the public hearing notice, and sent notice of the meeting to adjacent property owners.

[d] Other Procedural Issues

Other procedural issues may arise, which can lead to delay, disruption, and potential litigation. Most states impose statutory time limits on land use siting decisions, and if those time limits expire, the application may be subject to deemed denial or deemed approval by operation of law.¹⁹⁰ The applicant and agency may agree to an extension of time to render a decision, and agreements to enter into such a decision typically are not appealable.¹⁹¹

Disputes also can occur when agency members meet to conduct site visits or engage in private executive sessions to which the public is not invited. For example, a town board in New York was challenged, in part, for allowing a quorum of its board members to visit the site of a proposed wind farm to study the sound impacts. In that case, *Finger Lakes Preservation Ass'n v. Town Board of Town of Italy*,¹⁹² the court found the board members' visit was not a "public meeting" and did not violate the requirements of the state Open Meetings Law.

[8] Local Role in State Siting Decisions

In some states, municipalities that do not issue approvals in utility-scale matters still may be permitted to enact ordinances that must be considered by the state agency responsible for siting decisions. In others, municipalities may be required to sign off on projects or issue certificates of compliance with their ordinances. Even if not directly involved in the decision-making process, municipalities may appeal decisions of state agencies as interested parties in land use decisions.

In *Blue Mountain Alliance v. Energy Facility Siting Council*,¹⁹³ the Oregon Supreme Court interpreted a state statute which requires the Energy Facility Siting Council (EFSC) consider both local "land use regulations" and "public health and safety" measures in regards to the issuance of a site certificate for an energy facility.¹⁹⁴ The court analyzed whether the EFSC correctly declined to require the developer of a wind energy facility to comply with a county ordinance—adopted after its application was filed—which required a two-mile setback between wind turbines and rural residences. Under the relevant statute, to obtain approval from the EFSC,

¹⁹⁰Matter of USS Great River Solar LLC, No. A21-150, 2022 WL 4295368 (Minn. Ct. App. Sept. 19, 2022).

¹⁹¹See, e.g., *Preserve the Sandhills, LLC v. Cherry Cnty.*, 964 N.W.2d 721 (Neb. 2021).

¹⁹²887 N.Y.S.2d 499 (Sup. Ct. 2009).

¹⁹³300 P.3d 1203 (Or. 2013).

¹⁹⁴Or. Rev. Stat. Ann. §§ 469.401(2), .504(1)(b)(A).

facilities must comply with “land use” regulations in effect as of the date of the application.¹⁹⁵ In addition, the certificate ultimately issued by the EFSC must include a requirement that the parties “abide by local ordinance[s].”¹⁹⁶ At issue was whether or not the setback ordinance adopted by the county was a “land use” regulation, and if so, whether the developer was required to comply with a land use regulation not in effect as of the date of the application. The court found that setbacks were properly classified as a “land use” regulation, rather than a general “public health and safety” measure and concluded that the EFSC properly declined to consider the ordinance because it was not in effect on the date the application was filed.

As discussed above in § 31.02[5], the Maryland PSC has regulatory authority over utility-scale solar, and local zoning regulation of those facilities is preempted.¹⁹⁷ However, the PSC is required to give “due consideration” to consistency of the application with the comprehensive plan and zoning of the relevant county. In *Frederick County v. Legore Bridge Solar Center, LLC*,¹⁹⁸ the court of special appeals considered how to treat an application pending before the PSC at a time during which the county amended its zoning ordinance, the legislature amended the Public Utilities Code to require due consideration to local zoning,¹⁹⁹ and the court of appeals decided *Perennial Solar*, which held that local zoning of utility-scale solar was preempted. The PSC found the developer had acquired a vested right in a prior special exception issued by the county before the zoning change and granted the application, expressly ignoring the county zoning, comprehensive plan, or attempts to resolve issues related to the project as required by the statutory amendments. On appeal, the court of special appeals addressed section 7-207(c) of the Public Utility Code, as amended, which requires that the PSC coordinate with and include the local governing body in the certificate of public convenience and necessity public hearing process and establishes a process to ensure public comment. The PSC is still the final approving authority for siting and construction and is only required to give “due consideration” to the recommendation of the local governing body, consistency of the application with the local comprehensive plan and zoning, and efforts to resolve issues presented by the county. The court found that under *Perennial Solar*, the PSC has discretion in weighing the impact of relevant zoning standards, but it must

¹⁹⁵*Id.* § 469.504(1)(b)(A).

¹⁹⁶*Id.* § 469.401(2).

¹⁹⁷See Md. Code Ann. Pub. Util. § 7-207; Bd. of Cnty. Comm’rs of Washington Cnty. v. *Perennial Solar*, 212 A.3d 868 (Md. 2019) (discussed at § 31.04[1], *supra*).

¹⁹⁸No. 1249, 2020 WL 6892007 (Md. Ct. Spec. App. Nov. 24, 2020).

¹⁹⁹MD 2010 Repl. Vo. & Supp. 2019.

exercise that discretion after actually giving due consideration to these factors. Finding that it did not do so, the court remanded the matter to the PSC to consider what weight to give to these matters.

Two years later, in *Frederick County v. Maryland Public Service Commission*,²⁰⁰ the Maryland Court of Special Appeals considered the weight to be given to county recommendations under the Public Utilities Code. The public utility law judge (PULJ) had determined that the county “floating zone ordinance” was due no weight because it functioned as a de facto ban on utility-scale solar projects. The court found that “due consideration” requires a sliding scale in which greater consideration is given where the interests presented are more weighty, but that local interests cannot be ignored and the PSC must be cognizant of the recommendation of the governing body. In short, the PSC must “consider all relevant factors, and exercise reasonable judgment.” The court found that the PULJ and PSC had met this burden and had given due consideration to the county’s recommendation, comprehensive plan, and zoning.

In *In re AWA Goodhue Wind, LLC*,²⁰¹ the Minnesota Court of Appeals considered the decision of the Minnesota Public Utility Commission (MPUC)²⁰² to disregard a county’s ordinance regulating wind energy projects. The MPUC approved a 78 MW wind farm in the county. While the application was pending, the county adopted an ordinance imposing 10 “rotor diameter”²⁰³ setbacks from each residence not participating in the project, which had the effect of prohibiting the siting of all 50 turbines for the proposed project. The MPUC referred the matter of the ordinance’s applicability to an administrative judge who ultimately found good cause to disregard the ordinance setbacks. The MPUC issued the requested site permit and imposed a 1,626-foot setback, along with a requirement that developer make a “good-faith effort” to comply with the ordinance’s setback requirements and accommodate the county’s concerns regarding turbine noise and shadow flicker. On appeal, the court found that the MPUC must apply a county’s ordinance unless it finds good cause not to do so.²⁰⁴ The court concluded that substantial evidence supported the MPUC’s findings that the setbacks were unnecessary to protect human health, safety, or quality of life and their imposition could preclude the entire project

²⁰⁰No. 668, 2022 WL 17578907 (Md. Ct. Spec. App. Dec. 12, 2022).

²⁰¹No. A11-2229, 2012 WL 2369004 (Minn. Ct. App. June 25, 2012).

²⁰²See discussion at § 31.02[4], *supra*.

²⁰³The proposed turbines each had a rotor diameter of 271 feet, resulting in a required setback of 2,710 feet.

²⁰⁴Minn. Stat. §§ 216F.04, .07, .08, .081.

at issue, as well as hinder the implementation of state renewable energy policies. In addition, it found that Minn. Stat. § 216F.081, which creates a presumption in favor of applying a county's ordinance, did not require the MPUC to adopt or defer to the factual allegations accepted by the county in adopting the ordinance. As a result, the court concluded that the MPUC correctly determined that there was good cause to disregard the ordinance setback requirements.

§ 31.05 Conclusion

National and individual state energy portfolio goals and other policies promoting renewable energy sources have accelerated the development of utility-scale wind and solar projects. This has triggered the inevitable pushback from local residents impacted by these developments, a trend that is just as likely to continue. This opposition takes legislative form in the rapid spread of local zoning and other land use ordinances placing restrictions on and sometimes outright banning large-scale renewable projects. Opposition also manifests itself in citizen challenges to specific land use applications filed pursuant to those ordinances, inevitably resulting in litigation. Overseeing all of this are state legislatures, many of which have adopted statutes attempting to strike their preferred balance between statewide versus local control. These statutes sometimes authorize, but more often than not limit the extent to which local governments can regulate these projects. Activity on all of these fronts is unlikely to slow down anytime in the foreseeable future.