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ENVIRONMENTAL ACTIONS OPPOSING PA233 ZONING PREEMPTION

On October 10, 2024 the Michigan Public Service Commission (MPSC) released a final order (U-21547) concerning the siting of large scale renewable energy facilities within local units of government in Michigan. The Commission issued the order pursuant to authority granted under public act 233 of 2023. The order provides the application process and standards for those seeking a certificate from the Commission for siting and operation of large scale wind energy facilities of 100 MW or more, solar energy facilities of 50 MW or more and energy storage facilities of 50 MW or more with an energy discharge capacity of 200 MW hours or more. PA233, took affect on November 29, 2024

PA233 of 2023 was passed to replace exclusively local zoning regulation of the siting and operation of the above described renewable energy facilities with state determined mandates implemented by the Michigan Public Service Commission.

Passage and implementation of PA 233 effectively pre-empts the zoning authority of townships and cities that previously existed under state zoning statutes. PA 233 preempts this local zoning authority for the above described renewable energy facilities by establishing specific setbacks, fencing, height, sound and lighting requirements for solar, wind and energy storage facilities (Section 226(8)), among other conditions. PA 233 provides that local zoning authorities may not impose substantively more stringent standards than those provided in section 226 (8).

Historically the state legislature has placed the primary authority for local zoning regulation upon local units of government. Preemption of this authority by the state is a major reversal of state zoning law and policy.

Normally, it is likely true that local zoning authority may be limited by the legislature through delegation of authority to state regulatory bodies. It may well be that the legislature has authority to pass PA 233 and thereby limit local zoning authorities ability to site large renewable energy projects and transfer that authority to the MPSC. However, that legislative authority is not unfettered.

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In my opinion, the impact of creating MPSC authority for the siting of large renewable energy projects through PA233 is subject to review under the Michigan Environmental Protection Act (MEPA), MCLA 324. 1701 et seq. MEPA would take legal precedence over PA233 and other state legislative requirements because it is legislation that implements a State Constitutional command set forth in Const 1963, art 4, sec 52. That constitutional provision declares:

“The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.”

The Supreme Court has ruled that Article 4 section 52 creates a mandatory duty of the legislature to enact legislation to protect Michigan's natural resources. *State Highway Comm'n v Vanderkloot*, 329 Mich 159, 220 NW2d 416 (1974). That implementing legislation is MEPA, MCLA 1701et seq.

A major advantage to applying MEPA to evaluate the authority to site the renewable energy projects granted by the legislature to the MPSC under PA 233 is that its provisions are in the State Constitution. Therefore, the state and MPSC conduct in siting and certifying renewable energy projects must be performed consistent with MEPA in order to be consistent with the state constitution.

Under MEPA a party (given proper standing) may maintain an action against any person” (including business and government entities) for the protection of the air, water or other natural resources (e.g. Farmland) and the public trust in those resources from pollution, impairment, or destruction. MCL 324. 1701(1). To maintain this action, the plaintiff must make a *prima facie* case that the defendant has or is likely to pollute, impair or destroy the air, water or other natural resources.

In sum, MEPA's foundation in Const 1963 Art 4 Sec 52 places it in a *predominant position* to review many other State statutes, regulations and

administrative processes. In particular, State actions implementing PA233 including the standards for large scale renewable energy facilities contained in Sec 226(8) and the siting of these facilities must pass muster under MEPA's requirements. Most prominent of those requirements are that siting and operation of the facilities not cause or are not likely to cause pollution, impairment or destruction of the air, water or other natural resources the state.

MEPA authorizes courts to prevent conduct that harms the environment based on evidence presented in litigation. Under MEPA private parties may protect the environment in much the same way as they have historically protected property and contract rights. A primary thrust of MEPA is to prohibit state and local agencies from authorizing conduct that harms the air, water or other natural resources or the public trust in those resources.

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