



Livingston County Department of Planning

January 19, 2023

Cohoctah Township Board of Trustees
c/o Barb Fear, Clerk
Cohoctah Township Hall
3530 Gannon Road
Howell, MI 48855

Kathleen J. Kline-Hudson
AICP, PEM
Director

Re: County Planning Commission Review of Zoning Text Amendments
Z-06-23 Various Sections and Articles:
• **Utility Scale Solar Energy Systems and Moratorium**

Robert A. Stanford
AICP, PEM
Principal Planner

Dear Board Members:

The Livingston County Planning Commission met on Wednesday, January 18, 2023, and reviewed the zoning text amendments referenced above. The County Planning Commissioners made the following recommendation:

Z-06-23 Take No Action, Encourage Further Review.

Copies of the staff review and Livingston County Planning Commission meeting minutes are enclosed. Please do not hesitate to contact our office should you have any questions regarding county actions.

Sincerely,

Robert A. Stanford

Robert Stanford, Principal Planner

Enclosures

c: Robert Beach, Chair, Cohoctah Township Planning Commission
Mike Homier, Legal Counsel
Abby Cooper, Municipal Attorney

Meeting minutes and agendas are available at:
<https://www.livgov.com/plan/econdev/Pages/meetings.aspx>

Department Information

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Livingston County Department of Planning

MEMORANDUM

Kathleen J. Kline-Hudson
AICP, PEM
Director

TO: Livingston County Planning Commissioners and the
Cohoctah Township Board of Trustees

FROM: Robert Stanford, Principal Planner

DATE: January 6, 2023

SUBJECT: Z-06-23 Amendments to Zoning Ordinance Article -

Robert A. Stanford
AICP, PEM
Principal Planner

Various Sections and Articles:
Utility Scale Solar Energy Systems and Moratorium

Scott Barb
PEM
Principal Planner

During the November 16, 2022 Livingston County Planning Commission meeting, the Commission heard, reviewed and made recommendation on *Livingston County Zoning Case #Z-37-22 (Recommendation: Take No Action, Encourage Further Review)*. With this set of amendments the township proposed to do the following:

- The township proposed to remove the definition of "Solar Farm" from Section 2.02.
- The township proposed to replace references to "Solar farms" to "Utility scale solar energy systems" in Sections 4.03(M), 5.03(L), 6.03(K), 7.03(H), 10.03(G), 11.03(X), and 16.58(C).
- The township proposed to delete Section 13.17 regarding Solar Buildings.
- The township proposed to replace existing section 13.27 in its entirety and revise it with new regulations throughout.

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While it was felt by County Planning Staff that the proposed amendments were very comprehensive and many of them sufficiently addressed many of the elements related to proper planning and zoning related to the issue according to the current establish set of unofficial guidelines developed by the Michigan State University Extension and University of Michigan-Graham Institute of Sustainability entitled: "Planning & Zoning for Solar Energy Systems: A Guide for Michigan Local Governments"¹, there were many undefined, unclear and vague areas through the proposed amendments that the County Planning Commission recommended that the Township take back the amendments to reevaluate and continue to better clarify these areas of deficiencies in the proposal and perhaps repropose to the County Planning Commission at a near future date a cleaner more refined set of amendments.

¹(Source: available at:
<https://www.canr.msu.edu/planning/uploads/files/SES-Sample-Ordinance-final-20211011-single.pdf>)



Subsequent to this action, the Cohoctah Township Planning Commission received the recommendation of the County Planning Commission and has decided to take this current action. In addition, the township has decided to retain new legal counsel specifically to aid and assist in the further development of the township's solar and wind energy ordinance. The proposed amendments as presented in this review are a result of advice provided by the township's new legal counsel.

In conversations and public meetings attended by Staff with township planning commissioners, board members and legal counsel, Staff has come to the understanding that the township had indeed implemented a similar moratorium over the past year or so previous, which concluded on or around November-December of 2022. Because of the uncertainty and level of necessary additional work that is required to revise the previously proposed set of amendments (see case #Z-37-22) as well as the new ground swell of concern and activity by the township residents, the Township Planning Commission has decided to initiate this new course of action under the proposed moratorium.

For purposes of this review, proposed additions to existing text are noted in red underline, deletions in ~~striketrough~~.

ITEM 1. The Township Planning Commission has initiated this new course of action with the following Resolution, which formulates the basis for the action.

WHEREAS, Public Act 110 of 2006, MCL 125.3101 et seq., as amended, authorizes a township board to adopt and amend zoning ordinances that regulate the use of land and structures within its zoning jurisdiction to meet the needs for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare; and

WHEREAS, the Planning Commission wishes to consider recommending regulations applicable to Commercial Wind and to Solar Energy Projects in the Township; and

WHEREAS, the Planning Commission finds that it is necessary and reasonable for the Township Board to establish a temporary moratorium upon the issuance of any and all permits, licenses, and approvals for any property in the Township for the establishment and use of Commercial Wind and Solar Energy Projects for a period of 12 months, with the ability to extend said moratorium for up to an additional 12 months by the adoption of a resolution for extension by the Township Board; and

WHEREAS, the Planning Commission finds that adopting such a moratorium is in the best interest of the public health, safety, and welfare to ensure that the Planning Commission and the Township Board have sufficient time and space during which to thoughtfully consider such regulations without the added pressure of pending applications or proposed developments involving Commercial Wind and Solar Energy Projects; and



WHEREAS, the Planning Commission has determined that the following sections of the Township's Zoning Ordinance relating to "solar farms" should be repealed while the Planning Commission considers revised regulations: the definition of "solar energy system" and "solar farm" in section 2.02, section 4.03(M), section 5.03(L), section 6.03(K), section 7.03(H), section 10.03(G), section 11.03(X), section 16.58(C), section 13.27, and any other section that could be construed to permit Commercial Wind and Solar Energy Projects in the Township while the moratorium remains in effect.

NOW, THEREFORE, the Planning Commission of the Township of Cohoctah resolves as follows:

1. The Planning Commission recommends that the Township Board adopt Ordinance No. 2023-___, An Ordinance to Amend the Township Zoning Ordinance to Include a Moratorium on the Issuance of Permits, Licenses, or Approvals for, or for Any Construction of, Commercial Wind and Solar Energy Projects, And To Repeal Sections Of The Township Zoning Ordinance Pertaining To "Solar Farms" And "Solar Energy Systems" (the "Ordinance," attached as **Exhibit A**).
2. The Planning Commission shall forward this Resolution and the Ordinance, along with the minutes of the public hearing, to the Livingston County Planning Commission for review and recommendation and to the Township Board for consideration.
3. A copy of the Ordinance shall be available for examination at the office of the Clerk, and copies may be provided for a reasonable charge.
4. Any and all resolutions that are in conflict with this Resolution should be repealed but only to the extent necessary to give this Resolution full force and effect.

ITEM 2. The following is a summary of the proposed Ordinance and moratorium text.

Section 1. Addition of New Section 13.28 to Township Zoning Ordinance. This section adds Section 13.28 to the Township Zoning Ordinance. The new Section 13.28 contains the following subsections:

- A. Subsection (A)** defines "Commercial Wind and Solar Energy Project."
- B. Subsection (B)** describes the purpose and findings of the proposed Ordinance, including the need for a moratorium and repeal of sections of the Zoning Ordinance pertaining to "solar farms" and "solar energy systems."
- C. Subsection (C)** imposes a moratorium upon the issuance of any and all permits, licenses, or approvals for any property in the Township for the establishment or use of Commercial Wind and Solar Energy Projects, so long as the Ordinance is in effect.
- D. Subsection (D)** describes the term of the moratorium imposed by the Ordinance stating it will be in effect for 12 months following the effective date of the Ordinance,



and that the Township Board may extend the moratorium by resolution for an additional 12 months.

Section 2. Validity and Severability. This section provides that if any portion of the Ordinance is found invalid, such holding will not affect the validity of the remaining portions of the Ordinance.

Section 3. Repealer. This section repeals any ordinances or parts of ordinances in conflict with this Ordinance, including but not limited to Ordinance No. 84 adopted on November 9, 2017.

Section 4. Effective Date. This section provides that the Ordinance is effective as provided by law.

ITEM 3. The Township proposes an ordinance to amend the Township Zoning Ordinance to include a moratorium on the issuance of permits, licenses, or approvals for, or for any construction of, commercial wind and solar projects, and to repeal sections of the township zoning ordinance pertaining to “solar farms” and “solar energy systems”. New Section 13.28 is added to the Township Zoning Ordinance and reads as follows:

Section 13.28 Moratorium on Commercial Wind and Solar Projects and Repeal of Sections of the Township Zoning Ordinance Pertaining to “Solar Farms” and “Solar Energy Systems”

A: Definition. A “Commercial Wind and Solar Energy Project” is a utility-scale commercial facility that converts energy into electricity, whether by wind, photovoltaics (PV) or various experimental solar technologies, for the primary purpose of wholesale or retail sales of generated electricity.

B. Purpose and Findings. The purpose of this moratorium is to provide sufficient time for the Cohoctah Township Planning Commission and Township Board to fully and thoughtfully explore, analyze, research, and make informed decisions regarding Commercial Wind and Solar Energy Projects. In support of this Ordinance, the Cohoctah Township Planning Commission and Township Board have determined the following:

- 1. The integration of Commercial Wind and Solar Energy Projects within the Township's existing land uses requires suitable regulations and controls to ensure compliance with the Township's Master Plan and for the protection for the health, safety and welfare of all of the Township's residents.**
- 2. The Township wishes to consider whether amendments to its Zoning Ordinance to regulate the establishment and use of Commercial Wind and Solar Energy Projects are necessary in order to better protect the public health, safety, and welfare of Township residents.**
- 3. Imposing a moratorium, on a limited temporary basis, is reasonable and necessary in order to allow the Township time and space to fully and thoughtfully explore, analyze, research and**



develop any proposed zoning amendments regarding potential amendments to the Township's Zoning Ordinance applicable to Commercial Wind and Solar Energy Projects.

4. A moratorium should be imposed upon the issuance of any and all permits, licenses, and approvals for any property in the Township for the establishment and use of Commercial Wind and Solar Energy Projects for 12 months, subject to further extension by resolution adopted by the Township Board.
5. The following sections of the Township's Zoning Ordinance relating to "solar farms" should be repealed while the Planning Commission considers revised regulations: the definition of "solar energy system" and "solar farm" in section 2.02, section 4.03(M), section 5.03(L), section 6.03(K), section 7.03(H), section 10.03(G), section 11.03(X), section 16.58(C), section 13.27, and any other section that could be construed to permit Commercial Wind and Solar Energy Projects in the Township while the moratorium remains in effect.

C: Moratorium. A moratorium is hereby imposed upon the issuance of any and all permits, licenses, or approvals for any property in the Township for the establishment and use of Commercial Wind and Solar Energy Projects, so long as this Ordinance is in effect.

D. Term of Moratorium; Renewal. The moratorium imposed by this Ordinance remains in effect for 12 months following the effective date of this Ordinance. Before this moratorium expires, the Township Board may, by resolution, extend the moratorium for up to 12 additional months, if in its judgment the Township Board determines additional time is necessary. If an extension is adopted, the Township will publish notice of the resolution of extension.

Section 2. Validity and Severability.

Should any portion of this Ordinance be found invalid for any reason, such holding will not affect the validity of the remaining portions of this Ordinance.

Section 3. Repealer.

Any ordinances or parts of ordinances in conflict with this Ordinance, including but not limited to Ordinance No. 84 adopted on November 9, 2017, are hereby repealed only to the extent necessary to give this Ordinance full force and effect. Specifically but without limitation, the following sections of the Township Zoning Ordinance pertaining to "solar farms" are repealed: the definition of "solar energy system" and "solar farm" in section 2.02, section 4.03(M), section 5.03(L), section 6.03(K), section 7.03(H), section 10.03(G), section 11.03(X), section 16.58(C), section 13.27, and any other section that could be construed to permit Commercial Wind and Solar Energy Projects in the Township while the moratorium remains in effect.

Section 4. Effective Date.

This Ordinance is effective as provided by law.



Staff Comments: Staff understands the Township's desire to make sure the development and implementation of the set of regulations pertaining to commercial wind and solar energy projects are prepared to the best of its ability. The Township recently developed a set of regulations pertaining to utility solar energy systems which was recently reviewed and recommended on by the County Planning Commission (see County Zoning Case Z-37-22). It is Staff's understanding that with this current amendment, that previous submission will be held up and set aside for the time being while this moratorium is in place, to possibly be reintroduced into the Zoning Ordinance at some future date.

Staff would caution the township to limit the length of this proposed moratorium to the absolute least amount of time necessary to properly undergo its desired reexamination of the subject matter and the subsequent redevelopment of utility-scale wind and solar energy land use regulations.

Adopting a moratorium is not without legal risk. A local government must do so with caution and ensure that the municipal attorney is directly involved.

The following excerpt is taken from a Michigan State University Extension article entitled: "A zoning moratorium should only be done with caution"². It provides a great explanation for the need for a local municipality to exercise caution when determining to utilize a moratorium.

²(Source: "A zoning moratorium should only be done with caution" written by Brad Neumann, Michigan State University Extension, April 08, 2020, found online at: https://www.canr.msu.edu/news/zoning_moratoriums_should_only_be_done_with_caution)

Local units of government sometimes adopt moratoria to prevent anyone from developing or building something until regulations concerning the activity are developed and adopted. This has occurred in Michigan with medical marijuana dispensaries, signs and billboards, scrapyards, and wind and solar energy generation systems, to name a few.

The problem in Michigan is that there is no statutory authority for a local government to adopt a moratorium in the first place. This is a problem because there is no specific procedure or process for enacting a moratorium – leading to questions about how it is done.

On the other side of the coin, the U.S. Supreme Court has recognized the legitimate use of moratoria (Tahoe-Sierra, U.S. (2002)), and there are appellate level court cases in Michigan that provide support for the idea that moratoria can be done (e.g. Central Advertising Co. v St. Joseph Township 125 Mich App 548, 554-555 (1983).) In one case, "a moratorium on the issuance of building permits in a particular district of the city for a reasonably limited time" was not voided by the court (Heritage Hill v Grand Rapids, 48 Mich App 765, 768 (1973)). Nor did the Michigan Court of Appeals find it to be legally offensive for a township to declare a "brief moratorium on all sewer connections" (BPA II v Harrison Township, 73 Mich App 731, 733-734 (1977)).

While courts have not struck down moratoria in Michigan, there is no appellate court that has upheld a moratorium in Michigan for longer than six months. Moratoria are supposed to be short, tied to a direct threat to the public health, safety and general welfare, given a specific start and end date, and then removed at the end of that date.



The serious and important point is that a local government should never enact a moratorium without the direct involvement of the government's corporate attorney, who should be experienced in municipal and land use law. This is particularly important because there may be question over the government's authority to do so. There may also be question on how it is done. Normally, one would find such direction in enabling legislation, but this is lacking in Michigan. Therefore, it is important that a moratorium is enacted in a way that the attorney is comfortable with, because he or she will be the one to stand to defend the local government if challenged.

Under the doctrine of legislative equivalency, an ordinance can only be amended/suspended by another ordinance, meaning a moratorium can only be enacted by adoption of an ordinance. While some Michigan communities have attempted to enact a moratorium by resolution, it is well-established case law in Michigan that an ordinance cannot be suspended by resolution as shown in these examples:

- City of Saginaw v Consumers' Power Co., 213 Mich 460, 469 (1921) ("[A]n ordinance may not be repealed or amended without action of equal dignity to that required in its enactment.")*
- Lee v City of Taylor, 63 Mich App 221, 223 (1975) ("It is settled that a municipal corporation may only repeal an ordinance by an act of equal dignity and formality.")*
- McCarthy v Village of Marcellus, 32 Mich App 679, 688-89 (1971) ("An ordinance or resolution cannot be amended, repealed, or suspended by another act by a council of less dignity than the ordinance or resolution itself.")*
- Lorencz v Brookfield Twp., Mich App (No. 319235, Apr. 28, 2015, Unpublished) ("[A]n ordinance may only be repealed by an act of equal dignity, which requires the township to repeal by ordinance and not resolution.")*

It is important that the text of the moratorium ordinance include specific content on:

- The narrow subject to which the moratorium applies*
- An explanation as to how the moratorium is addressing a direct and immediate threat to public health, safety and general welfare.*
- Findings of fact that support the public health, safety and welfare threat.*
- A specific starting date.*
- A specific ending date.*
- Anything else the local government's attorney believes is important to convey.*

Township Recommendation: Approval. The Cohoctah Township Planning Commission recommended Approval of this zoning amendment at its January 6, 2023, public hearing. There were several public comments regarding this amendment noted in the minutes.

Staff Recommendation: Approval With Conditions. Following the November 2022 County Planning Commission meeting, the Planning Commission recommended "Take No Action,



Encourage Further Review", on Livingston County Zoning Case #Z-37-22, as there were many areas of concern with the amendments as proposed and a great deal of increased effort was seen as needed by Cohoctah Township to properly address these concerns and greatly improve the set of regulations going forward.

This, coupled with the fact that the township has retained new legal counsel in its efforts to reassess the current situation and move forward in this planning process under their guidance may necessitate an additional previously unforeseen time commitment in order to effectively and efficiently develop a set of guidelines regulating utility-scale solar that best addresses the health, safety and well-being of the residents of the community and best serves the community as a whole.

Therefore, it is recommended that the township continue to remain diligent in finding a well-conceived and reasonable final resolution to this land use issue as expeditiously as possible, including repeal of regulations as proposed if the township feels this is necessary, relying on the advice of its legal counsel as it progresses through this new course of action. However, the recommendation would also be that these steps are taken without implementation of the moratorium as proposed by the amendments, which constitute the conditions of this Approval.

It is believed that undertaking a further continuation of a previous moratorium period is an unnecessary step and that the tasks necessary to improve the previously proposed set of regulations (as provided in the Staff review for the case) can be completed through the normal course of action utilized in the past by the township whenever any further revisions or refinements that are suggested or recommended to proposed amendments by the County Planning Commission are subsequently implemented by the township.