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REAL SOLUTIONS

Solar Ordinances: 7 Common Questions (And Answers!)

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Solar energy is a hot topic, and the alternative energy sector in Michigan has seen an explosion of growth over the past several years. This, in turn, has resulted in ever-mounting pressure on local government to take action regarding solar energy, on both the personal and utility scales. Like any issue, the regulation of solar energy within your municipality can be a controversial topic, with passionate voices on both sides. This handout will assist you in evaluating whether a solar ordinance is right for your community, and if so, what items you should discuss with your municipal attorney when considering a solar ordinance.

I. Why Now?

The rapid emergence of alternative energy in Michigan is the result of two primary forces: public interest, and recent legislation. In order to promote the development of clean energy, the Legislature passed two acts: PA 295 of 2008 and PA 324 of 2016, which establish clean energy requirements for Michigan's energy providers. Currently, Michigan's energy providers are required to have a renewable energy credit portfolio of at least 15% by 2021.

Concerned citizens have pushed for even greater requirements. A citizen's group known as "Clean Energy, Healthy Michigan" recently initiated a ballot campaign designed to require utilities to have a renewable energy portfolio of at least 30% by 2030. Both DTE Energy and Consumers Energy recently agreed to a voluntary expansion of their renewable energy portfolios to 25% by 2030 in exchange for the withdrawal of that proposal.

Given this intense legislative and public interest, Michigan's energy providers are rapidly expanding their investments in Michigan's renewable energy sources, including solar power. Although the dramatic growth of alternative energy is already well underway, many municipalities are still caught unprepared when approached about the possibility of an alternative energy facility being placed within their borders. A good

solar ordinance, however, can help to ensure your municipality is prepared for the ever-increasing likelihood of such a request.

II. What is a Solar Ordinance?

A solar ordinance is the comprehensive regulation of a solar energy within a municipality, and typically describes which types of solar energy systems are permitted within a municipality, where they may be located, and the limitations that apply to them. A well-drafted solar ordinance will protect a local governments' interests while also ensuring that it does not run into exclusionary zoning issues or other foreseeable legal and practical problems. Depending on whether a local government has zoning, a solar ordinance can be a standalone police-power ordinance or incorporated into a municipality's pre-existing zoning ordinance.

III. Do you need a Solar Ordinance?

For most municipalities, adopting a solar ordinance is the right move. As energy providers are required to rely more extensively on renewable energy, it is likely that Michigan municipalities will face increased interest, and possibly even pressure, to approve renewable energy projects.

Having a solar ordinance in place will allow you to respond to these requests in a way that will help to avoid future legal challenges and prevent your municipality from rushing to adopt an ordinance after having already been approached about a project. As with any regulation, however, you should carefully consider the advantages and disadvantages.

ADVANTAGES

A well-drafted solar ordinance:

- Promotes sustainable energy production;
- Increases the tax base;
- Promotes job growth;
- Encourages the rental or sale of unused or underused land;
- Provides a source of funding to allow for meaningful municipal review and oversight
- Ensures that solar energy production is harmonious with surrounding land uses; and
- Lessens the chance of nuisance issues arising in the future.

DISADVANTAGES

While there is little downside to a well-drafted solar ordinance, municipalities must be cautious of poorly-prepared solar ordinances. A poorly-prepared ordinance can:

- Discourage economic development;
- Overlook the needs of surrounding land owners;

- Lead to issues related to glare or other visual distractions; and,
- Lead to exclusionary zoning challenges if improperly drafted.

Most, if not all of these concerns can be addressed by a well-written and comprehensive solar ordinance.

IV. What Forms can a Solar Ordinance Take?

Municipalities can regulate solar energy through either an amendment to its pre-existing zoning ordinance, through the adoption of police power ordinance, or through a hybrid approach using both types of ordinances.

a. ZONING ORDINANCES

A zoning ordinance regulates the use of land and buildings according to districts, areas, or locations under the authority provided in the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.* If a local government already has zoning ordinance in place, that ordinance may be amended to regulate solar energy systems.

Typically, zoning ordinances that include solar energy facilities differentiate between small scale and large scale facilities. It is common for a number of a municipality's citizens to want to power their homes or business with a few solar panels for either economic or personal reasons. These uses generally have minimal impact on surrounding properties, and many municipalities choose to allow them as either accessory uses, or permitted uses subject to site plan review.

Utility-grade operations, on the other hand, have a significantly greater impact on surrounding land uses and communities as a whole. Commonly referred to as "solar farms," these are operations that typically require a significant amount of space and equipment to operate effectively. The intensity of these uses, and the public interest related to them, almost always requires them to be regulated as a special use limited to certain districts (often agricultural, commercial, or industrial).

Municipalities regulating both sizes of solar operations often include general regulations applying to all solar uses, and more specific requirements for large-scale solar. No matter what approach your community chooses, however, it is important to consider requirements relating to setbacks, parcel size, maximum structure height, building form, density, and similar matters. It is also important to be sure that your municipality's regulations are appropriate for the size of the use involved.

Municipalities have plenty of choice when choosing to regulate solar energy through zoning. Most municipalities choose to regulate large scale solar operations as a special use, limited to a specific district. Others, however, choose to create an overlay district, which encompasses a fixed area within the municipality where solar projects will be considered. An overlay district helps to limit solar projects only to those areas where they are most compatible, without subjecting the entirety of a district (or districts) to the potential of solar energy development.

b. POLICE POWER ORDINANCES

Municipalities without a zoning ordinance (that do not otherwise want to adopt one) can regulate solar energy projects through police power ordinance. The permissible subjects of these ordinances are different than those of zoning ordinances, and are limited to regulations relating to the betterment of health, safety, morals, and general welfare of the public. It is important to remember that a police power ordinance should not attempt to regulate by districts, or ban solar energy projects in certain areas. Instead,

these ordinances should be generally applicable to solar facilities irrespective of where they are located within a municipality.

Although police power ordinances cannot limit solar energy facilities to specific districts, they do have a number of advantages over zoning ordinances:

- Police power ordinances can be amended, adopted, or repealed more quickly than zoning ordinances because they are not subject to the same notice and public hearing requirements as zoning ordinances;
- Police power ordinances are not subject to referendum;
- Police power ordinances are not subject to prior, lawful, non-conforming uses (i.e. “Grandfathering”); and
- Police power ordinances apply municipality-wide.

Police power regulations can be comprehensive ordinances addressing all concerns regarding solar energy systems, or can be limited in scope to only address potential nuisances caused by those systems.

Municipal authority to adopt police power ordinances are found throughout Michigan law, although the source of that authority differs depending on the type of government involved:

- General Law Townships
 - MCL 41.181.
- Charter Townships
 - MCL 42.1(2) and MCL 42.15.
- Cities
 - Article 7, § 22 of the Michigan Constitution; MCL 117.4(l)
- Villages
 - Article 7, §22 of the Michigan Constitution; MCL 67.1(z)
- Counties
 - MCL 46.11(j).
 - Be careful! All county police power ordinances must be related and limited to *county issues*.

Caution!: A local municipality that regulates only by police power ordinance often does so because it lacks a zoning ordinance, and is subject to county zoning. When this occurs, it is essential that the municipality consults with its attorney to be sure that there is not a conflict between the proposed police power ordinance, and the county’s zoning ordinance. A conflict between a local police power ordinance and a county zoning ordinance will be resolved in the favor of the zoning ordinance. MCL 125.3210.¹

c. COMBINED APPROACH

Municipalities that have a zoning ordinance may find that a combined approach of adopting a zoning amendment and a police power ordinance provides a flexible and defensible approach to solar regulation. Combining both types of ordinance allows a municipality to both designate where solar projects are

¹ A county zoning ordinance would not, however, prevail over a local zoning ordinance. MCL 125.3209.

appropriate, and define general and easily-updated standards that regulate the operation of any solar energy system within the municipality.

V. What Should we Address when Considering a Solar Ordinance?

When considering a solar ordinance, municipalities have a number of important decisions to make regarding its contents.

a. What type of systems are to be regulated?

In general, a solar ordinance will regulate photovoltaic devices, which are a system of components designed to capture and process solar energy. When multiple photovoltaic devices are connected together they become a solar array, which provides a single output of energy from multiple devices. A solar ordinance should also regulate structures associated with these devices, including transmission lines, substations, and maintenance buildings.

As discussed above, solar arrays can vary widely in size, scope, and impact. A small system, for example, could be as small as a few solar roof panels on a resident's home. A large system, on the other hand, can encompass hundreds of acres, and consume much of a municipality's undeveloped land. The regulations that apply to a personal-use solar array are not well suited to large, commercial solar arrays, and the reverse is also true. Thus, local governments must decide whether they would like to regulate large systems, small systems, or both.

b. What terms should be included?

Solar systems, whether large or small scale, cause impacts to the local community that are different than many other uses and activities. The following items are issues that municipalities should consider when drafting and adopting a solar ordinance:

- Setbacks
- Height
- Noise
- Lot size
- Project area
- Security
- Lighting
- Glare
- Location of transmission lines
- Decommissioning/abandonment
- Maintenance and repair
- Environmental impact
- Allowing testing facilities
- Compliance with building code and national electric safety code
- Types of land where projects may be located
- Compliance with federal, state and local agency statutes, code and ordinances
- Aesthetics, including neutral colors and lighting
- Signs
- Inspections and owner/operator maintenance
- Permit terms and fees
- Liability to property owners
- Security and escrow accounts to handle damage during construction, post-construction damages and liability and the costs for application review of a permit requests and site plans
- Safety

c. What terms should not be included?

Other than a term specifically excluding the possibility of solar energy systems within a local government, no specific terms are impermissible. It is important, however, that local governments carefully consider balancing concerns about solar energy production with the interests of those residents who wish to see more solar energy. An ordinance that is too restrictive will discourage the establishment of solar energy systems, while an ordinance that is too permissive could lead to disputes between a solar energy producer and neighboring property owners. It is important that the terms of a solar ordinance fully consider, and carefully balance, the interests on both sides of the solar energy question.

VI. How do we Enforce our Solar Ordinance?

Practically, taking enforcement action against a violation of a solar ordinance is usually less-problematic than discovering that a violation exists. Thus, a well-crafted ordinance will provide for periodic reporting requirements, and an escrow requirement that covers a municipality's costs for reviewing reports. In addition, a well-crafted solar ordinance will have built in enforcement mechanisms, such as the requirement for an escrow account, designed to assist a municipality in ensuring compliance.

A good solar ordinance will also require large-scale solar providers to provide contact information allowing citizens to file complaints, and informal dispute resolution options. If a dispute cannot be resolved informally, and municipal involvement is required, most large-scale solar producers will be willing to work cooperatively with a municipality to resolve the situation. Cooperative resolution of a violation is almost always preferable to both large-scale solar providers and municipalities, as it tends to lead to a quicker and less-expensive solution than an ordinance enforcement action.

If an enforcement action is necessary, however, the solar ordinance should specify the appropriate penalty. These penalties are typically designated either a misdemeanor, or a civil infraction.² Municipalities should also be sure to include language in their solar ordinances that reserves the right to file a civil suit when necessary.

VII. What Happens if the Project is Abandoned or Becomes Obsolete?

Solar facilities, like any other facilities, have a limited lifespan. One oft-overlooked issue in solar ordinances is what happens once a facility has become obsolete, or if it is abandoned. These issues are significant, particularly for large-scale projects, where the costs of decommissioning an array can be millions of dollars.

To avoid unintentionally requiring the municipality to decommission obsolete and abandoned facilities, a solar ordinance should contain explicit requirements regarding a solar provider's decommissioning obligations. These requirements should be broad, encompassing not only the removal of solar arrays, but all structures and facilities, as well as restoration of the underlying ground to original condition. To ensure that these requirements can be enforced, it is essential that municipalities also include the requirement for decommissioning agreement and financial security (such as a surety bond or escrow account) as a requirement of any solar ordinance.

² Most municipalities are aware of the benefits of municipal civil infractions which usually allow faster, more cost-effective ordinance enforcement. Municipal civil infractions can also lead to injunctive relief, which would require violators to either take, or stop taking, certain actions. If your municipality does not enforce its ordinances through using civil infractions, you may want to consider contacting your municipal attorney to discuss revising your ordinance enforcement procedures.

Conclusion

The regulation of solar energy is multi-faceted, and carries with it a number of unique issues that should be considered before an ordinance is adopted. It is important that a municipality looking to regulate in this area do so only after careful consultation with its attorney. Nevertheless, the extensive growth and significant public interest in this area suggest that municipalities should be proactively establishing these ordinances to ensure the protection of their citizens, and the prosperity of Michigan as a whole.



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