

'We're not experts,' says state agency given authority over placements of wind and solar energy installations

2023 law stripped local zoning officials of most power over solar, wind developments

By Jason Hayes | June 2024

When government employees plainly state they're not experts on an issue, is it advisable to trust them to regulate it?

"Chevron deference" is a legal doctrine based on a 1984 Supreme Court case that established a norm of judicial deference to regulatory agencies on issues where the text of a law is ambiguous.

Broadly, the doctrine expects courts to defer to agency expertise in matters over which an agency has jurisdiction.

But what happens when state legislators transfer the authority to decide complex zoning issues away from the experts in townships and counties to a state regulatory agency that admits it lacks expertise in zoning?

An April 5 Michigan Public Service Commission meeting highlighted this confusion.

Contentions over the siting of wind and solar facilities — the process of deciding where developers can

place them — came to a head in Michigan in 2023.

That's when a new state law transferred authority for siting decisions for new large-scale wind and solar projects from local officials to state regulators. Under

Public Act 233, townships and counties can no longer determine whether they will allow new renewable energy facilities in their area. State regulators now have the authority to make siting decisions, regardless of local sentiment.

The MPSC explained in the online meeting how the law will be applied. It noted that state regulators could preempt local decisions if a local government does

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not have a “compatible renewable energy ordinance” (CREO) prepared and it “fails to approve or deny” a request to allow a new wind or solar development “in a timely manner.”

While state government attempts to diminish the law’s impact with public messages claiming that Act 233 “creates a voluntary siting process” for new wind and solar development, its language remains clear. A community’s ordinance may influence wind or solar developments but cannot stop or hold off that development. As a practical matter, the communities where these significant wind and solar projects would be located have almost no ability to regulate them.

During the meeting, MPSC staff said, “A Compatible Renewable Energy Ordinance is an ordinance that allows for development of renewable energy facilities within the local unit under conditions that are no more restrictive than the setback, noise, and other requirements in PA 233.” Local communities may express their opinions, but the MPSC is free to disregard them.

The virtual meeting allowed the public to raise questions over the contentious new law. One questioner focused on township and county master plans, which guide the community’s long-term development. Would a community need to abandon (at least in part) or rework its plan if a developer proposed a new solar or wind facility? What if community officials had planned for a different use, such as a manufactured housing development or a school? Would Public Act 233 and the developer’s intention to build a renewable facility that met the requirements of the law, the questioner wanted to know, take precedence over the township’s

plans to build new infrastructure for its residents?

Cathy Cole, director of strategic operations for the Michigan Public Service Commission and the lead staff responsible for implementing this new law, noted that it was a good question. She then explained that she did not have an answer. “I think that we’re going to have to take that one back. I’m going to admit to you that the MPSC is not; we are not local zoning or planning experts. So, we are going to take that question back. I appreciate it very much.” Or, in plain English, the agency responsible for implementing the law admits it lacks the relevant expertise to do so.

While Cole’s answer was generous, it was also insufficient. More to the point, “We are not the experts” demonstrates how misguided the decision to pass Public Act 233 was. The Michigan Public Service Commission now oversees wind and solar siting decisions. But these decisions should have been left to the communities impacted by developments, not a panel of state regulators who may have never visited them. The MPSC cannot reasonably brush off this apparent lack of knowledge by pointing out, “We’re not the experts.”

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