GRAHAM SUSTAINABILITY INSTITUTE
CENTER FOR
EMPOWERING COMMUNITIES
UNIVERSITY OF MICHIGAN

To: Cathy Cole & Jule Baldwin, Michigan Public Service Commission

From: Sarah Mills & Madeleine Krol, University of Michigan Center for EmPowering Communities

Date: May 28, 2024

RE: Staff Straw Proposal Batch 1 feedback

Dear Cathy and Julie,

Our apologies for the delay in submitting comments on the Straw proposal presented on April 5th. Following, we provide feedback on the areas that intersect with our experience over the last several years working with communities across the state as they have been planning and zoning for renewable energy. Please do not hesitate to contact us if you have any questions or would like any clarification.

Sarah (sbmills@umich.edu)

Madeleine (krol@umich.edu)

First batch (April 5th) Staff Straw Proposals:

Page 2: We are still getting questions—including from developers—about whether, post-November 29th, all projects need to be approved either through a CREO or through the MPSC. It would be helpful to clarify in top-most "no" option something to the effect of "the developer proceeds with a local siting process."

Page 2: In the orange box, it would be helpful to have guidance for local units about how they go about "request(ing) the applicant to file at the MPSC"

Page 2 "Yes there's a CREO pathway": It would be helpful to add in a box right underneath the "yes" box that clarifies that the developer follows the local process according to the local unit's zoning ordinance.

Page 2: In the 1st blue box under the "Yes there's a CREO pathway", it would be helpful to make it clear that the 120 days starts once an application is filed, not necessarily from the date of meeting with the local official. Consider amending "the local unit has 120 days" to say "Once a developer files a [complete] application with the local unit, the local unit…" Note, that we added in the word "complete" in brackets. The law is clear that in the MPSC-pathway, the 1-year timeline starts once the application is complete (and gives the MPSC 60 days to determine if it is complete). It isn't clear how the local government could make a decision on an incomplete application, so extending this same qualification to the CREO pathway seems reasonable, but we recognize this suggestion goes beyond the legislative text.

Page 3 (comments on section 223(1)): Overall, these provisions aim to ensure notice of and access to the public meeting without being overly burdensome. The reading of the definition of "affected local unit" here to include all affected local units and staff's rationale for providing this notice (i.e., that a county which does not have zoning authority may still regulate aspects of the project and so should be provided notice) aimed to uphold these goals. We might suggest:

- When there is not a venue within the city or township suitable to hold the meeting, developers could be given some flexibility. Staff could extend the "Unless otherwise requested by the local official…" language to this part of the guidance.
- Providing direct notice to addresses is the best way to alleviate future accusations from nearby residents that they were unaware of the proposed project. The rationale for the 1- and 5-mile notice requirements that staff has given in the Stakeholder Sessions (i.e., that these mimic New York State's process) seem well-considered and better tailored to the scale of the impact (both positive and negative) that these large projects may have. While it is true that the Michigan Zoning Enabling Act only requires direct notice for those within 300 feet of a proposed project, few other types of development have the same footprint as the large-scale renewables projects which the MPSC will be regulating. Therefore, it seems to make sense to exceed the 300' standard.

  The proposed standard, though, may present developers with some practical difficulties—having to map out for the postal service or county equalization department (where we have gotten tax addresses to conduct our research) to determine which addresses are and are not within the 1- or 5-mile boundaries. Furthermore, this may leave some residents who live within the "affected" township but potentially more distant from the project without notice, even though their local government operations will be impacted by the project—whether through increased local tax revenues or the provision of emergency services to respond in case of emergency. To simplify the process of determining who needs notice and to ensure all within the affected local unit are provided notice, we might recommend staff to consider:
    - Requiring direct notice to all postal addresses within the affected local township, village, or city, regardless of how close they are to the project. When the project is in more than one township/city, this also allows the notice to advertise only the Public Meeting in that township/city. [We acknowledge that for battery storage projects and most solar projects, this will increase the number of addresses that receive notice compared to staff's proposal.]
    - In the case that a project is located near the boundary of a local unit, we might recommend requiring notice only to those addresses in neighboring local units (which are not considered <u>affected</u> local units) that are located within 300' of a participating property. [For wind projects, this will most likely reduce the number of addresses that receive notice compared to staff's proposal. The impact on solar and battery storage projects depends upon where these projects are located with respect to township/city boundaries.]
- Staff's proposal suggests that the notice include "directions for submitting written comments for those unable to attend the public meeting." We recommend being clearer that the intention is that these comments will go to the developer, so that responses to them can be incorporated in their eventual application (Section 225 (1) (j)).

Page 4 (comments on section 223(2)): We believe staffs' recommendations about which officials should be contacted and the methods of contact clear up some uncertainty and allow for staff to verify their outreach which they would submit in their eventual application (Section 225 (1)(j)).

Page 4 (comments on section 223(3)):

- Overall, we believe that staff's intent with the first bullet point in this section clarifies the key hindrance to local implementation of the law: it clarifies that only zoning jurisdictions need CREOs. This will make implementation of the law much easier for affected local units that do NOT have zoning jurisdiction; they will not have to establish non-zoning CREOs, nor establish processes for evaluating proposals that subsequently arise. It will reduce the number of local approvals that developers will need, and also will not jeopardize the established body of law in Michigan that (in our non-lawyer understanding) says land use regulation must be done through zoning, and only one unit of government for any piece of Michigan geography can have zoning jurisdiction. However, because there is some dispute between lawyers about whether the law supports this (see the March 7th and March 19th Stakeholder Meetings), we worry that it will be litigated, creating confusion and uncertainty for both local units of government and developers.
- We see opportunities for confusion between the first and second bullets in this section. The first implies that where a project spans two zoning jurisdictions (e.g., two townships), an application (presumably for the whole project) can be brought to the commission if any one of the zoning jurisdictions lacks a CREO. The second bullet suggests that if a zoning jurisdiction notified the applicant of a CREO, the local unit can sue; there's no caveat noted about the case where they have a CREO but their neighbor does not. We recommend that the staff be more explicit in clarifying what happens in the case where a project that spans two zoning jurisdictions, one of which has a CREO and the other does not.
- We recommend that a local jurisdiction's notice of a CREO be provided in writing (it could be a simple email) to the developer and also, potentially, the MPSC to minimize conflict of whether or not notice of a CREO was provided.
- The third bullet about the developer proceeding if the local official has failed to respond after 30 days seems reasonable, especially in light of the offer being provided in email and certified mail.

Page 4/5 (Comments on Section 225 (1)(j)):

- The 2nd bullet suggests that the developer provide direct notice when the case is filed at the MPSC. It may be helpful to provide developers with a template for this notification, since presumably any comments at this point will be directed to MPSC / MPSC staff.
- On the 5th bullet: Minutes and transcripts often have very different levels of detail. Minutes are less helpful to understand the specifics of what was said. A transcript would be most instructive for Commission staff and will be particularly helpful to ensure that any public comments provided in real-time are transcribed and included in the report. Transcriptions are often produced after-the-fact based on audio recordings and so it may be helpful to require an audio recording to mediate any disputes about the fidelity or thoroughness of the report of the meeting.
- On the 7th bullet, this may go a long way to helping ensure the Public Meeting isn't just performative—that the developer grapples with each public comment. As staff noted verbally in the April 5th Stakeholder Meeting, not all public comment will be able to be addressed. But being

explicit about which comments were addressed in the final application—and how—and which were not may be helpful for the Commission in assessing the extent to which the applicant incorporated public feedback. To allow the Commission and the public to better assess responsiveness to the comments, staff might consider asking for a table of each comment—though they could be reordered / grouped topically. Further, the staff might consider being more explicit that this bullet applies not just to the written comments but comments provided in real-time at the Public Meeting as well.

- Section 225 (1)(j) also includes a summary of … "meetings with elected officials under section 223". We suggest staff consider what sort of documentation of those meetings is required. Any written correspondence between the applicant and local officials may be relevant to include; a summary, transcript or audio recording of any meetings that take place between these parties is also something to consider. Likewise, staff should consider whether to ask the applicant to provide item-by-item feedback to issues raised by local officials.
- Relatedly, staff may consider providing guidance on what sort of reporting is required, and whether the developer needs to provide expert witness testimony / line-by-line list of accommodations made as a result of consulting with:
    - The drain commissioner (pursuant to Section 225(1)(p))
    - State agencies (pursuant to Section 225 (1)(k))
    - Whether meetings with other local officials (e.g., fire department, road commissioners, etc.), while not required, should be reported on

Page 6 (CREO guidance):

- The guidance throughout this section implies that a CREO is a zoning ordinance but without saying it's a zoning ordinance. As a result, there's still some ambiguity about whether local governments can establish/regulate placement and performance standards of renewable energy through non-zoning ordinances. Clarifying this would be extremely helpful and may help mitigate future disputes.
- 1a: This makes clearer (than what was on page 4, section 223(3)) that unless the "entire footprint of the proposed project" is covered by a CREO or unzoned, the MPSC can consider the entire project (even if part of the project *is* unzoned or covered by a CREO). Again, it might be helpful to add some caveats to the 5th bullet on page 4 clarifying this.
- 1b: As mentioned on page 3 of this memo, this approach makes for much easier implication of the law, but we worry it will be litigated.
- 1c: Not requiring all technologies to be covered will reduce barriers for local governments to adopt CREOs.
- 1d: On the one hand, staff's recommendation appears to provide local units with significantly more opportunity to regulate the placement and impacts of projects because the law has broad quasi-discretionary standards laid out in Section 226(7), including environmental standards (226(7)(c)), labor standards (226(7)(d)), and farmland impact standards (226(7)(f)). On the other hand, since it's not clear how stringently the Commission will apply those standards, it may be difficult for local governments to determine whether they are doing so in a way that is more or less restrictive than the statute allows. Thus, local governments who include some of these non-numeric standards in their CREOs assume some amount of risk (i.e., of losing intervenor funds and CREO status if they deny a project which complies with 226(8) but not these other

standards). Furthermore, it's unclear from this guidance whether local governments with CREOs have the same authority to apply conditions to approvals that the MPSC is given in Section 226(6), and if the local governments do have the authority to apply conditions to a CREO, how the restrictiveness of the conditions will be assessed. Certainly some of these things will sort themselves out over time as the Commission hears cases and applies its standards and conditions. But in the interim it still presents some amount of uncertainty to both developers and local units.

- 1e: Staff's recommendation that CREO status can be regained helps underscore that ordinances are not set in stone and can shift overtime, learning from the past or adapting to changing local conditions. This seems like a reasonable, non-punitive approach. On the other hand, we anticipate that the loss of a CREO is likely to be a result of the local unit's more restrictive application of some of the more discretionary standards. Since it's the application of the standard, rather than the standard itself that may be the problem, it's not clear whether an ordinance modification will actually rectify the situation for future projects. Even so, there still is a "penalty"—the loss of intervenor funds—for local units that deny projects that comply with Section 226(8).

Page 7:

- 1st bullet: We concur with staff's assessment that the plain reading of the law supports the idea that all 4 types of general purpose local governments (city/village/township/county) may be affected local units that are entitled to intervene by-right, and so are eligible for a portion of the intervenor grants. As a result, there will always be at least two affected local governments (a county and a city/township), sometimes 3 or more (if a village is involved and/or if the project crosses city/township boundaries).
- 2nd bullet: We were intrigued by staff's methodology for sharing the grant funds between local units. Giving all local units some amount of base for intervention but then disbursing the rest proportionately based upon MW/impact tries to balance the fact that there are fixed costs of hiring a lawyer to intervene (regardless how much of the project is in the jurisdiction). The rationale for capping counties to $10,000, even if they are the zoning jurisdiction, wasn't clear to us. Further, it's possible that some affected units may only host the substation or grid interconnection infrastructure and no wind/solar/storage components, so they would only be entitled to $5,000, which may not be enough money to effectively participate.
    - We might recommend just dividing the funds evenly between all affected local units, regardless of the proportion of the project that they host.
- 3rd (last) bullet: Clarity that the intervenor funds are only for local governments makes sense to us, but its not clear from the statute's text, and this may be a place where other intervenors wishing to access those funds challenge staff's interpretation.

Page 8:

- 1st and 3rd bullet: Because staff recommends unused funds will be refunded to the developer, there seems to be very little rationale for the commission requiring the applicant to deposit any less than the combined $150,000 total allowed in statute. If these funds were to be used as a "grant," with local governments keeping whatever was unused, then it would make sense for the Commission to give greater scrutiny to how much should be allocated at the outset.

- 2nd bullet: We agree that it may make sense to pool funds. That staff suggest local units be allowed to pool funds suggests that they may be contemplating rules about allowable uses of the funds, which would make sense if any unused funds are returned to the applicant. In the final draft recommendations, it may be helpful for staff to outline any of the other stipulations for use of these funds and to whom (and how) the local governments are accountable in showing that they have used the funds appropriately.
- 3rd bullet: Most local governments won't know what is required of "filing an exhibit". This presumably is something that the intervenor funds can be used to prepare? If so, making that clear in the instructions would be helpful.

Fee structure (pages 11-13):

- We don't have any familiarity with existing MPSC fee structures, but everything laid out seems sensible. #9 on page 12 seems particularly important for monitoring during construction, addressing any compliance issues, and doing any final checks before releasing the decommissioning bond.