

Public Acts 102-1123, 103-0081 and 103-0580– Overview of County Limitations on Regulation of Solar and Wind Energy Projects and Options for Legislative Amendments

- ▶ Illinois State Association of Counties
- ▶ Wind and Solar Facility Task Force
 - ▶ November 29, 2023 Meeting
 - ▶ (Updated January 8, 2024)

▶ Presented by:

Michael T. Jurusik

Klein, Thorpe and Jenkins, Ltd.

mtjurusik@ktjlaw.com



Statutory Authority

- ▶ Comprehensive Solar Energy Act of 1977 (30 ILCS 725/1.2)
- ▶ Illinois Counties Code
 - 55 ILCS 5/5-12020(e) (Solar and Wind Farms)
 - Public Act 102-1123: County Wind and Solar Zoning and Site Approval Permit Restrictions.

Comprehensive Solar Energy Act of 1977

▶ Legislative Policy:

- “Section 1.1(d) ... **solar energy systems are an effective and feasible means of reducing the dependence** ... on non-State energy sources and of conserving valuable fossil fuel and other **non-renewable energy sources;**”
- “Section 1.1(e) ... it is in the **public interest to** define solar energy systems, demonstrate solar energy feasibility, **apply incentives for using solar energy**, educate the public on solar feasibility, study solar energy application, and coordinate governmental programs affecting solar energy.”

Public Act 102-1123: Overview

- ▶ House Bill 4412 approved by the General Assembly during the January 2023 “lame duck” session of the 102nd General Assembly. Governor Pritzker signed the bill into law on and **effective as of January 27, 2023.**
- ▶ See Illinois State Association of Counties - ISSUE BRIEF dated January 27, 2023 for a comprehensive overview of the Act.
- ▶ The Act amends the Illinois Counties Code to **restrict local zoning and site permitting authority** over the siting of wind and solar facilities and to **impose mandatory compliance requirements.** 55 ILCS 5/5-12020.

Public Act 102-1123: Key Compliance Deadlines

▶ Amend Existing County Zoning Ordinances

- **Within 120 days of the effective date of the Act**, Counties were mandated to amend existing zoning ordinances in conflict with the provisions of the Act.
- Counties permitted to regulate the siting of commercial wind energy facilities with standards that are not more restrictive than the Act law, including unincorporated areas of the county that are outside of the zoning jurisdiction of a municipality and that are outside the 1.5-mile radius surrounding the zoning jurisdiction of the municipality.

Public Act 102-1123: Key Compliance Deadlines

▶ Public Hearing Requirement

- Must hold a public hearing per the Open Meetings Act **not more than 60 days after the filing of an application.**
 - Only if a County adopts hearing standards for siting approval or a special use permit for a commercial wind energy facility or a commercial solar energy facility.
 - **Note: The Act does not say that the public hearing has to be completed within 60 days ... a county board can open and commence the public hearing and, if needed, continue the hearing to one or more dates to complete the proceeding.**
 - **Note: 60-day period was increased from 45-day period per Public Act 103-0580 (eff. December 8, 2023).**

Public Act 102-1123: Key Compliance Deadlines

▶ Siting Decisions

- Counties must make siting and permitting decisions **not more than 30 days after the conclusion of the public hearing.**
- A request for siting approval or a special use permit, or modification of an approved siting or special use permit, ***shall be approved if the request follows the standards and conditions imposed within the Act,*** and the zoning ordinance adopted is consistent with the provisions within the law and the conditions imposed under state and federal statutes and regulations.
- Counties are now permitted to allow “test wind towers” or “test solar energy systems” to be sited ***without formal approval*** by the county board. The previous law included test wind towers and the Act added test solar energy systems.

Public Act 102-1123: Key Limitations on County Authority

- (g) A county **may not** place any restriction on the installation or use of a commercial wind energy facility or commercial solar energy facility ... ***unless it adopts an ordinance that complies with this Section.*** A county **may not establish siting standards for supporting facilities that preclude development of commercial wind energy facilities or commercial solar energy facilities.**
- (h) A county **may not adopt zoning regulations that disallow, permanently or temporarily, commercial wind energy facilities or commercial solar energy facilities from being developed or operated in any district zoned to allow agricultural or industrial uses.**
- (j) Except as otherwise provided in this Section, a county **shall not** require standards for construction, decommissioning, or deconstruction of a commercial wind energy facility or commercial solar energy facility or related financial assurances ***that are more restrictive than*** those included in the AMIA. Any decommissioning payment plan shall be in accordance with the financial assurance required by the AIMA.

Public Act 102-1123: Key Limitations on County Authority

- ▶ Counties ***are prohibited from setting sound limitations*** for wind towers in commercial wind energy facilities or any components in commercial solar energy facilities that are more restrictive than the sound limitations established by the Illinois Pollution Control Board under 35 Illinois Administrative Code parts 900, 901 and 910.
- ▶ Counties ***are prohibited from requiring earth berms or similar structures*** to shield solar farms from adjacent properties and public rights-of-way. Certain vegetative screening is allowed.
 - **Per Public Act 103-0580 (eff. 12.8.2023): 55 ILCS 5/5-12020(r)(2) amended to require vegetative management plans to comply with the AIMA if the ground cover and vegetation management plan complies with the underlying landowner agreements.**
- ▶ Counties ***may not require permit application fees*** for a commercial wind energy facility or commercial solar energy facility ***that are unreasonable***. All ***application fees*** imposed by the county ***shall be consistent with fees for projects*** in the county ***with similar capital value and cost***.

Public Act 102-1123: Key Limitations on County Authority

- ▶ **Counties may not condition approval** of a commercial wind energy facility or commercial solar energy facility ***on a property value guarantee*** and ***may not require a facility owner to pay into a neighboring property devaluation escrow account.***
- ▶ **Counties may not set blade tip height limitations for wind that is more restrictive than the height allowed by the Federal Aviation Administration (FAA).**
- ▶ **Fencing Restrictions for Solar Projects:**
 - The Act provides that a commercial solar energy facility must be sited so that ***the facility's perimeter is enclosed by fencing having a height of at least 6 feet and no more than 25 feet*** and for a commercial solar energy facility to be sited so that ***no component of a solar panel has a height of more than 20 feet above the ground*** when the solar energy facility's arrays are at full tilt.

Public Act 102-1123: Key Limitations on County Authority

▶ Road Use Agreements

- The facility owner is responsible for the **reasonable cost of improving roads used by the facility owner to construct** the commercial wind energy facility or the commercial solar energy facility and the **reasonable cost of repairing roads used by the facility owner during construction** of the commercial wind energy facility or the commercial solar energy facility so that those roads are in a condition that is safe for the driving public **after the completion of the facility's construction**.
 - **What about long-term maintenance activities by the facility owner?**
- Road related fees, permit fees or other charges imposed by IDOT, a road district, or other unit of local government under a road use agreement with the facility owner **shall be reasonably related to the cost of administration of** the road use agreement.

▶ Approval to Cross or Impact Drainage Systems

- ▶ The facility owner with siting approval from a county to construct a commercial wind energy facility or a commercial solar energy facility **is authorized to cross or impact a drainage system**, including, but not limited to, drainage tiles, open drainage ditches (districts), culverts and water gathering vaults, owned or under the control of the drainage district under the Illinois drainage **code without obtaining prior agreement or approval from the drainage district, except that the facility owner must repair or pay for the repair of all damage to the drainage system caused by the construction** of the commercial wind energy facility or the commercial solar energy facility **within a reasonable time after construction is complete**.
- ▶ **Per Public Act 103-0580: New Subsection, 55 ILCS 5/5-12020(j-5) added to require commercial wind/solar facilities to file a "farmland drainage plan" with the county and any impacted drainage districts. The plan shall be developed "independently by the facility developer" (not the county or landowner) from information "publicly available from the county or the drainage district" (no plan review input by county or drainage districts) and should outline how the surface and subsurface drainage will be restored after construction or deconstruction processes and include repair plans for affected drainage during construction or deconstruction. The repairs are to be based on the AIMA procedures.**

Public Act 102-1123: Key Limitations on County Authority

- ▶ **Financial Assurance** (i.e., letter of credit, surety bond (performance and payment bond), trust instrument, cash escrow, etc.) is **limited by a mandated 11-year phased-in, capped dollar amount** set by a percentage formula contained in the AIMA as required by the Act.
 - On or before **first Anniversary** of Project Operation Date: **10% of est. decommissioning costs.**
 - On or before **sixth Anniversary** of Project Operation Date: **50% of est. decommissioning costs.**
 - On or before **eleventh Anniversary** of Project Operation Date: **100% of est. decommissioning costs.**
 - Neither the AIMA percentage formula nor the Act adequately protects the county or the landowners in the event of an early abandonment or termination of a solar / wind project if the Financial Assurance is inadequate to complete the decommissioning and restoration activities.
 - **The cost of decommissioning cannot be re-evaluated until after the 10th Anniversary of the Commercial Operation Date.**
- ▶ **The Act is silent on the use of the Financial Assurance to cover public safety / emergency repairs that are not timely addressed by the operator.**
- ▶ **The amount of any decommissioning payment shall be limited to the cost identified in the decommissioning or deconstruction plan, as required by those agricultural impact mitigation agreements, minus the salvage value of the project.**
- ▶ **Per Public Act 103-0580: Amount of any decommissioning payment plan must be in accordance with the financial assurance required by the AIMA – the following language has been stricken from the Act “... amount of any decommissioning payment shall be limited to the cost identified in the decommissioning or deconstruction plan, as required by those agricultural impact mitigation agreements, minus the salvage value of the project.”**

Public Act 102-1123 – Legislative History

- ▶ Legislative History transcript of the debates on Public Act 102-1123 reveals that the Chief Sponsor stated “the counties ultimately do have the say on zoning”, which is not fully accurate in the sense that counties cannot prohibit solar and wind projects that meet the standards of the Act, so traditional zoning standards (i.e., the six (6) *LaSalle National Bank v. County of Cook* factors and the three (3) *Sinclair* factors) have arguably been marginalized:
 - The existing uses and zoning of nearby property (LaSalle);
 - The extent to which property values are diminished by the particular zoning restriction (LaSalle);
 - The extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public (LaSalle);
 - The relative gain to the public as compared to the hardship imposed upon the individual property owner (LaSalle);
 - The suitability of the subject property for the zoned purposes (LaSalle);
 - The length of time the property has been vacant as zoned considered in the context of land development in the area of the subject property (LaSalle);
 - Whether a comprehensive government zoning plan for land use and development exists (Sinclair);
 - Whether the zoning ordinance is in harmony with the comprehensive government zoning plan (Sinclair); and
 - Evidence or lack of evidence of community need for proposed use (Sinclair).

Public Act 102-1123 – Legislative History

- ▶ It is also conceded that the Act’s “requirements” are “guardrails ... They can’t go below ... they can’t go above.” (Page 77 of the transcript.)
- ▶ The noted statutory “guardrails” are set forth in the Act, which confirm that counties “may not adopt zoning regulations that disallow, permanently or temporarily, commercial wind energy facilities ... from being developed or operated in any district zoned to allow agricultural or industrial uses.”

Public Acts 102-1123, 103-0081 and 103-0580 - Areas for Proposed Legislative Amendments

- ▶ **Eliminate the inconsistencies between Public Act 102-1123 and its incorporation of the Illinois Department of Agriculture's Agricultural Impact Mitigation Agreement ("AIMA").**
- ▶ The Act limits certain measures a county may take, including a limitation on construction, decommissioning, or deconstruction standards that shall not be more restrictive than the standards in the AIMA.
- ▶ Public Act 102-1123 states that:
 - Except as otherwise provided in this Section, ***a county shall not require standards for construction, decommissioning, or deconstruction of a commercial wind energy facility or commercial solar energy facility or related financial assurances that are more restrictive than those included in the Department of Agriculture's standard wind farm agricultural impact mitigation agreement, template 81818, or standard solar agricultural impact mitigation agreement, version 8.19.19, as applicable and in effect on December 21, 2022.***
 - Public Act 102-1123 codified at 55 ILCS § 5.5-12020(j) (emphasis added).

Public Acts 102-1123, 103-0081 and 103-0580 – Areas for Proposed Legislative Amendments

- ▶ **Eliminate the inconsistencies between the Act and the AIMA:**
- ▶ AIMA, template 8.19.19 [solar energy facilities] states that the actions in the AIMA “shall be subject to the following conditions”.
 - Condition A states, “All Construction or Deconstruction activities ***may be subject to County or other local requirements.*** However, the ***specifications outlined in this AIMA shall be the minimum standards*** applied to all Construction or Deconstruction activities.” (emphasis added).
 - Section 17 of the AIMA [ver. 8.19.19], sets forth ***standards*** for “Deconstruction Plans and Financial Assurance of Commercial Solar Energy Facilities.”
- ▶ AIMA template 8.18.18 [wind energy facilities] contains a similar condition and states the “***specifications*** in this AIMA ***shall be the minimum standards applied*** to all Construction or Deconstruction activities.”
 - Section 21 of the AIMA [ver. 8.18.18] sets forth ***standards*** for “Deconstruction of Commercial Wind Energy Facilities and Financial Assurance.”

Public Acts 102-1123, 103-0081 and 103-0580 – Areas for Proposed Legislative Amendments

- ▶ The limitation that county standards shall not be more restrictive than those in the AIMA indicates that the AIMA terms are the “ceiling”. A county ordinance may go no further than what is provided by the AIMA terms.
- ▶ However, the AIMA’s characterization of the specifications regarding construction or deconstruction as the “minimum standards” suggests that the terms therein are the “floor”. A county ordinance must, at a minimum, include those standards. However, at the same time, the statute does not permit county ordinances that “are more restrictive than” the AIMA terms.
- ▶ Based on these two conflicts, it is unclear whether a county should treat the AIMA terms regarding deconstruction as “minimum standards” or whether any deviation would be “more restrictive than” the AIMA terms. If the Act says “go no further” but the AIMA says “start here”, it is unclear what room is between the two provisions.
- ▶ The Act uses the words “standards”, “requirements” and “restrictions” interchangeably, which leads to confusion.

Public Acts 102-1123, 103-0081 and 103-0580 – Areas for Proposed Legislative Amendments

- ▶ **Require the initial Financial Assurance to be set at a higher percentage (75% to 100% of est. decommissioning costs) than the current mandated 11-year phased-in, capped dollar amount set by a percentage formula.**
- ▶ **The cost of decommissioning should be re-evaluated every 5 years after the Commercial Operation Date.**
- ▶ **Allow the use of the Financial Assurance to cover public safety / emergency repairs that are not timely addressed by the operator.**
- ▶ **Require the replenishment of the Financial Assurance if used to cover public safety / emergency repairs or for decommissioning of a portion of a project.**

Public Acts 102-1123, 103-0081 and 103-0580 – Areas for Proposed Legislative Amendments

- ▶ Amend Public Hearing Requirement to require holding a hearing per the OMA ***not more than 60 days*** after the filing of an application. ***Adopted pursuant to Public Act 103-0580.***
- ▶ Amend Siting Decision Requirement to require counties to make siting and permitting decisions ***not more than 60 days*** after the conclusion of the public hearing.
- ▶ Amend to allow counties to require earth berms for ground-based solar farm projects.
- ▶ Is the standard that county permit application fees cannot be “unreasonable”, an acceptable standard?
- ▶ Is the standard that all county application fees shall be “consistent with fees for projects in the county with similar capital value and cost”, an acceptable standard? (i.e., for some counties, a large solar farm or wind farm project may not have a comparable fee schedule).

Public Acts 102-1123, 103-0081 and 103-0580 – Areas for Proposed Legislative Amendments

- ▶ Are there more appropriate sound standards for wind towers than the standards of the Illinois Pollution Control Board under 35 Illinois Administrative Code parts 900, 901 and 910?
- ▶ This item has been raised in some Counties: Amend to add a cap on the amount of land in any district zoned to allow agricultural or industrial uses that can be developed or operated with commercial wind energy facilities or commercial solar energy facilities.
 - Wind farms are compatible with farming uses (minimal loss of productive farmland).
 - Large scale solar farms take available farmland out of production.
 - Does the reduction in available agricultural or industrial zoned land in favor of solar projects lead to lower property taxes collected, loss of local jobs, etc.?
- ▶ Require county or drainage district plan review and approval authority of farmland drainage plans (or preparation of plans by independent third party for benefit of landowners, drainage districts and counties) now required by new subsection (j-5) See also, 55 ILCS 5/5-12020(t).
- ▶ Other Amendments???

Legislative Changes Since Adoption of Public Act 102-1123

- ▶ Since adoption, additional changes have been made to 55 ILCS 5/5-12020 and the changes made through Public Act 102-1123.
- ▶ **Public Act 103-0081**, effective date of June 9, 2023, amends 55 ILCS 5/5-12020(u).
- ▶ Effective December 8, **Public Act 103-0580**, effective date of December 8, 2023, amends various sections of 55 ILCS 5/5-12020 and creates two new subsections.
- ▶ House Bill 3146 proposes amendments to 55 ILCS 5/5-12020(e) and was referred to the Rules Committee on March 10, 2023. There has been no subsequent action on adoption since that date.

Public Act 103-008: Amendments

- ▶ 55 ILCS 5/5-12020(u) creates certain exemptions to the amendments adopted by Public Act 102-1123.
- ▶ Public Act 103-0081 added a third exemption, stating that the requirements of Public Act 102-1123 will not apply to developments on property within a certified enterprise zone, that was zoned for industrial use prior to January 27, 2023, and that is located within (4) miles of the I-88 and I-39 intersection (Rochelle area).

Public Act 103-0580: Amendments

- ▶ In addition to **changing the public hearing requirement from within 45 days to within 60 days** (55 ILCS 5/5-12020(c)) and amending how the decommissioning plan is calculated (55 ILCS 5/5-12020(j)), this Public Act creates two new subsections and makes other various changes.
- ▶ Changes include:
 - Vegetation management plans to comply with the AIMA. 55 ILCS 5/5-12020(r).
 - Facility developer must file with the county **a farmland drainage plan required by subsection (j-5)** and can cross / impact / damage drainage systems per plan, but there is **no county or drainage district plan review or approval authority**. See also, 55 ILCS 5/5-12020(t).

Public Act 103-0580: New Sections

- ▶ 55 ILCS 5/5-12020(r)(2) was amended so that counties can require submittal of **vegetative management plans that comply with the AIMA** if the ground cover and vegetation management plan comply with the underlying landowner agreements. **A poorly drafted amendment:**
 - “. . .a county may . . . (2) require the submittal of a vegetation management plan **“that is in compliance with the agricultural impact mitigation agreement”** in the application to construct and operate a commercial solar energy facility in the county **if the vegetative ground cover and vegetation management plan comply with the requirements of the underlying agreement with the landowner or landowners where the facility will be constructed.”**

Public Act 103-0580: New Sections

- ▶ Subsection (j-5) requires a farmland drainage plan on file with the county and impacted drainage districts.
- ▶ The plan should outline how surface and subsurface drainage of farmland will be restored during and after construction or deconstruction.
- ▶ This plan must be **independently created by the facility developer** and must include procedures for repair and restoration using procedures outlined in the AIMA.
- ▶ 55 ILCS 5/5-12020(j-5).
- ▶ **Subsection (s-5) requires compensation for agricultural damages or crop loss stemming from drainage system damage** caused by the construction or deconstruction of a facility.
- ▶ The facility owner is required to repair or pay for repair of damage to the subsurface drainage system caused by construction or deconstruction **“as soon as reasonably practicable.”**
- ▶ The facility owner is required to repair, restore, or pay for the repair of damage to the surface drainage caused by construction or deconstruction.
- ▶ 55 ILCS 5/5-12020(s-5).

Pathway for Proposed Legislative Amendments

- ▶ Identify and prioritize the areas of the law to be amended.
- ▶ Identify key legislators who will sponsor and support the Amendments.
- ▶ Identify other aligned groups who will support the Amendments.
- ▶ Prepare Legislative Amendments.
- ▶ Circulate (ISACo) a Template County Board Resolution to all Illinois Counties that supports the Amendments.
- ▶ Circulate (ISACo) a Template State's Attorney Letter to all Illinois Counties that supports the Amendments.
- ▶ Head to Springfield with the Amendments, the County Board Resolutions and the State's Attorney Letters.

Questions?

Michael T. Jurusik

- ▶ Shareholder and Director of the law firm of Klein, Thorpe and Jenkins, Ltd.
- ▶ Represents home rule and non-home rule units of local government, including cities, villages, counties, fire and police commissions, fire and police pension boards, 911 JETSBs, water agencies and water commissions, and other special districts
- ▶ Advises local government clients on a variety of matters including:
 - Open Meetings Act, Freedom of Information Act, Local Records Act, and State Officials and Employees Ethics Act compliance matters
 - Bidding, contract and procurement laws
 - Intergovernmental agreements and P3s (public – private partnership arrangements)
 - Economic development, land use and zoning matters
 - Federal and state grants and municipal finance matters
 - Enterprise fund, special revenue fund and utility franchise matters
 - Civil litigation, administrative proceedings and alternative dispute resolution forum
 - Solar and wind farm projects (code amendments, drafting of permit regulations and assistance with permit approval public hearings)
- ▶ Co-author of local government and municipal law publications and speaker at local government seminars and conferences
- ▶ Named an Illinois Leading Lawyer
- ▶ Email: mtjurusik@ktjlaw.com
- ▶ Office Phone: 312.984.6432
- ▶ Cellular Phone: 708.638.0355

Klein, Thorpe and Jenkins, Ltd.

Chicago Office

120 South LaSalle Street, Suite 1710
Chicago, Illinois 60603
312.984.6400

Suburban Offices

15010 South Ravinia Avenue, Suite 10
Orland Park, Illinois 60462
708.349.3888

900 Oakmont Lane, Suite 301
Westmont, Illinois 60559
312.984.6400

Downstate Office

7 Northpoint Drive
Streator, Illinois 61364
815.672.3116

Lake County Office

544 Lakeview Parkway, Suite 301
Vernon Hills, Illinois 60061
312.984.6400

VISIT KTJ

www.ktjlaw.com

on Facebook

Subscribe to KTJ E-notes