

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

In re Implementing Provisions of
Public Act 233 of 2023

COA Case No. 373259
MPSC Case No. 00-021547

ALMER CHARTER TOWNSHIP, et al.

Appellants,

v

MICHIGAN PUBLIC SERVICE
COMMISSION,

Appellee,

and

MICHIGAN ENERGY INNOVATION
BUSINESS COUNCIL, et al.

Intervening Appellees.

**Amicus Curiae Our Home, Our Voice, Inc.'s
Brief in Support of Appellants**

Erica J. Sarver (P80106)
Fawzeih H. Daher (P82995)
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, MI 48226
(313) 259-7777
esarver@bodmanlaw.com
fdaher@bodmanlaw.com
*Attorneys for Amicus Curiae
Our Home, Our Voice, Inc*

Table of Contents

Table of Authorities	ii
Statement of Interest of Amicus Curiae.....	iii
Statement of Questions Presented.....	iv
Introduction.....	1
Statement of Facts.....	2
Standard of Review.....	2
Argument	2
I. The PSC does not have the authority to limit local land use decisions.	2
II. The Order is an improper attempt at rulemaking.....	4
Conclusion	7
Certificate of Compliance	9

Table of Authorities

Cases

<i>3M Co v Dep't of Env't Great Lakes & Energy</i> , 348 Mich App 28 (2023).....	6
<i>AFSCME v Mich Dep't of Mental Health</i> , 452 Mich 1; 550 NW2d 190 (1996).....	5, 6, 7
<i>Detroit Base Coal for Human Rights of Handicapped v Dir, Dep't of Soc Servs</i> , 431 Mich 172; 428 NW2d 335 (1988).....	5, 6
<i>Faircloth v Family Independence Agency</i> , 232 Mich App 391; 591 NW2d 314 (1998).....	5
<i>Mich Charitable Gaming Ass'n v Michigan</i> , 310 Mich App 584; 873 NW2d 827 (2015).....	5
<i>Mich Farm Bureau v Bureau of Workmen's Comp</i> , 408 Mich 141; 289 NW2d 699 (1980).....	6
<i>In re Public Service Comm'n</i> , 252 Mich App 254; 652 NW2d 1 (2002).....	2
<i>Silver Creek Twp v Corso</i> , 246 Mich App 94; 631 NW2d 364 (2001).....	4

Statutes

MCL 125.3807	3
MCL 125.3841	3
MCL 125.3843	3
MCL 126.3206	3

Other Authorities

“Administrative Rules in Michigan” A Manual of Style and Procedures, Legal Editing and Law Publications Division, Legislative Services Bureau, June 2003.....	4
--	---

Statement of Interest of Amicus Curiae

Amicus Curiae Our Home, Our Voice, Inc. (“OHOV”) is a Michigan nonprofit corporation whose core purpose is to protect and ensure the rights of Michigan residents to participate in land use decisions impacting their communities.¹

¹ None of the parties or their counsel contributed monetarily or to the authorship of this brief. MCR 7.212(H)(3). Jeffrey Benore, a supporter of OHOV, made the only monetary contribution to preparing this brief.

Statement of Questions Presented

OHOV relies on the statement of questions presented in Appellants' Brief. See Appellants' Brief at p. vi.

Introduction

Over the last several years, *amicus curiae* Our Home, Our Voice, Inc. (“OHOV”), and its supporters have spent hundreds of hours participating in local zoning and planning processes throughout the state of Michigan, to ensure that decisions regarding the zoning and siting of renewable energy facilities align with the community’s land use goals and objectives. While OHOV’s supporters belong to diverse communities across the state, increasing pressure to engage in large-scale renewable energy development mostly implicates the land use decisions of rural communities, many of which contain expansive undeveloped land zoned for agricultural use. While these locales are appealing to developers, their rural character is highly valued by their residents. Through their local engagement, OHOV’s supporters raise questions about the screening, fire safety, setbacks, and other features of large-scale renewable energy facilities. Even when residents disagree with the ultimate outcome of local zoning and planning processes, their engagement ensures that decisionmakers are aware of the community’s concerns.

Appellants—a collection of counties and municipalities—correctly highlight the inconsistencies between the order issued by the Public Service Commission (“PSC”) (the “Order”) and the limited authority extended to the PSC under Public Act 233 of 2023 (“PA 233”). OHOV, in its capacity as a nonprofit organization dedicated to preserving the right of Michigan citizens to participate in local land use decisions that impact their communities and way of life, writes separately to highlight the extent to which the Order infringes on citizen engagement and overtakes the authority reserved for municipalities under the Michigan Planning Enabling Act and Michigan Zoning Enabling Act.

OHOV further concurs with Appellants’ position that the Order is invalid on its face as it arose from an unvarnished attempt to sidestep the rulemaking process required by Michigan’s Administrative Procedures Act (“APA”). The Order arose from a “contested case” that was

initiated *sua sponte* by the PSC, which requested the PSC’s staff “to file recommendations on application filing instructions, guidance relating to compatible renewable energy ordinances (CREOs), and any other issues involving Act 233.” Exhibit A to Appellants’ Brief, Order, at p. 2. Many of the questions and inconsistencies identified by Appellants could have been avoided had the PSC complied with the APA rulemaking process.

Indeed, environmental justice requires that communities which may be impacted by proposed renewable energy development have a full and fair opportunity to meaningfully engage in the planning and siting process. The PSC’s desire to encourage renewable energy development in the state of Michigan does not justify its exclusion of Michigan communities from the site approval and planning process. For these reasons and as further detailed below, this Court should vacate the Order.

Statement of Facts

OHOV relies on the statement of facts in Appellants’ Brief. See Appellants’ Brief at pgs. 2-14.

Standard of Review

OHOV relies on the standard of review in Appellants’ Brief. See Appellants’ Brief at p. 15.

Argument

I. The PSC does not have the authority to limit local land use decisions.

The PSC is “a creature of statute,” and has only the authority set forth in PA 233. *In re Public Service Comm’n*, 252 Mich App 254, 263; 652 NW2d 1 (2002). PA 233 does not grant the PSC authority to override local land use decisions, particularly where Michigan’s Zoning Enabling Act (“MZEA”) reserves that authority for municipalities. In some cases, the Legislature has removed from local authority certain types of zoning – such as for qualified residential treatment

programs (MCL 126.3206) – but it has not done so with respect to renewable energy facilities. By purporting to limit compatible renewable energy ordinances (“CREOs”) to only those that contain provisions no stricter than those in PA 233, the Order improperly implies that municipalities may not limit qualifying energy projects to a particular zoning district(s) under their master plans or through adoption of zoning ordinances consistent with those plans. Further, it is unclear whether the Order purports to invalidate any CREO that contains *additional* limitations on qualifying facilities.

The Order undermines and conflicts with the zoning and planning authority granted to local governments and their citizens. Michigan’s Planning Enabling Act (“MPEA”) outlines the process by which a local government must engage in the master planning process. The MPEA provides that “[a] local unit of government may adopt, amend, and implement a master plan as provided in this act,” the purpose of which is to ensure that development “[c]onsiders the character of the planning jurisdiction and its suitability for particular uses, judged in terms of such factors as trends in land and population development,” and “promote[s] public health, safety, morals, order, convenience, prosperity, and general welfare.” MCL 125.3807(1) and (2). The MPEA requires a planning commission, in preparing a master plan, to seek engagement and comment from a variety of governmental entities on the proposed plan. MCL 125.3841(2). The planning commission is then required to hold “not less than 1 public hearing on the proposed master plan,” following “the expiration of the deadline for comment under section 41(3).” MCL 125.3843(1).

OHOV’s supporters have engaged in local master planning processes for years, with the intention of ensuring that their local master plan comports with the community’s goals and expectations. And as Appellants note, “many Appellants spent most of 2024 preparing, reviewing, and adopting CREOs,” including by conducting public hearings at which Appellants “receiv[ed]

public comment for several hours.” Appellants’ Brief at p. 12. OHOV supporters actively participated in dozens of public hearings across the state, providing feedback, asking questions, and otherwise engaging in the democratic process. The Order, by improperly modifying the definition of a CREO contained in PA 233, purports to invalidate CREOs created by local municipalities with the direct input of their constituents.

Zoning ordinances and local master plans also commonly come into conflict with the Mobile Home Commission Act (“MHCA”). In that context, this Court has held that “zoning laws regulate the development and proper use of land; the MHCA does not.” *Silver Creek Twp v Corso*, 246 Mich App 94, 98; 631 NW2d 364 (2001) (upholding a township’s requirement that a developer obtain a special land use permit for a mobile home park development). This Court further reasoned that “compliance with applicable and valid ordinances . . . is a necessary prerequisite for [the MHCA] to become an operative and governing provision.” *Id.*

The Order further states that a local government “is considered not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction.” In that case, the Order would allow an applicant to simply sidestep any local engagement – in direct violation of the moratorium.

II. The Order is an improper attempt at rulemaking.

Michigan’s administrative rules procedure was established “to prevent arbitrary decision making by state agencies delegated authority to implement and apply law.” “Administrative Rules in Michigan” A Manual of Style and Procedures, Legal Editing and Law Publications Division, Legislative Services Bureau, June 2003. P.1 Introduction. Procedural safeguards were “needed to ensure that agencies observed certain minimum standards when issuing rules having the force and effect of law. Further, the procedure sought to facilitate public participation and enhance legislative

oversight in the formulation of rules.” *Id.* The APA sets forth the process that an agency must follow when it promulgates rules and regulations. *Mich Charitable Gaming Ass’n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015). “An agency’s failure to follow the process outlined in the APA renders a rule invalid.” *Id.* “The agency’s label is not dispositive and the inquiry must focus on the ‘actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule.’” *Detroit Base Coal for Human Rights of Handicapped v Dir, Dep’t of Soc Servs*, 431 Mich 172, 188; 428 NW2d 335 (1988) (citation and quotation marks omitted). Whether an agency action should have followed the formal rulemaking process is a question for this Court to answer, not the agency. It is clear that the Order is a rule, and not a true order entered in a contested case.

Under the APA, an agency is required to employ formal rulemaking when it establishes policies that “do not merely interpret or explain the statute or rules from which the agency derives its authority,” but rather “establish the *substantive standards* implementing the program.” *Faircloth v Family Independence Agency*, 232 Mich App 391, 404; 591 NW2d 314 (1998) (emphasis added). The Order attempts to establish a framework under which the PSC will administer its limited authority under PA 233 and therefore should have followed the formal rulemaking process. While styled as an order in a contested case, the “contested case” was initiated by the PSC. Exhibit A to Appellants’ Brief, Order, at p. 2. The PSC requested that its staff prepare “application filing instructions, guidance relating to compatible renewable energy ordinances (CREOs),” and address “any other issues involving Act 233” that staff saw fit to include. *Id.*

The Supreme Court has recognized that even form contracts issued by a state agency must “be subjected to the democratic process contemplated by the APA” when they “prescribe an agency’s policies regarding the implementation or application of its statutory duties.” *AFSCME v*

Mich Dep't of Mental Health, 452 Mich 1, 14; 550 NW2d 190 (1996). In *AFSCME*, the Michigan Department of Mental Health used a form contract “with hundreds of group home providers for the provision of care to developmentally disabled persons” – care that was previously administered by the Department directly. *Id.* at 6. The changes embodied in the revised contract went “to the heart of the department’s statutory mandate,” and “many of the contract’s provisions set forth departmental policy and standards that have a direct effect on the care provided in group homes, care that the department is statutorily mandated to provide.” *Id.* at 7-8. The Court rejected the Department’s argument that the revised contract was simply guidance, in part because the revised contract bound all providers who sought to contract with the Department to provide care. *Id.* at 10. Here, the PSC’s Order goes even further – binding not just applicants desiring to locate renewable energy facilities in the State of Michigan, but municipalities who attempted to adopt CREOs or otherwise address the presence of renewable energy facilities in their communities.

In *Detroit Base Coal*, the Supreme Court held that a policy adopted by the Department of Social Services requiring telephonic hearings represented a substantial change affecting the rights of the public to administrative hearing and the conduct of those hearings, and as such, could not be implemented without the benefit of rulemaking. *Detroit Base Coal*, *supra* at 172. Similarly, in *Mich Farm Bureau v Bureau of Workmen’s Comp*, 408 Mich 141, 159; 289 NW2d 699 (1980), this Court held that letters from the director of the Bureau of Workmen’s Compensation computing weekly worker’s compensation benefits qualified as rules that had not been properly promulgated. More recently, this Court in *3M Co v Dep’t of Env’t Great Lakes & Energy*, 348 Mich App 28 (2023) rejected attempts by the Michigan Department of Environment, Great Lakes, and Energy where the Department followed some, but not all, of the formal rulemaking processes mandated by the APA, and held that the rule changes were invalid.

The Order substantially impacts the rights of the public to participate in land use decisions in their communities, and the process by which petitioners are to seek approvals to locate a renewable energy facility in the state. As such, it should have been promulgated by formal rulemaking.

Conclusion

[T]he APA is essential to the preservation of a democratic society. Put simply, without public oversight and scrutiny of legislative action undertaken by administrative agencies, such agencies would rule without the normal safeguards of our republic. Indeed, the APA is a bulwark of liberty by ensuring that the law is promulgated by persons accountable directly to the people.

AFSCME, supra, at 14 (citation and quotation marks omitted). OHOV and its supporters have attempted to participate fully in the decisions surrounding the location and siting of renewable energy facilities in their communities. The Order has the force and effect of a rule.

Even if it had been properly promulgated in compliance with the APA, the Order purportedly invalidates otherwise valid CREOs adopted by Appellants with the participation and input of their constituents. The Order sets forth the standards that a petitioner must satisfy to receive the PSC's permission to locate a renewable energy facility, but the approval process described by the Order does not enable local resident participation. For the foregoing reasons and those stated in Appellants' Brief, OHOV respectfully requests that the Court vacate the Order.

Respectfully submitted,

BODMAN PLC

By: /s/*Erica J. Sarver*

Erica J. Sarver (P80106)

Fawzeih H. Daher (P82995)

6th Floor at Ford Field

1901 St. Antoine Street

Detroit, MI 48226

(313) 259-7777

esarver@bodmanlaw.com

fdaher@bodmanlaw.com

*Attorneys for Amicus Curiae Our Home, Our
Voice, Inc.*

Dated: April 15, 2025

Certificate of Compliance

In accordance with MCR 7.212(B), the undersigned counsel certifies that amicus curiae Our Home, Our Voice, Inc.'s brief contains 2,101 words, exclusive of the case caption, cover sheets, table of contents, table of authorities, statement of jurisdiction, statement of questions presented, the signature block, attachments, and exhibits. The brief's word count was calculated by Microsoft Word, which is the word processing software that was used to create the brief.

Respectfully submitted,

BODMAN PLC

By: /s/Erica J. Sarver

Erica J. Sarver (P80106)
Fawzeih H. Daher (P82995)
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, MI 48226
(313) 259-7777
esarver@bodmanlaw.com
fdaher@bodmanlaw.com
Attorneys for Amicus Curiae
Our Home, Our Voice, Inc.

Dated: April 15, 2025