

Bloom Sluggett, PC

COUNSELORS & ATTORNEYS

Clifford H. Bloom
Direct Dial (616) 965-9342
Direct Fax (616) 965-9350
cliff@bloomsluggett.com

December 12, 2022

Ms. Patti Sargent
Township Clerk
White River Township
White River Township Offices
7386 Post Road
Montague, Michigan 49437

**Re: The White River Township Zoning Ordinance
Solar Farms - Issues**

Dear Patti:

As you know, White River Township (the "Township") adopted fairly comprehensive amendments to the White River Township Zoning Ordinance (the "Zoning Ordinance") in 2019. Recently, the White River Township Planning Commission ("Planning Commission") has been considering further amendments to the existing solar farm regulations in the Zoning Ordinance. Concurrently, the Township has received an application from National Grid Renewables ("NGR") for the Lakeside Solar project to create a solar farm on approximately 1,700 acres within the Township.

Given the size of the proposed solar farm, the many technological aspects related to the application and apparently widespread citizen and property owner concerns about the proposal, a number of issues have arisen for which Township officials would like to have answers.

1. The potential conflict of interest involving the Township Supervisor.

Township Supervisor Michael Cockerill has apparently entered into a written lease or other agreement with NGR to place solar energy facilities on his farm. The issue has arisen regarding whether Mr. Cockerill has a conflict of interest with regard to the NGR application as well as participating in potential current amendments to the Zoning Ordinance regarding solar energy facilities and solar farms.

Clearly, as to the pending NGR application, Supervisor Cockerill has a direct financial interest and thus, a conflict of interest. Mr. Cockerill should not participate in any Township proceedings or actions regarding that application and should formally recuse himself.

As for the pending proposed zoning amendments; in general, if a member of a Michigan township board votes on an ordinance (or ordinance amendment) of general applicability, they would not have a conflict of interest (and would not have to recuse themselves), even if it might

affect that township board member's property rights, finances, business or other personal matters in the future. However, in this particular case, given that Supervisor Cockerill has already signed a lease or agreement with NGR and that the pending zoning amendments could very well impact Mr. Cockerill's financial interests quite soon, it is likely that Mr. Cockerill would have a conflict of interest and it would be advisable that he recuse himself regarding the zoning amendments and not participate in the zoning amendment process.

2. A possible moratorium regarding larger solar energy facilities.

You have asked whether the Township can impose a moratorium on new solar farms or larger solar energy facilities in order to prepare and adopt possible amendments to the Zoning Ordinance related thereto in more detail, even though there is a pending application by NGR for a new solar farm. Interestingly, although municipalities throughout Michigan have frequently used moratoria regarding various zoning matters, the Michigan courts have not addressed the validity of such moratoria in depth. See *Sandstone Creek Solar, Inc. v Township of Benton*, 335 Mich App 683 (2021) and *Metamora Township v American Aggregates of Michigan, Inc.* (unpublished Michigan Court of Appeals decision dated April 1, 2021; Case No. 349069; 2021 WL 1236108). Although it is likely that a moratorium ordinance for a relatively short period of time (for example, four to six months) would be upheld by the Michigan courts, that cannot be certain. The fact that there is a pending application with the Township for a solar farm should not be determinative as, in Michigan, a property owner or applicant does not have a "vested right" until and unless all zoning approvals and permits have been obtained and the project is under substantial construction. See *Schubiner v West Bloomfield Township*, 133 Mich App 490 (1984); *City of Lansing v Dawley*, 247 Mich 394 (1929) and *Bloomfield Township v Beardslee*, 349 Mich 296 (1957).

There are various matters that could potentially be added to the Township's existing zoning regulations regarding new or expanded solar farms and larger solar energy generation facilities. For instance, the Township could limit the size or amount of acreage involved for a new solar farm or the equivalent. Or, solar farms over a certain size could be prohibited from utilizing prime agricultural land, thus taking such land out of active farm cultivation. Or, the Township could put a "cap" on the total number of acres within White River Township that could have solar farm facilities on land within the Township.

3. Can solar farms or large solar energy generating systems be banned altogether from White River Township?

Some citizens have asked whether new solar farms or large solar energy generating facilities can be banned from White River Township entirely. It is highly unlikely that the Michigan courts would sanction a complete prohibition on such facilities in the absence of compelling circumstances. "Exclusionary zoning" is prohibited in Michigan. That is, where there is a demonstrated need for a particular, legal use, building or facility and the proposal is reasonable, Michigan municipalities generally cannot exclude such a use, building or activity completely.

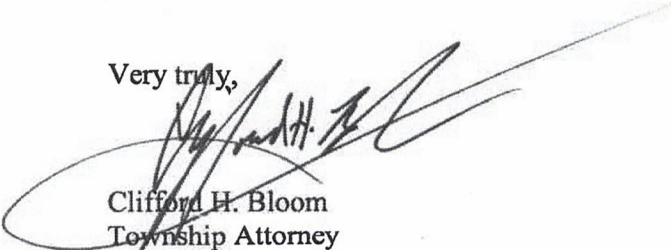
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“MCL 125.3207 prohibits municipalities from enacting any zoning ordinance ‘totally prohibiting’ a given land use if a ‘demonstrated need’ exists for that use, unless there is no location where the use may be ‘appropriately located,’ [or] the use is ‘unlawful.’ “ *Kyser v. Kasson Twp.*, 486 Mich. 514, 540, 786 N.W.2d 543 (2010); see also *id.* at 542, 786 N.W.2d 543 (“[T]he exclusionary zoning provision, MCL 125.297a, now MCL 125.3207, applies to all land uses within the community and precludes the zoning power from completely prohibiting a lawful land use where there is a demonstrated need for that land use within a jurisdiction.”). Accordingly, a plaintiff challenging the ordinance under MCL 125.3207 must show a “ ‘demonstrated need’ for a certain land use in order to overcome a zoning ordinance’s ‘effect of totally prohibiting the establishment of a land use within a local unit of government.’ “ *Ter Beek v. City of Wyoming*, 495 Mich. 1, 22 n. 8, 846 N.W.2d 531 (2014). See also *City of Holland*, 463 Mich. at 684, 625 N.W.2d 377 (stating the elements of an exclusionary zoning claim under MCL 125.592, the predecessor of MCL 125.3207). *International Outdoor, Inc. v City of Livonia* (Unpublished Court of Appeals decision dated June 14, 2016; Case No. 325243; 2016 WL 3298229).

Moreover, if enough Michigan municipalities prohibit new solar farms or large solar energy generating facilities, it is possible that could prompt a reaction from the Michigan Legislature to take away local municipal zoning and other regulatory authority from Michigan townships, cities, villages and counties and vest the exclusive control over new solar farms and large solar energy generating facilities in a state of Michigan agency (or agencies) such as the Michigan Public Service Commission. In that case, a township such as White River Township would likely have no control whatsoever over a new or expanding solar farm or solar energy generating facility.

Please do not hesitate to contact me should Township officials have any further questions regarding these matters.

Very truly,



Clifford H. Bloom
Township Attorney

cc: Township Supervisor
Zoning Administrator
Chairperson of the Planning Commission