



House Bill 1390

Certificate of Public Convenience and Necessity - Electric Facilities - Study and Procedures

MACo Position: **OPPOSE**

To: Economic Matters Committee

Date: March 5, 2020

From: Alex Butler

The Maryland Association of Counties (MACo) **OPPOSES** HB 1390. The bill would: (1) remove current incentives for energy developers seeking a Certificate of Public Convenience and Necessity (CPCN) from the Public Service Commission (PSC) to follow local zoning and land use requirements; (2) require the creation of illogical “one-size-fits-all” setback and buffering requirements for energy projects; and (3) apply vague and unnecessary prohibitions against local governments regarding the withholding or delay of site plan or permit approvals for energy projects.

Local Zoning and Land Use

Local zoning should and does play an important role in the siting of generating stations, especially as the state moves toward a more “dispersed” energy generation grid. These facilities can have significant impacts on long-term land use planning, development, and conservation goals.

In recognition of the importance of local land use, this Committee and the General Assembly passed HB 1350 in 2017, which requires the PSC to duly consider a project’s consistency with the local comprehensive plan and zoning and the efforts to resolve any issues presented by the local government. Since the passage of HB 1350, many counties have revised their zoning to accommodate utility scale solar and other generation projects.

However, HB 1390 would eliminate the ability for a local government and the PSC to require generating stations to be subject to many common types of local zoning applications and permits, including special exceptions or floating zones. The bill would prohibit the PSC from requiring an applicant to apply for such a permit or consider their failure to do so as part of an application, undermining both HB 1350 (2017) and common local zoning practices.

Additionally, the PSC already has the authority to preempt local zoning and land use requirements regarding the siting of energy generation facilities. This preemption authority was made clear by the Maryland Court of Appeals in its 2019 decision for *Washington County v. Perennial Solar, LLC* (464 Md. 610). Thus, the PSC already has the authority to overturn any local zoning or land use action where it disagrees with the local jurisdiction’s decision or believes the jurisdiction has acted in bad faith.

Setback and Buffering Requirements

HB 1390 also requires the PSC to create licensing conditions requiring “commercially reasonable setbacks and visual buffering requirements using predetermined setback distances and screening plans applicable to all solar photovoltaic facilities in the state...” This “one-size-fits all” approach makes no sense and upends the current, long-standing model that properly incorporates input from local jurisdictions.

As the PSC stated in its written testimony, there would likely be conflicting interpretations as to what is “commercially reasonable.” The PSC also noted that each energy generation project is different, with setbacks and buffering determined on a case-by-case basis, based on multiple factors.

The PSC is not a land use agency and is not equipped to issue uniform setback guidelines for every jurisdiction in the state. Currently, the PSC necessarily relies on a local government’s input regarding setbacks and buffering, based on its knowledge of the proposed project site and surrounding properties.

Local Site Plan and Permit Approvals

Finally, HB 1390 includes vague language stating that a local government “may not unreasonably withhold or delay issuance of site plan approval or other permit or approval” for a CPCN project. The bill does not define what would be considered “unreasonable” and would invite litigation and legal challenges.

The PSC also has the authority to remove local site plan or permit approvals from its conditions for CPCN approval. A recent Letter of Advice from the Office of the Attorney General states that “i[n] the event that local authorities do not act [on a site plan or permit], the developer could request that the PSC revisit or revise or modify those conditions, whichever is appropriate. Revisions or modifications to initial CPCN conditions are consistent with PSC practice.” *See* Letter of Advice to the Honorable Brian Feldman (January 7, 2020).

Conclusion

HB 1390 contains provisions that would undermine the role of local land use, as established by the General Assembly in 2017, in the siting of energy generation facilities; create illogical setback and buffering requirements; establish vague and unnecessary local site-plan and permit restrictions; and upend the current relationship between local governments and the PSC. Accordingly, MACo requests the Committee give HB 1390 an **UNFAVORABLE** report.