

PUBLIC SERVICE COMMISSION AND POLITICAL SUBDIVISIONS BACKGROUND MEMORANDUM

Section 4 of 2017 Senate Bill No. 2286 ([appendix](#)) directs the Legislative Management to study the cooperation and communication between the Public Service Commission (PSC) and political subdivisions in regard to ensuring local ordinances and zoning provisions are considered and addressed as part of the application and public hearing process.

SENATE BILL NO. 2286 AND OTHER 2017 LEGISLATION

Senate Bill No. 2286 updated North Dakota Century Code Sections 49-22-03, 49-22-14.1, and 49-22-16, relating to energy conversion and transmission facility siting to provide efficiency to the PSC approval process for siting gas or liquid transmission pipelines. The bill provided:

- The Public Service Commission must require an applicant for certificate of site compatibility or a route permit to comply with the road use agreements of the impacted political subdivision. A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.
- When an application for a certificate for a transmission facility is filed, the PSC is required to notify the townships with retained zoning authority and cities and counties in which any part of the proposed corridor is located. The Public Service Commission may not schedule a public hearing sooner than 45 days from the date notification is sent by mail or electronic mail. Upon notification, a political subdivision must provide a listing to the PSC of all local land use, zoning, or building requirements. The requirements must be filed at least 10 days before the hearing or the requirements are superseded and preempted.
- An applicant must comply with all local requirements provided to the commission which are not otherwise superseded by the PSC.

The Legislative Assembly passed 2017 House Bill No. 1144 relating to energy conversion and transmission facility siting. The bill split the North Dakota Energy Conversion and Transmission Facility Siting Act, codified as Chapter 49-22, into two separate chapters. The bill created Chapter 49-22.1 to address gas or liquid transmission facilities and gas or liquid energy conversion facilities, while amending Chapter 49-22 to pertain only to electric transmission and electric energy conversion facilities.

ZONING PROVISIONS

Chapter 11-33 provides for county zoning. Chapter 11-33 contains provisions for creating, amending, repealing, and enforcing county zoning regulations. Cities have zoning authority within city limits under Chapter 40-47. Organized townships that have not relinquished zoning authority to the county have zoning authority within the township under Sections 58-03-11 through 58-03-15.

Section 11-33-01 provides counties may promote public health, safety, morals, public convenience, general prosperity, and public welfare by regulating the location and use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes through land use zoning. Section 11-33-03(3) provides standards for the regulation or restriction of construction, reconstruction, alteration, repair, or use of buildings and structures by the county. Those restrictions may include the height; number of stories; size of buildings; and use for trade, industry, residence, or other purposes, such as the placement of billboards.

Section 11-33-03 provides county zoning regulations are made to regulate and restrict buildings and structures and to conserve and develop natural resources among other things. In the 1997 North Dakota Supreme Court case, *Continental Resources, Inc. v. Farrar Oil Company*, the court concluded counties with home rule authority do not have authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency. However, Sections 11-33-01 and 40-47-01 provide for county and city boards to establish institutional controls that address environmental concerns with the State Department of Health as provided in Section 23-20.3-03.1.

Section 40-47-01 provides the governing body of a city may regulate and restrict the height; number of stories; the size of buildings and other structures; the percentage of lot that may be occupied; the size of yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. Section 40-47-06 provides the governing body of a city must appoint a

commission, to be known as the zoning commission, to recommend the boundaries of the various original districts, and appropriate regulations to be enforced in the zoning districts.

Section 58-03-11 provides the board of township supervisors may establish one or more zoning districts and within the districts may regulate and restrict the erection; construction; reconstruction; alteration; repair; use of buildings and structures; the height, number of stories, and size of buildings and structures; the percentage of lot that may be occupied; the size of courts, yards, and other open spaces; the density of population; and the location and use of buildings, structures, land for trade, industry, residence, or other purposes. Section 58-03-12 provides the regulations and restrictions established in a township zoning district must be made in accordance with a comprehensive plan with reasonable consideration as to the character of the district; its peculiar suitability for particular uses; the normal growth of the municipality; the various types of occupations, industries, and land uses within the area; must be designed to facilitate traffic movement; encourage orderly growth and development of the municipality and adjacent areas; promote health, safety, and general welfare; and provide for emergency management.

Section 58-03-13 provides the board of township supervisors of a township must establish, by resolution, a township zoning commission to recommend the boundaries of the various township zoning districts and appropriate regulations and restrictions to be established in the districts.

PUBLIC SERVICE COMMISSION JURISDICTION **General Jurisdiction of the Public Service Commission**

Section 2 of Article V of the Constitution of North Dakota provides the PSC consists of three Public Service Commissioners and the powers and duties of the PSC must be prescribed by law. Section 49-02-01 sets out the general jurisdiction of the PSC. That section provides the general jurisdiction of the commission extends to:

- Contract and common carriers engaged in the transportation of persons and property, excluding air carriers.
- Telecommunications companies engaged in the furnishing of telecommunications services as provided for in Chapter 49-21.
- Pipeline utilities engaged in the transportation of gas, oil, coal, and water.
- Electric utilities engaged in the generation and distribution of light, heat, or power.
- Gas utilities engaged in the distribution of natural, synthetic, or artificial gas.
- All heating utilities engaged in the distribution of heat.
- Warehouse companies engaged in the marketing, storage, or handling of agricultural products.
- All other public utilities engaged in business in this state or in any county, city, township, or other political subdivision of the state.

Section 49-02-02 authorizes the PSC to require public utilities or other persons to conform to the laws of this state and to all rules, regulations, and orders of the commission not contrary to law. In addition the PSC may hold hearings on good cause or on its own motion. If it appears to the satisfaction of the PSC that all interested parties have agreed concerning a matter at hand, or that no interested party has asked for a hearing, the PSC may issue an order without a hearing.

Chapter 49-22 grants the PSC authority to issue certificates of site compatibility or route permits for energy conversion or transmission facilities.

Energy Conversion and Transmission Facility Siting Act

The 1975 Legislative Assembly passed Senate Bill No. 2050, the North Dakota Energy Conversion and Transmission Facility Siting Act, codified as Chapter 49-22. This chapter provides areas of protection to individual landowners in the siting of transmission facilities, such as:

- Including a statement of policy in which the Legislative Assembly declares "the construction of energy conversion facilities and transmission facilities affects the environment and the welfare of the citizens of this state. Therefore, it is necessary to ensure that the location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse effects on the environment and upon the welfare of the citizens of this state by providing that no energy conversion facility or transmission facility shall be located, constructed, and operated within this state without a certificate of site compatibility or a route permit acquired pursuant to this chapter." (Section 49-22-02)

- Requiring each utility that owns or operates, or plans within the next 10 years to own, operate, or start construction on any facility to develop a 10-year plan and submit the plan to the PSC. The plans must include a description of the general location, size, and type of all facilities to be owned or operated by the utility during the ensuing 10 years, as well as those facilities to be removed from service during the 10-year period; a description of the efforts by the utility to coordinate the plan with other utilities so as to provide a coordinated regional plan for meeting the utility needs of the region; and a description of the efforts to involve environmental protection and land-use planning agencies in the planning process, as well as other efforts to identify and minimize environmental problems at the earliest possible stage in the planning process. (Section 49-22-04)
- Requiring the PSC, in evaluating an application for a certificate of site compatibility, to consider the:
 - Effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment;
 - Effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites;
 - Potential for beneficial uses of waste energy from a proposed energy conversion facility;
 - Adverse direct and indirect environmental effects that cannot be avoided should the proposed site or route be designated;
 - Alternatives to the proposed site, corridor, or route which are developed during the hearing process and which minimize adverse effects;
 - Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated;
 - Direct and indirect economic impacts of the proposed facility;
 - Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route;
 - Effect of the proposed site or route on areas which are unique because of biological wealth or because they are habitats for rare and endangered species; and
 - Problems raised by federal agencies, other state agencies, and local entities. (Section 49-22-09)
- Requiring the PSC to hold a public hearing in each county in which any portion of a site, corridor, or route is proposed to be located in an application for a certificate or a permit. If more than one county is involved, the PSC may hold a consolidated hearing in one or more of the affected counties. A hearing for any county may not be consolidated if five or more affected landowners in the county file a petition with the commission within 10 days of the publication of the notice of hearing. At the public hearing, the PSC must afford interested persons an opportunity to be heard. Notice of a public hearing must be given by the PSC by service on any persons and agencies the commission deems appropriate and twice by publication, once at least 20 days before the hearing and a second time within 20 days before the hearing. (Section 49-22-13)
- Allowing the PSC to appoint advisory committees to evaluate sites or corridors considered for designation. There must be at least one representative from the Department of Agriculture, a public or municipally owned utility, a private investor-owned utility, and a cooperatively owned utility; and one representative from each county and city in which an electric energy conversion facility or electric transmission facility is proposed to be located. (Section 49-22-14)
- Prohibiting a certificate of site compatibility for an energy conversion facility from superseding or preempting any local land use; zoning; or building rules, regulations, or ordinances and prohibiting a site from being designated if it violates local land use; zoning; or building rules, regulations, or ordinances. A permit for the construction of a transmission facility within a designated corridor may supersede and preempt any local land use; zoning; or building rules, regulations, or ordinances upon a finding by the commission that such rules, regulations, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location. Without such a finding by the commission, no route shall be designated which violates local land use; zoning; or building rules, regulations, or ordinances. (Section 49-22-16)
- Allowing any party aggrieved by the issuance of a certificate of site compatibility or transmission facility construction permit from the PSC, certification of continuing suitability filed by a utility with the commission, or promulgation of a final order by the commission, to request a rehearing by the commission. (Section 49-22-19)

SUGGESTED STUDY APPROACH

In conducting the study, the committee may desire to receive testimony from the PSC and impacted parties including the North Dakota Association of Counties, North Dakota League of Cities, North Dakota Township Officers Association, Northwest Landowners Association, and Western Dakota Energy Association. The focus of the testimony should be on the cooperation and communication between the PSC and the impacted parties as it relates to ensuring local ordinances and zoning provisions are considered and addressed as part of the application and public hearing process. The committee also may want to request the PSC and the impacted parties to suggest methods to improve the relationships between landowners and the oil and gas industry, the efficiency of the siting process, including timelines associated with notification and permitting; the public input process; and the compliance with and enforcement of political subdivision zoning ordinances.

ATTACH:1