

Arthur D. Swannack

Whitman County Board of Commissioners

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To our Honorable Planning Commission members,

RE: Wind Farm Code:

I was asked to comment regarding the direction planning commission should examine when evaluating the current wind code under the temporary moratorium, some thoughts on what needs fixed and anything else which comes to mind.

I'll start out by saying that my reason for a moratorium and considering changes to our current wind code come because I recognized our decommissioning code's allowance for a deduction of the value of scrap materials from the required bonding value is antiquated. Montana is the only state still allowing this consideration. EFSEC has removed it from consideration on their bonding requirements for decommissioning and I believe it should be removed from our bonding requirement considerations as well. There is too much variability in the scrap value currently to have a reliable bond guarantee.

I do not support requirements to have both the Landowner and the Business renting the land to build/operate a commercial wind farm upon to both put up decommissioning bonds for full decommissioning costs. It is duplicative, redundant and likely not supportable as a condition if challenged in court. I suspect most landowners, because of not having ownership of the wind/solar/battery storage facility, wouldn't be able to obtain a bond, as they don't own the facility. Even if they did obtain a bond, they would have the developer/owner pay for it. As Bonds don't last more than 5 years, and often less, it provides no additional protection. I also don't know of a situation where such bonding methodology is used.

I believe there is too much consideration of the absolute worst-case scenario and not enough weight given to the likely scenario. These facilities in the end will be either run under a long-term contract for power supply to a public utility, or be sold entirely to a public utility. A State law known as CETA (the Clean Energy Transformation Act) requires public utilities be 80% carbon neutral by 2030 and 100% renewable powered by 2045. The demand for renewable power won't be going away anytime soon due to the current majority party in the state House, Senate and Governor's office supporting this law. It is unlikely all three offices will become run by the minority party and to change that law you would need all three minority parties in control.

If the Utility breached the contract, they would be liable for damages to the owner of the power generating facility. If it's owned by a public utility, we can't require a bond as the ratepayers stand behind the liability—at least as I understand the current law.

My suggestion is to require the County to take appropriate measure to verify the Bond is in place always, it is being kept up to date, the financial health of the facility and owner is monitored annually

and the underwriting determining the bond amount for decommissioning is correct and updated every two to four years for cost changes.

Setbacks: just some comments:

The US Supreme Court has said that interim controls and zoning regulations can be considered a “**taking**” under certain conditions. Prosecutor Tracy, as the County’s attorney, will give you the best advice on whether a proposed change to code would violate property rights and be a “**taking**” for which the County might be liable for damages/court costs and would also invalidate the proposed zoning control. The County doesn’t have the money to pay for a lot of court challenges, let alone payments for damages. Below are some links which may be relevant, but Denis is our attorney and should be the one whose advice you listen to.

<https://mrsc.org/explore-topics/decisions-agos/topics/regulatory-takings-court-decisions>

https://scholar.google.com/scholar_case?case=5858523458892549380&q=First+English+Evangelical+Lutheran+Church+of+Glendale+v.+County+of+Los+Angeles&hl=en&as_sdt=3,48

https://scholar.google.com/scholar_case?case=7166131298875597236&q=Agins+v.+Tiburon&hl=en&as_sdt=3,48

https://scholar.google.com/scholar_case?case=16963280698452399899&q=Penn+Central+Transportation+Co.+v.+New+York+City&hl=en&as_sdt=3,48

https://scholar.google.com/scholar_case?case=15307284477438038942&q=Pennsylvania+Coal+Co.+v.+Mahon&hl=en&as_sdt=3,48

<https://www.cegachronicles.com/2024/04/u-s-supreme-court-rules-that-legislatively-imposed-permit-conditions-must-satisfy-the-essential-nexus-and-rough-proportionality-tests-for-takings/>

I believe the setbacks in code are reasonable and would stand up to a court test currently. I don’t believe doubling setbacks from houses would withstand a court challenge, nor would making property line setbacks the same as house setbacks, but you talk and decide what you wish to recommend to us. That is planning commission’s job and I respect you and thank you for your time working on this subject.

You might be able to change setbacks for Kamiak Butte and similar areas to one mile away from these “special spots” and not be subject to unreasonable taking lawsuits. However, that would likely only work for entities wishing to apply for a conditional use permit through the County and wanting to appease local residents. If someone applied through EFSEC or decide to challenge the setback in court, the State Supreme Court would likely not uphold such a restriction.

Ag Lands and Commercial Wind Energy Facilities:

Agriculture is under a **major** financial downturn currently. It was stated last week at an Ag West (formerly NW Farm Credit) meeting I attended by one of their vice president’s in the loan office that a

farmer would be doing very good if they break even this year and if conditions stay the same for the next two years, he didn't know who would still be farming. If preserving farms and local farmers is one of your goals, it looks to me like ANY income source which helps farmers stay in business is important. If my experience going through the ag downturn of the 90s is any reference point, these conditions can go on for longer than one or two years, and up to a decade.

Airports: Both the FAA and the Department of Defense review wind tower location, heights etc... and give approval or denial before the applicant comes to the County. If a resident has concerns and complains to either entity, their complaint may be considered on a case by case basis. An applicant must receive both the FAA and DOD approval for a tower before they can proceed. I note that 90 possible proposed wind turbine locations were submitted to both federal agencies before we even knew about the Harvest Hills project and Bill Myers brought the matter to the BoCC's attention. I looked up the issue and found the FAA considerations online and the Department of Defense decision where they prohibited certain towers in specific locations due to national defense considerations. The County doesn't have a role in those evaluations, that is the federal government's role.

I'll conclude with this thought. All data which substantiates a zoning regulation must balance the interests of both the landowner wishing to do something with their property and the interests of people affected by what the landowner wishes to do. If a regulation/limitation is put forward, it needs to have peer reviewed science backing it up and a justification which a court would view as reasonable. Property rights are complicated and what someone thinks is a property right, may not be.

E.G.---Just because you can see the big Love's truck stop gas station sign lit up a half a mile away from your house doesn't mean you have a health, safety or welfare condition or property right which a court would say allows a county to prohibit them from putting up the big sign.

I appreciate your efforts.

A handwritten signature in green ink that reads "Arthur D. Swannack". The signature is written in a cursive, flowing style.

Art Swannack

Whitman County Commissioner