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The Honorable Rebecca L. Miller
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Dear Prosecutor Miller:

You have asked for an Opinion of the Attorney General concerning subdivision and land development ordinances. This Opinion is being issued under West Virginia Code Section 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

Your letter seeks an opinion concerning "solar and wind farms being assembled in West Virginia." In particular, it seeks advice on what measures Hampshire County might implement to address their construction. Hampshire County does not have a zoning ordinance, though it does have a subdivision and land development ordinance. *See* HAMPSHIRE COUNTY, SUBDIVISION AND LAND DEVELOPMENT ORDINANCE (Jan. 2, 2009), https://tinyurl.com/4puvjcrs.

Thus, you have asked the following legal questions:

Is it permissible for the Hampshire County Commission to create a land development ordinance, separate from its subdivision ordinance, or is a land development ordinance simply a part of the subdivision ordinance?

If the Hampshire County Commission has the ability to create a land development ordinance, can the land development ordinance limit the assembly of solar and

wind farms within its county through zoning ordinances to ensure that our local ecosystems and most valuable resources within our county are protected?[1]

We conclude that West Virginia law does not contemplate a "land development ordinance" separate from a "subdivision ordinance." Rather, it contemplates a single ordinance titled a "subdivision and land development ordinance." And West Virginia law differentiates between that sort of ordinance—which regulates the specifics of how people build out and develop their property—and a zoning ordinance—which instead regulates a property's general use. Hampshire County Commission can't use its subdivision and land development ordinance to completely "limit" solar and wind farms, as that would constitute a zoning effort. But the Commission can use the subdivision and land development ordinance to regulate *how* these farms are constructed in several ways.

DISCUSSION

I. West Virginia law does not contemplate a "land development ordinance" as something separate from a "subdivision ordinance."

The Hampshire County Commission is "created by statute, and possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given." Syl. pt. 1, *State ex rel. State Line Sparkler of WV, Ltd. v. Teach*, 187 W. Va. 271, 418 S.E.2d 585 (1992). "[I]n the absence of express or implied authority" given by the relevant statutes, local land use regulations are "void." *Bittinger v. Corporation of Bolivar*, 183 W. Va. 310, 315, 395 S.E.2d 554, 559 (1990) (quoting *Matthews v. Bd. of Zoning Appeals of Green Cnty.*, 237 S.E.2d 128, 133 (Va. 1977)). Because the Hampshire County Commission can "do only such things as are authorized by law, and in the mode prescribed," *id.*, the answer to your questions must be rooted in the statutory text that gives the Commission its land-use regulation powers.

We start with the Code's land-use planning chapter, Chapter 8A, and specifically Article 4, titled "Subdivision and Land Development Ordinance." W. VA. CODE § 8A-4-1, *et seq.*

Article 4's text shows that the Legislature did not contemplate your suggested distinction between a "subdivision ordinance" and a "land development ordinance." The Code sees no separation. The setup for Article 4 comes in Article 1, where the Legislature, casting a broad land-use regulation vision, says that local governments may "[e]nact a subdivision and land development ordinance." W. VA. CODE § 8A-1-1. Article 4 repeats that option, with the first section saying that a county commission "may regulate subdivisions and land development" by "enacting a subdivision and land development ordinance." *Id.* § 8A-4-1(a). The next several statutory sections detail what a "subdivision and land development ordinance" looks like, with that quoted phrase appearing over 20 times. *Id.* §§ 8A-4-2 to 8A-4-7.

[1] Your letter also asked whether the County Commission could impose a moratorium on the construction of these farms. In later communications with our office, you confirmed that our July 21, 2023 opinion letter to Pendleton County addressing the same question obviated any further need for us to answer that question here.

Four textual clues within the phrase "subdivision and land development ordinance" show that it references a single ordinance.

First, it uses the singular "ordinance." If the Legislature were creating two sorts of ordinances, it likely would have used the plural "ordinances." *See, e.g.*, *State ex rel. Lorenzetti v. Sanders*, 235 W. Va. 353, 361, 774 S.E.2d 19, 27 (2015) (noting the Legislature's choice to use a singular object in construing a statute).

Second, the Legislature joined "subdivision" and "land development" with an "and." When the Legislature uses the conjunctive "and," it "makes both" words "necessary." *In re Z.S.-1*, 249 W. Va. 14, 893 S.E.2d 621, 630 (2023). As the D.C. Circuit described it in *In re Flyers Rights Education Fund, Inc.*, a statute using "and" instead of "or" is "a strong indication that" the drafter "did not intend the" the joined words to be "alternatives." 61 F.4th 166, 168 (D.C. Cir. 2023) (cleaned up)). This principle is a straightforward application of the "conjunctive/disjunctive canon," under which "*or* creates alternatives" while "*and* combines items." ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012). Applying that canon, when a statute lists two items that could theoretically be read as separate categories, but joins them with an "and," the interpretation should conceptually combine those two words. *Id.* at 118-19. So here, because the Legislature joined "subdivision" and "land development" using "and," the best reading is to treat those modifiers as a combined title for a single ordinance, not alternative titles for different ordinances.

Third, when a Legislature wants to clarify the relationship between modifiers and their subjects, it can repeat a crucial word or phrase to highlight the intended relationship. *Cf.* SCALIA, *supra*, at 148 (saying that in English the "typical way in which syntax would suggest no carryover modification is that a determiner (*a*, *the*, *some*, etc.) will be repeated before the second element"). Here, if the Legislature intended to create separate ordinances, the best clarification would have been to insert another ordinance directly after subdivision. So, the statute would read: "subdivision ordinance or land development ordinance." This wording would unambiguously create two ordinances, not one. That the Legislature didn't do that is powerful evidence to the contrary.

Fourth, subdivision and land development have significant conceptual overlap; they are two closely related kinds of land-use regulations. *See Subdivision*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A parcel of *land* in a larger *development*." (emphasis added)). So, it's not surprising that they would be treated in the same single ordinance.

Three other textual clues beyond the phrase "subdivision and land development ordinance" buttress this reading.

First, the articles used in the statute point to one, unified ordinance. Fifteen times in Article 4, the Legislature used the phrase, "*the* subdivision and land development ordinance." *See generally* W. VA. CODE § 8A-4-1, *et seq.* (emphasis added). Deploying the definite article "the" "particularizes the subject," showing that the Legislature is speaking about a "specific" "subject"—not many different ones. *Dale v. Painter*, 234 W. Va. 343, 351, 765 S.E.2d 232, 240 (2014) (citing cases). Thus, in *Dale*, the Supreme Court held that the word "the" signaled that the

Legislature was speaking about one particular law enforcement officer. *Id.* The Legislature's predominant use of "the" before the operative phrase throughout Article 4 signals the same: it's talking about one particular ordinance, not two. It's true that a handful of times the Legislature uses the indefinite article "a" to introduce the phrase—as in, "a subdivision and land development ordinance." But because the Legislature also used the conjunctive "and," authorities say the phrase should still be interpreted as applying to only one article. *See* SCALIA, *supra*, at 121-22 (saying the phrase "[a] husband and father must report annually" means "only someone who fits both descriptions must comply").

Second, what the Legislature didn't say is just as important as what it did. The Legislature knew well how to linguistically distinguish subdivision and land development with the tools we've mentioned above—it does it several times in Article 4 in other, non-ordinance contexts. In West Virginia Code Section 8A-4-2(a)(1), for example, the Legislature says a county commission "shall include" several provisions in its "subdivision and land development ordinance," among which is, "[a] minor subdivision or land development process, including criteria, requirements and a definition of minor subdivision." There, the Legislature used the disjunctive "or," and it explicitly talked about a minor subdivision as distinct from a land development. In that same section, the Legislature extended the compliance deadline for certain requirements related to "any subdivision or land development plan or plat." W. VA. CODE § 8A-4-2(c). The Legislature is again using the disjunctive "or," and it is offering multiple modifiers and subjects, creating four distinct possibilities: a subdivision plan, a subdivision plat, a land development plan, and a land development plat. The Legislature repeats these formulations elsewhere in the Chapter 8A. *See, e.g.*, W. VA. CODE §§ 8A-5-1 to 8A-5-2. In short, if the Legislature had wanted to allow county commissions to create subdivision ordinances or land development ordinances, it knew how to. That it chose not to is significant.

Third, reading the statute differently could defeat some of its text. West Virginia Code Section 8A-4-2(b)(5) says a "subdivision and land development ordinance *may* include," among other things, "[e]xemptions of certain types of land development from the subdivision and land development ordinance requirements." (emphasis added). If "subdivision" and "land development" ordinances could really be separate, this exemption makes no sense. A county commission could theoretically have "land development exemptions" from a "subdivision ordinance." But "[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 6, *Kanawha Cnty. Bd. of Educ. v. Hall*, 249 W. Va. 161, 895 S.E.2d 16 (2023). That the text provides a "land development exemptions" from a "subdivision and land development ordinance" is thus strong evidence that the Legislature contemplated only one sort of ordinance.

Given the clarity of the statute, we also do not see any reason to think that the power to create a separate land development ordinance is "necessarily implied in the full and proper exercise of the powers [the commission is] expressly given." *T. Weston, Inc. v. Mineral Cnty.*, 219 W. Va. 564, 569, 638 S.E.2d 167, 172 (2006). The Legislature contemplated that counties like yours would create a single ordinance.

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For these several reasons, West Virginia statutes do not empower a county commission to pass a "land development ordinance" distinct and separate from a "subdivision ordinance."

II. A county commission may not use a subdivision and land development ordinance to do the work of a zoning ordinance, but the commission can use it to regulate solar and wind farms in other ways.

The Hampshire County Commission cannot use its subdivision and land development ordinance to dictate property use—for example, to entirely prohibit wind and solar farms in certain places in Hampshire County. *See generally* Off. of the W. Va. Att'y Gen., Opinion Letter Concerning a Potential Windmill Moratorium in Pendleton County (July 21, 2023), https://tinyurl.com/2rc3r846 (saying that a total building moratorium is an exercise of the zoning power).

Our Supreme Court has long drawn a firm, bright line between various kinds of land-use ordinances. "Subdivision" and land development ordinances, it says, must "be distinguished from zoning ordinances." *Singer v. Davenport*, 164 W. Va. 665, 669, 264 S.E.2d 637, 640 (1980). These ordinances play fundamentally different land-use roles: zoning ordinances "provide an overall comprehensive plan for land use, while subdivision regulations govern the planning of new streets, standards for plotting new neighborhoods, and the protection of the community from financial loss due to poor development." *Id.* at 669, 264 S.E.2d at 640-41 (citing cases). So "zoning can prohibit certain uses of property for subdivision purposes, regulations are designed to govern the manner in which unrestricted property is developed." *Id.* at 669, 264 S.E.2d at 641. Put differently, zoning ordinances focus on the high-level question of *whether* solar or wind farms can be built on a property, while subdivision ordinances focus on the nitty gritty questions of *how* that build out happens. Our Supreme Court has consistently recognized this distinction. *See, e.g.*, *Fairlawns Homes, Inc. v. City of Morgantown*, 155 W. Va. 172, 176, 182 S.E.2d 48, 51 (1971) (contrasting a "subdivision ordinance" and "zoning ordinance"); *Largent v. Zoning Bd. of Appeals for Paw Paw*, 222 W. Va. 789, 796, 671 S.E.2d 794, 801 (2008) (noting absurdity of a municipality being able to exercise its "powers respecting subdivision control" but not its "zoning" powers).

This line between ordinances that govern a property's ultimate purpose and those that govern the innumerable build-out details appear throughout West Virginia's land-use jurisprudence. For example, our Supreme Court has contrasted "building regulations" with zoning ordinances in similar terms: while it's "perhaps confusing" to have several different sorts of land-use ordinances, zoning, building, and subdivision and land development ordinances all ultimately "involve the use of a certain area of the community. The distinguishing factor between the two types of permits"—zoning and the others—is that the latter two ordinances "involve[] how that use is undertaken, while a zoning [ordinance] concerns whether a certain area may be used for a particular purpose." *Harrison v. Town of Eleanor*, 191 W. Va. 611, 617, 447 S.E.2d 546, 552 (1994) (quoting *Bittinger*, 183 W. Va. at 314, 395 S.E.2d at 558); *see also* syl. pt. 1, *Kaufman v. Plan. & Zoning Comm'n*, 171 W. Va. 174, 298 S.E.2d 148 (1982) ("Zoning is concerned with whether a certain area of a community may be used for a particular purpose."). So in *Bittinger*, for example, the Court held that the ordinance in question was a building ordinance when it "relate[d] to how the use of a certain area is undertaken and the quality and quantity of the buildings in question," such as "requir[ing] documentation of road access, traffic generation, traffic flow,

and public services." 183 W. Va. at 314, 395 S.E.2d at 558. In short, our Supreme Court has consistently juxtaposed general-purpose zoning ordinances with the sorts of ordinances that focus on the specific, granular ways people build out their property. Syl. pt. 6, *Harrison*, 191 W. Va. 611, 447 S.E.2d 546.

All this means that courts don't let county commissions blur the lines between types of land-use ordinances—these ordinances aren't interchangeable. *See generally Ashbaugh v. Corp. of Bolivar*, 223 W. Va. 741, 679 S.E.2d 573 (2009); *McClure v. City of Hurricane*, 227 W. Va. 482, 711 S.E.2d 552 (2010). Courts aren't shy to declare a land-use act void when a county commission acts outside its statutory lane. *Bittinger*, 183 W. Va. at 315, 395 S.E.2d at 559. If the Hampshire County Commission wants to completely "limit" wind and solar farms in various parts of the county, it must do so through a zoning ordinance, not a subdivision and land development ordinance. *Harrison*, 191 W. Va. at 618, 447 S.E.2d at 553 (holding that the ordinance was not a zoning ordinance because it didn't "address[] whether the Appellee's property could be used for a particular purpose, such as an apartment complex").

The Hampshire County Commission may, however, use its subdivision and land development ordinance to regulate the buildout, construction, and maintenance of solar and wind farm builds, as explained in West Virginia Code Section 8A-4-2. For example, it can create a "land development process" that wind and solar farm owners must comply with. *Id.* § 8A-4-2(a)(1), (3). It may set "standards for setback requirements, lot sizes, streets, sidewalks, walkways, parking, easements, rights-of-way, drainage, utilities, infrastructure, curbs, gutters, street lights, fire hydrants, storm water management and water and wastewater facilities." *Id.* § 8A-4-2(a)(5). It may create standards for wind and solar farms seeking to build in "flood-prone or subsidence areas." *Id.* § 8A-4-2(a)(6). And it may charge various fees to process these applications. *Id.* § 8A-4-2(a)(12). Along with these and other general provisions, the Legislature also said these ordinances can include "[g]uidelines" specific to "renewable energy systems."[2] *Id.* § 8A-4-2(b)(3). And it may include "[a]ny other provisions consistent with the comprehensive plan" that it considers "necessary." *Id.* § 8A-4-2(b)(6).

In short, so long as the Hampshire County Commission respects the boundaries between subdivision and land development and zoning ordinances, the Legislature has given it many ways to regulate the "assembly of solar and wind farms within its county … to ensure that [its] local ecosystems and most valuable resources … are protected."

[2] The Code does not define "renewable energy systems"—neither in this section nor anywhere else. But one authority reads this provision to "encourage renewable energy system installations." Robert J. Denicola, *Harnessing the Power of the Ground Beneath Our Feet: Encouraging Greater Installation of Geothermal Heat Pumps in the Northeast United States*, 38 COLUM. J. ENV'T L. 115, 160 (2013).

Sincerely,

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