



State of West Virginia  
Office of the Attorney General

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Honorable April D. Mallow  
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Dear Prosecutor Mallow:

You have asked for an Opinion of the Attorney General concerning the proper procedures for the County Commission to follow when enacting a zoning moratorium. This Opinion is being issued under West Virginia Code § 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 explains that Pendleton County may consider imposing a moratorium on the building of industrial wind turbines in the County. Pendleton County wants to follow the proper procedures, but it does not presently have a county planning or zoning office.

You have asked the following legal question:

*Pursuant to the West Virginia Open Governmental Proceedings Act and state zoning laws, what would be the proper procedure for the County Commission to follow should they consider adopting a moratorium on the building of industrial wind turbines in Pendleton County?*

We conclude that a county wanting to adopt a moratorium must follow the procedure for enacting a zoning ordinance under West Virginia Code § 8A-7-5. While Pendleton County has discretion whether or not to pursue a moratorium, the Legislature has set out the procedure if it chooses to do so. That statutory process requires Pendleton County to adopt a comprehensive plan, develop a zoning ordinance, and enact a zoning ordinance.

## DISCUSSION

Although West Virginia does not have a statute expressly enabling municipalities to adopt moratoriums, Chapter 8A of the West Virginia Code—the state zoning law—empowers municipalities to adopt zoning ordinances. W. VA. CODE § 8A-7-1; *see also id.* § 8-24-1 (repealed 2004). Using this authority, municipalities may adopt moratoriums. *See Bittinger v. Corp. of Bolivar*, 183 W. Va. 310, 395 S.E.2d 554 (1990) (striking down moratorium where “town council [did not] follow the [zoning] procedures set”); *accord Sagamore Park v. City of Indianapolis*, 885 F. Supp. 1146, 1150 (S.D. Ind. 1994) (holding that a building moratorium “is an act of zoning”); *N.J. Shore Builders Ass’n v. Ocean Twp.*, 319 A.2d 255, 256 (N.J. App. Div. 1974) (treating interim zone measures and moratoriums as the same); *see also Sara C. Bronin & Dwight H. Merriam, In Absence of Specific Statutory Authority, in 1 Rathkopf’s The Law of Zoning and Planning* § 13:10 (4th ed. 2023) (noting that most States have found authority to issue moratoriums within the general police power of zoning); *but see, e.g., Naylor v. Twp. of Hellam*, 773 A.2d 770, 775 (Pa. 2001) (finding that the power to impose a moratorium was not an incidental power of a municipality’s ability to zone).

And municipalities may adopt moratoriums as either zoning or building ordinances. A zoning ordinance is “concerned with whether a certain area of a community may be used for a particular purpose,” *syl. pt. 1, Kaufman v. Plan. & Zoning Comm’n*, 171 W. Va. 174, 298 S.E.2d 148 (1982), while a building ordinance “involves how the use of any given piece of property is undertaken,” *Harrison v. Town of Eleanor*, 191 W. Va. 611, 618, 447 S.E.2d 546, 553 (1994). Pendleton County’s proposed moratorium would fall under a zoning ordinance because prohibiting the construction of windmills concerns how property may be used for a particular purpose; not how that use is undertaken. *See id.* (finding setback requirement of at least twenty feet for apartment complexes was a building ordinance); *Bittinger*, 183 W. Va. at 314, 395 S.E.2d at 558 (holding a moratorium on the issuance of all building permits was a building ordinance). So Pendleton County needs to pass a zoning ordinance to enact a moratorium.

We recognize that Pendleton County does not presently have any county zoning laws. So lacking an ordinance that requires a landowner to obtain a permit or the like, a person could currently build an industrial wind turbine in the County. Pendleton County’s situation is thus different from the usual moratorium, in that it would not require the County to suspend any existing requirements.

The Supreme Court of Appeals has not squarely addressed how municipalities should impose moratoriums when existing ordinances aren’t already in place, but the Court’s description of zoning laws’ purposes supports the view that moratoriums must follow zoning procedures. “The purpose of zoning is to provide an overall comprehensive plan for land use.” *Singer v. Davenport*, 164 W. Va. 665, 669, 264 S.E.2d 637, 640 (1980). Zoning procedures, after all, ensure that the community is aware of the limited uses for land. And that aim would embrace moratoriums, which prevent certain activity.

Similarly, other States have treated moratoriums as an extension of zoning laws even when zoning laws and procedures are not already in place in a locality. *See, e.g., Tuscola Wind III, LLC*

*v. Ellington Twp.*, No. 17-CV-11025, 2018 WL 1291161 (E.D. Mich. Mar. 13, 2018) (holding that zoning moratorium must comply with the State’s zoning enabling act); *B & L Dev. Corp. v. Town of Greenfield*, 146 Misc. 2d 638, 640, 551 N.Y.S.2d 734, 736 (Sup. Ct. 1990) (same). As one court put it, a moratorium “is functionally similar to a zoning ordinance” even when a municipality “has no zoning plan in place yet.” *Ecogen, LLC v. Town of Italy*, 438 F. Supp. 2d 149, 158 n.5 (W.D.N.Y. 2006). A “moratorium ordinance ha[s] the effect of making the unzoned areas of the County subject to zoning restrictions.” *Vulcan Materials Co. v. Iredell Cnty.*, 407 S.E.2d 283, 286 (N.C. Ct. App. 1991).

Because a municipality likely derives its moratorium authority from its power to adopt zoning ordinances, a municipality adopting a moratorium must also comply with the procedures to enact zoning ordinances set out in West Virginia Code § 8A-7-1. If a county fails to do so, then the moratorium will likely be found invalid. *See Bittinger*, 183 W. Va. at 315, 395 S.E.2d at 559 (“[T]o suspend operation of an ordinance, the ordinance must be repealed or succeeded by another ordinance or an instrument of equal dignity.”); *State ex rel. Brown v. Corp. of Bolivar*, 209 W. Va. 138, 544 S.E.2d 65 (2000) (per curiam) (same); *Hukle v. City of Huntington*, 134 W. Va. 249, 255, 58 S.E.2d 780, 784 (1950) (“It is a general rule that the ordinance of a municipal corporation may not be repealed by mere motion or resolution.”).

Here again, other courts agree. “The weight of authority sustains the right of local governments to adopt interim zoning ordinances [like moratoriums], *provided* the procedural requirements of zoning enabling statutes are strictly followed.” *Sprint Spectrum L.P. v. Jefferson Cnty.*, 968 F. Supp. 1457, 1465 (N.D. Ala. 1997) (emphasis in original); *see also, e.g., City of Sanibel v. Buntrock*, 409 So. 2d 1073, 1075 (Fla. Dist. Ct. App. 1981) (“[I]t is not too much to ask that a municipality follow the same [zoning] procedures with respect to notice and hearing before it puts such a moratorium into effect.”).

Thus, to adopt a moratorium on the building of industrial wind turbines, Pendleton County needs to pass a valid ordinance by adopting a comprehensive plan, working with the planning commission and the public to develop that ordinance, and enacting the ordinance. W. VA. CODE § 8A-7-1(a). We address each of these obligations in turn.

*First*, Pendleton County needs to adopt a comprehensive plan. W. VA. CODE § 8A-7-4(a)(1); *see also id.* § 8A-3-1. A comprehensive plan is a “plan for physical development, including land use, adopted by a governing body, setting forth guidelines, goals and objectives for all activities that affect growth and development in the governing body’s jurisdiction.” *Id.* § 8A-1-2(c). “While a comprehensive plan itself is not the binding zoning law,” *City of Morgantown v. Calvary Baptist Church*, 243 W.Va. 578, 590, 849 S.E.2d 150, 162 (2020), it “is a guide to a community’s goals and objectives and a way to meet those goals and objectives,” W. VA. CODE § 8A-1-1(a)(5); *Largent v. Zoning Bd. of Appeals for Town of Paw Paw*, 222 W. Va. 789, 790, 671 S.E.2d 794, 795 (2008). So a comprehensive plan “lay[s] the groundwork for the future enactment of zoning laws.” *Singer*, 164 W.Va. at 668, 264 S.E.2d at 640. And Pendleton County “may not enact a valid zoning ordinance without ... adopting a comprehensive plan. *Largent*, 224 W. Va. at 793, 671 S.E.2d at 798.

West Virginia Code § 8A-3-4 contains the mandatory components of a comprehensive plan. The plan must include “[a] statement of goals and objectives for the governing body,” “[a] timeline on how to meet short and long-range goals and objectives,” “an action plan,” and more. W. VA. CODE § 8A-3-4(b)(1)-(7). West Virginia Code § 8A-3-5 sets forth optional components of such a plan, including “[a]n analysis of the history of the area,” environmental factors, “programs to promote tourism,” “conservation,” “safety programs,” and “natural resources use.” So, the County Commission’s comprehensive plan should describe (among other things) the specifics around the proposed moratorium and the County’s reasons for it, as well as how the moratorium will affect the community.

*Second*, the Pendleton County Commission, “with the applicable planning commission,” must then prepare a study of the land within its jurisdiction and create a report on zoning. W. VA. CODE § 8A-7-4(a). “No zoning ordinance may be enacted without a study and report.” *Id.* § 8A-7-4(c). Under West Virginia Code § 8A-7-4, the study may include:

- (1) Evaluating the existing conditions, the character of the buildings, the most desirable use for the land and the conservation of property values in relation to the adopted comprehensive plan; and
- (2) Holding public hearings and meetings with notice to receive public input.

The planning commission must then prepare a report on zoning using the study and the comprehensive plan that includes “the proposed zoning ordinance, with explanatory maps showing the recommended boundaries of each district, and the rules, regulations and restrictions for each district.” *Id.* § 8A-7-4(b).

Right now, Pendleton County does not have a planning commission. But the Supreme Court of Appeals—in dealing with a zoning ordinance from Pendleton County—has clarified that a planning commission is not mandatory, but is something “a governing body should have.” *Pancakes, Biscuits & More, LLC v. Pendleton Cnty. Comm’n*, No. 14-1263, 2015 WL 6143370, at \*4 (W. Va. Oct. 16, 2015) (citing West Virginia Code § 8A-1-1(b)(2)). Given this permissive language, Pendleton County need not create a planning commission to prepare the study and report. But a study and report must be completed, no matter who does it.

*Third*, and finally, Pendleton County needs to enact the zoning ordinance by following the proper procedures of West Virginia Code § 8A-7-5, which provides for public input. The County Commission must hold “at least two public hearings and give public notice”—one during the day and the other in the evening. W. VA. CODE § 8A-7-5(a). Subsection (b) requires the County to publish notice in a local newspaper for “at least fourteen consecutive days prior to the public hearing.” *Id.* § 8A-7-5(b). And the notice must include the specifics of the hearing, as well as a “brief summary of the principal provisions of the proposed zoning ordinance.” *Id.* Subsection (c) requires the County to make available copies of the proposed ordinance to the public before the meeting. *Id.* § 8A-7-5(c). Finally, any substantial amendments following the public hearings require additional public hearing before voting on the zoning ordinance. *Id.* § 8A-7-5(d).

The County should be comfortable complying with these notice requirements having complied with similar ones before. Again, *Pancakes* is instructive. The Supreme Court of Appeals noted that Pendleton County provided “adequate notice” by reading the ordinance “in its entirety at two separate public meetings.” *Pancakes*, 2015 WL 6143370, at \*4. Although the County Commission in *Pancakes* passed its ordinance under a different statute—and therefore its notice requirements were less onerous—the County Commission already has a good baseline for following the requirements of Section 8A-7-5.

After complying with these rules, the governing body may enact the zoning ordinance—or it “may hold an election” to approve the zoning ordinance. W. VA. CODE § 8A-7-5(e). Some factors the County must consider when enacting the zoning ordinance include “[p]romoting [the] general public welfare, health, safety, comfort and morals”; “[e]nsuring attractiveness and convenience is promoted”; and “[l]essening congestion.” *Id.* § 8A-7-2(a). The zoning ordinance may also include “[r]egulating the use of land and designating or prohibiting specific land use.” *Id.* § 8A-7-2(b)(1). Finally, the zoning ordinance shall: 1. “[c]reate a board of zoning appeals”; 2. “[s]pecify certification requirements for zoning district maps that are consistent with the governing body’s comprehensive plan”; 3. “[a]dopt procedures and requirements for nonconforming land uses”; 4. “[a]dopt procedures and requirements for variances”; and 5. “[a]dopt procedures and requirements for conditional use permits.” *Id.* § 8A-7-2(c). Pendleton County would then have a valid moratorium on the building of industrial wind turbines in the County.

Your letter also asks about any applicable procedures under the West Virginia Open Governmental Proceedings Act, W. VA. CODE § 6-9A-1. Although the Commission needs to comply with the Act in issuing its moratorium, the Act does not impose any additional requirements beyond what the Commission already follows with its twice-a-month meetings. The meetings must be open to the public, and the Commission must “promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media.” *Id.* § 6-9A-3(d). Regularly scheduled meetings require notice three business days before the meeting, while special meetings just need two business days. Notice and Agenda of *The Open Governmental Meetings Act*, W. VA. ETHICS COMM’N, <https://rb.gy/axqqr> (last visited July 18, 2023). And at those meetings, the governing body needs to prepare minutes with the “date, time, and place of the meeting,” the “name of each member of the governing body present and absent,” “[a]ll motions, proposals,” and the “results of all votes.” W. VA. CODE § 6-9A-5. So the Commission should be familiar with these requirements. It will not have to do more beyond the requirements that the zoning procedures impose.

\* \* \* \*

The general police power authority delegated by a zoning enabling statute gives Pendleton County the power to choose for itself—or not—whether enacting a moratorium is in the County’s best interests. If it decides to move forward, though, it must follow the zoning ordinance procedure, or it risks a court striking down the moratorium.

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Finally, our opinion analyzes only the requirements for enacting a moratorium under West Virginia state zoning law or the West Virginia Open Governmental Proceedings Act. We have not sought to identify all the ways a moratorium might be challenged under other state and federal laws. *See, e.g.,* Matthew G. St. Amand & Dwight H. Merriam, *Defensible Moratoria: The Law Before and After the Tahoe-Sierra Decision*, 43 NAT. RES. J. 703 (2003) (describing considerations in developing a legally defensible development moratorium).

Sincerely,



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