



Plus Power, LLC
1780 Hughes Landing Blvd, Suite 675
The Woodlands, Texas 77380
P: 832-585-1238
pluspower.com

August 10, 2023

Jefferson County Planning Commission
202 W Main St
Dandridge, Tennessee 37725

To the County Planning Commissioners of Jefferson County:

On August 22, 2023, the Jefferson County Planning Commission (“County Planning Commission”) will consider a site plan application for a battery energy storage system (“BESS”) which was submitted by Plus Power, LLC (“Applicant”) on July 11, 2023 (the “Submission”). Applicant has been working with the County Planning Commission and other local officials in and around Jefferson County to permit a BESS project that will provide reliable electric energy for the Jefferson County and Eastern Tennessee, be an important source of revenue for Jefferson County and also be a good neighbor to all residents of Jefferson County.

The occurrence of certain recent events at the county government level has raised concerns regarding the standard of review that the County Planning Commissioning will apply to the Submission. It is Applicant’s position that the standard of review that the County Planning Commission must follow be based upon Section 6.6 of the Zoning Resolution of Jefferson County, Tennessee (contains amendments through April 2021) (the “Zoning Resolution”), which contains the site plan requirements currently in effect within Jefferson County, Tennessee.

As described in further detail below, there are several reasons which support Applicant’s position, but most importantly is the fact that the Modified Amendment suffers from legal and procedural defects which would render it *void ab initio*. As a result, the County Planning Commission must not consider any such proposed changes to the Zoning Amendment in its review of the Submission. Further and in the alternative, even if the Modified Amendment were properly passed, Public Chapter 453, which is applicable to the Submission, requires the County Planning Commission to consider the Submission based upon the *law in effect at the time of filing*. In this case, because the amendment to the Zoning Resolution occurred after July 11, 2023, the County Planning Commission cannot consider such amendment in its decision. Finally, Applicant also notes that the recent moratorium on BESS development is similarly void and inapplicable as it too suffers from procedural and legal defects.

We look forward to working together with the County Planning Commission to make the Dumplin Valley Energy Storage Project a reality and bring the benefits of an advanced BESS project to Jefferson County. Enclosed for your reference is a summary of the law applicable to the County Planning Commission’s review of the Submission. We welcome the opportunity to discuss with you further.

Sincerely,

Plus Power

DUPLIN VALLEY STORAGE – SUMMARY OF LEGAL POSITION

BACKGROUND AND TIMELINE

On December 7, 2022, Applicant received a determination by the Jefferson County Board of Zoning Appeals (the “BZA”), pursuant to Section 9.3 of the Zoning Resolution, that BESS are a permitted use in the A-1 District. Following the BZA’s determination, Jefferson County officials prepared a proposed amendment to the Zoning Resolution to specify additional conditions for any BESS in Jefferson County. This proposed amendment, designated Resolution 2023-16 (the “Original Amendment”), was reviewed and approved as follows:

February 28, 2023: Approval by the Jefferson County Planning Commission
March 27, 2023: Approval by the Jefferson City Regional Planning Commission
April 11, 2023: Approval by the Dandridge Regional Planning Commission, *and*
April 18, 2023: Approval by the White Pine Regional Planning Commission.

On July 10, 2023, a working session was held by the County Commission on the Original Amendment. On July 11, 2023, the Applicant submitted the site plan application and requested to be on the Jefferson County Planning Commission’s August agenda for site plan approval. On July 17, 2023, the Jefferson County Commission (the “County Commission”) held a public hearing to consider approving or denying the proposed Original Amendment to the Zoning Resolution. At that hearing, the County Commission took the following actions in the order provided below:

1. Adopted a motion to schedule a public hearing to consider a six-month moratorium on the issuance of any new permits for BESS facilities;
2. Modified the Original Amendment to add a five-mile setback between any BESS facility and “any school”;
 - (1) Modified the Original Amendment to require the installation of fire hydrants;
 - (2) Modified the Original Amendment to add a severability clause (together, the “Modified Amendment”); *and*
 - (3) Adopted the Modified Amendment.

DISCUSSION

As described in more detail below, the County Planning Commission should consider the Applicant’s Submission according to the Zoning Resolution in effect, without regard to the Original Amendment or the Modified Amendment.

Due to procedural defects in the County Commission’s adoption, the Modified Amendment is void ab initio under Tennessee law.

a) Background - As noted above, on July 17, 2023, the County Commission adopted the Modified Amendment. Despite the Modified Amendment’s substantial changes, for the reasons described below, this Modified Amendment should be considered void *ab initio* because the County Commission failed to submit the Modified Amendment to the Regional Planning Commissions or provide proper public notice.

b) Tennessee Law

According to Tennessee state law, a County Commission is the only body with statutory power to amend a Zoning Resolution. *Tenn. Code Ann § 13-7-105(a)*. In addition, the County Commission cannot consider a proposed amendment to the Zoning Resolution unless the proposed amendment is first submitted to the County Planning Commission and the Regional Planning Commissions (collectively, the “Planning Commissions”). *Id.*¹ The Planning Commissions can then either approve, disapprove, or make suggestions. *Id.* After the Planning Commissions consider the proposed amendment, the amendment may then be submitted to the County Commission for consideration. *Id.* If a zoning amendment is not reviewed by the Planning Commissions prior to its consideration by the County Commission, the adoption of the zoning amendment by the County Commission is void *ab initio*. *Edwards v. Allen*, 216 S.W.3d 278, 293 (2007).

Once a proposed amendment to the Zoning Resolution has been considered by the Planning Commissions, it can be revised by the County Commission without resubmitting the proposed amendment to the Planning Commissions *so long as the revision is not substantial*. If the revision to the proposed amendment to the Zoning Resolution is substantial, it must be resubmitted to the Planning Commissions before it can be adopted by the County Commission. *Edwards v. Allen*, 216 S.W.3d at 287-288. In determining whether a zoning amendment is substantial, the courts have considered whether it is revised so substantially to create a strong possibility that the Regional Planning Commissions’ recommendations would have been affected or would produce no detrimental effects to those who would oppose it. *Id.* An affirmative answer to either question mandates resubmission. *Westland West Community Ass’n v. Knox County*, 948 S.W.2d 281, 281-83 (Tenn.1997).

In this case, the Modified Amendment added a five-mile setback for BESS from any schools. The effect of that revision would prohibit the location of BESS facilities in the County since BESS facilities must be located next to a substation and, as noted below, all existing substations in Jefferson County are located within five miles of a school.

Figure 1 shows Jefferson County’s boundary, the red pins represent the substations in Jefferson County, the yellow pins represent schools within Jefferson County, and the green circles have a five-mile radius from each of the yellow pins. As shown by Figure 1, there is no property in the County that is both next to a substation and not located within five miles of a school.

¹ Where there are multiple regional planning commissions in the county, then each must approve an amendment with county-wide application. *See* Tenn. Op. Atty. Gen. No. 99-150, 1999 WL 728594.

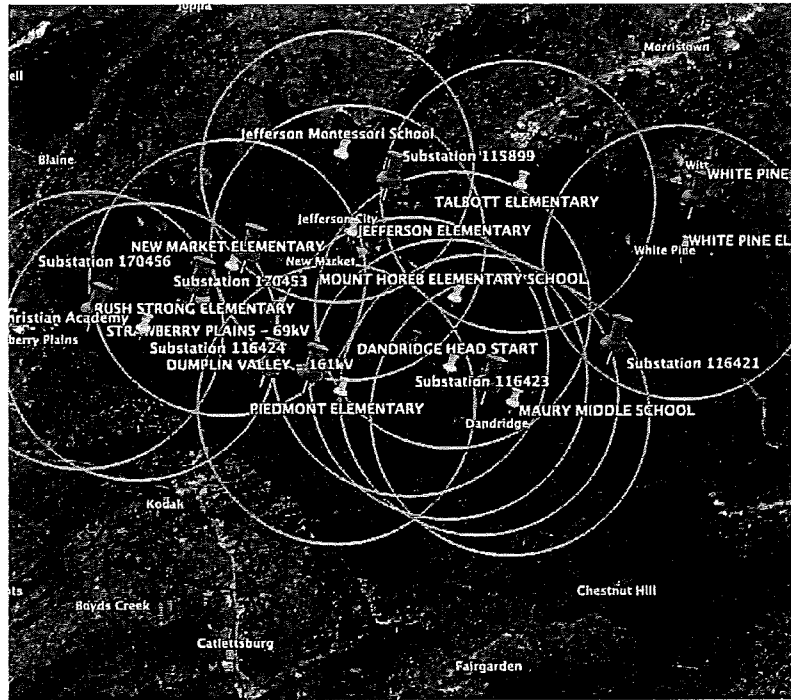


Figure 1. Substations (red pins) and schools (yellow pins) in Jefferson County with a 5mi radius circles

The Original Amendment would not have excluded BESS facilities from the County whereas the Modified Amendment amounts to a complete prohibition of BESS. The drastically altered outcome creates a strong possibility that the Regional Planning Commissions' recommendations would have been affected. This effective prohibition clearly produces detrimental effects on the Applicants and others who may propose BESS facilities in Jefferson County.

Because this effective prohibition of BESS facilities in the County was never considered by the Planning Commissions, the revision to the Original Amendment to add the five-mile setback from schools was required to be resubmitted to each Planning Commission prior to the adoption of the Modified Amendment by the County Commission.

Newly enacted Public Chapter 453 requires the Planning Commission to judge the merits of the Applicant's site plan application on the law in effect at the time of application.

Pursuant to Public Chapter 453, the Applicant expected its site plan application submitted July 11, 2023 to be judged based on the law in effect at the time of filing. The law in effect on July 11, 2023, was the Zoning Resolution. Therefore, the Planning Commission must judge the Applicant's site plan application on the Zoning Resolution. In addition, as a result, the provisions of the Modified Amendment do not apply to the Applicant's site plan application. The Applicant decided to voluntarily comply with the Original Amendment provisions, as stated by the Applicant during the working session held by the County Commission on July 10, 2023.

The proposed six-month moratorium on the issuance of permits for any new BESS facilities in the County is similarly void for lack of consideration by the Planning Commissions and legally defective public notice.

In *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466 (Tenn.2004), the Tennessee Supreme Court considered whether a moratorium on the issuance of demolition permits was required to be adopted in compliance with the requirements for the adoption of zoning regulations. The court found that since the moratorium on the issuance of demolition permits substantially affected the country club's use of its property, the moratorium had to be adopted in compliance requirements for the adoption of zoning regulations. *Id.* at 47.

In the case of the proposed moratorium on any new BESS facilities in the County, the moratorium will prevent the Applicant from using its property or other property in the County for a BESS facility, which obviously substantially affects the Applicant's use of its property. Therefore, Tenn. Code Ann § 13-7-105(a) would *require* that the proposed moratorium be reviewed by the Planning Commissions prior to its adoption by the County Commission. This resubmission was not done here.

Tenn. Code Ann § 13-7-105(b) also provides that prior to adopting an amendment to the Zoning Resolution, the County Commission must hold a public hearing on the amendment and provide at least fifteen (15) days' advance notice of the time and place of the public hearing in at least one (1) publication in a newspaper of general circulation in the county. If the zoning amendment does not substantially comply with the requirements of Tenn. Code Ann § 13-7-105(b), the zoning amendment is void. *Hutcherson v. Criner*, 11 S.W.3d 126 (Tenn.Ct.App.1999); *Town of Surgoinsville v. Sandidge*, 866 S.W.2d 553 (Tenn.Ct.App.1993). Therefore, Tenn. Code Ann § 13-7-105(b) would require that the public notice be published in a newspaper of general circulation in the County at least fifteen (15) days prior to the public hearing conducted by the County Commission on the proposed moratorium, and the County Commission must conduct the public hearing prior to the adoption of the resolution imposing the moratorium.

In this instance, the moratorium was first mentioned and a motion was approved to hold a public hearing at a meeting on July 17, 2023. A public hearing on the moratorium and an immediate vote purporting to enact the moratorium by the County Commission thereafter was held on July 27, 2023, only ten days after the moratorium was first publicly suggested. There was no chance for the required 15-day public notice to have taken place since the earliest the notice could have been placed in the newspaper was on July 18, 2023, only 9 days before the public hearing and vote. Clearly, this moratorium is void for failure to comply with the requirements of the law relating to public notice of an Amendment to the Zoning Ordinance.