

**SHOW-ME THE SUN: HOW MISSOURI CAN SUPPORT ITS  
COMMITMENT TO RENEWABLE SOURCES OF ENERGY  
THROUGH PREEMPTION OF LOCAL ZONING ORDINANCES**

INTRODUCTION

IKEA is the world’s largest furniture retailer with more than 300 stores in 41 countries.<sup>1</sup> IKEA’s products are notoriously complex to assemble, but purchasers keep flocking.<sup>2</sup> Among the rows of bedroom sets and shelves of modern-looking table lamps, the store’s British customers will soon find solar panels.<sup>3</sup> That a home-furnishings store sells solar panels is a testament to the progress made in residential-scale renewable energy generation technology.<sup>4</sup> But what if IKEA were to sell the product in the United States? Customers might find the hoops through which they must jump to simply receive approval to install the panels to be as difficult, if not more, than assembling one of the brand’s infamously complicated pieces of furniture.

Home improvement projects are the American Dream perfecting itself. The progression of what is possible, from indoor plumbing, to gas-powered lights, to electricity, to air conditioning, has now reached residential-scale renewable energy generation systems. American home-improvement enthusiasts would no doubt clean out IKEA’s solar panel stock in a heartbeat.<sup>5</sup> But as with any advance in technology, the law takes quite a while to catch up.<sup>6</sup>

---

1. Walter Loeb, *IKEA Is a World-Wide Wonder*, FORBES (Dec. 5, 2012), <http://www.forbes.com/sites/walterloeb/2012/12/05/ikea-is-a-world-wide-wonder/>.

2. See Alexandra Petri, *Some Assembly Required—The Lies of IKEA and Beyond*, WASH. POST (Aug. 16, 2013, 9:06 AM), <http://www.washingtonpost.com/blogs/compost/wp/2013/08/16/some-assembly-required-the-lies-of-ikea-and-beyond/>; see also Natt Garun, *IKEA Furniture Assembly VLOG Proves Its Instructions Are Totally Indecipherable*, DIGITAL TRENDS (Feb. 22, 2012), <http://www.digitaltrends.com/lifestyle/ikea-furniture-assembly-vlog-prove-its-instructions-are-totally-indecipherable/>.

3. Tiffany Hsu, *Ikea to Sell Solar Panels in British Stores, But U.S. Must Wait*, L.A. TIMES (Oct. 4, 2013), <http://articles3.latimes.com/2013/oct/04/business/la-fi-mo-ikea-solar-panels-20131003>.

4. Throughout this Comment I will be referring to residential-scale solar energy generation systems as “distributed generation.” This term covers all systems where electricity and thermal energy are generated at or near the site where the energy is used. Frederick R. Fucci, *Distributed Generation*, in THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES 345, 345 (Michael B. Gerrard, ed., 2011).

5. One annual national survey has shown that for the past five years, nine out of ten Americans have supported greater reliance on solar energy resources. The most recent poll, from 2013, shows that eighty-five percent of voters favor solar energy over all other forms of energy.

In this Comment, I argue that the state of Missouri, in seeking to achieve its goal of increased reliance on renewable sources of energy, would be best served by strong state-level control over land use regulation affecting residential-scale renewable energy systems. First, I give a brief overview of how energy is generated and regulated. I then explain land use regulation, highlighting how municipalities can influence the installation of distributed generation systems. Next, I describe a recent decision from the Missouri Court of Appeals for the Western District that illustrates the power struggle between installers of residential systems and hesitant local governments. I analyze that ruling for the confusion it causes regarding what regulations a local government may place on distributed generation. To close, I suggest that the state should clarify land use regulation by preempting municipal ordinances with a statewide standard.

## I. BACKGROUND

### A. *Generation and Regulation of Electricity*

I have typed this Comment on a computer powered by electricity, and if you are not reading it on a computer screen, you are at least sitting under a lamp with a machine-printed copy in your hand. The electricity generated to power these processes could have either been generated using renewable or non-renewable fuel sources. Additionally, it could have been generated either hundreds of miles away or in your very own backyard. Each of these attributes of electricity generation, and additionally how the industry is regulated, are examined in turn.

Electricity is generated using either renewable or non-renewable sources. Fuel sources such as coal, petroleum, and natural gas are referred to as “non-renewable.”<sup>7</sup> These non-renewable sources currently provide the bulk of the nation’s power at 82% of total energy consumed.<sup>8</sup> However, non-renewables’ dominance is waning. Renewable sources of energy made up more than half of all added generation capacity worldwide within the last year.<sup>9</sup> Moreover, the

---

*National Solar Survey*, SOLAR ENERGY INDUS. ASSOC., <http://www.seia.org/research-resources/national-solar-survey> (last visited Feb. 4, 2014).

6. See Hannah Wiseman, Lindsay Grisamer & E. Nichole Saunders, *Formulating a Law of Sustainable Energy: The Renewables Component*, 28 PACE ENVTL. L. REV. 827, 827 (2011) (examining the pace of legislative responses to technological advances).

7. Federal Energy Management and Planning Programs Definitions, 10 C.F.R. § 436.101 (2014).

8. U.S. ENERGY INFO. ADMIN., ANN. ENERGY REV. 2011, at 37 tbl.2 (2012), available at [http://www.eia.gov/totalenergy/data/monthly/pdf/flow/primary\\_energy.pdf](http://www.eia.gov/totalenergy/data/monthly/pdf/flow/primary_energy.pdf).

9. REN21, RENEWABLES 2013 GLOBAL STATUS REPORT 13 (2013), available at [http://www.ren21.net/Portals/0/documents/Resources/GSR/2013/GSR2013\\_lowres.pdf](http://www.ren21.net/Portals/0/documents/Resources/GSR/2013/GSR2013_lowres.pdf). More added capacity is on its way. In fact, Ameren Missouri, one of the state’s largest energy suppliers,

U.S. Energy Information Administration predicts that generation from renewable resources will increase by 77% between 2010 and 2035.<sup>10</sup> These resources include solar radiation, wind, and hydropower.<sup>11</sup>

The nation's 6000<sup>12</sup> power plants feed into regional grids composed of 160,000 miles of high-voltage transmission lines.<sup>13</sup> This massive electricity infrastructure has developed entirely within the past 140 years.<sup>14</sup> The industry is regulated by the state and federal governments because of two characteristics in particular: it provides essential services and has the tendency to form a natural monopoly.<sup>15</sup> To explain, because electricity companies provide what is considered an essential service,<sup>16</sup> and do so best when there is only one such provider in a particular service area,<sup>17</sup> governmental entities have stepped in to make sure that they consistently operate with the best interests of the public in mind.<sup>18</sup>

The Missouri Public Service Commission is responsible for regulation of investor-owned electric utility companies in Missouri.<sup>19</sup> That agency is charged by Missouri statute with ensuring that customers receive safe and

---

has recently announced its intention to construct a solar-energy center on a 19-acre site in O'Fallon, Missouri. Tim Bryant, *Ameren Missouri Plans to Build Solar Energy Center*, ST. LOUIS POST-DISPATCH, Jan. 14, 2014, at A8. The solar-energy center will provide enough electricity to power around 650 homes in the St. Louis area. *Id.* Ameren's director of renewable strategy cites the center as a "great learning tool" that the company will use to inform construction of future solar energy projects. *Id.*

10. U.S. ENERGY INFO. ADMIN., ANN. ENERGY OUTLOOK 2012 WITH PROJECTIONS TO 2035, at 49 (2012), available at [http://www.eia.gov/forecasts/archive/aeo12/pdf/0383\(2012\).pdf](http://www.eia.gov/forecasts/archive/aeo12/pdf/0383(2012).pdf).

11. Renewable Energy Resources Act of 1980, 42 U.S.C. § 7372 (2014).

12. *Frequently Asked Questions: How Many and What Kind of Power Plants Are There in the United States*, U.S. ENERGY INFO. ADMIN. (Dec. 26, 2013), <http://www.eia.gov/tools/faqs/faq.cfm?id=65&t=2>.

13. *Electricity Explained: How Electricity is Delivered to Consumers*, U.S. ENERGY INFO. ADMIN. (July 9, 2012), [http://www.eia.gov/energyexplained/index.cfm?page=electricity\\_delivery](http://www.eia.gov/energyexplained/index.cfm?page=electricity_delivery).

14. REGULATORY ASSISTANCE PROJECT, ELECTRICITY REGULATION IN THE U.S.: A GUIDE 1 (2011), available at <http://www.raponline.org/document/download/id/645>.

15. *Id.* at 3.

16. *Id.*

17. *Id.* at 3–4. See also BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS 53 (2d ed. 2006).

18. REGULATORY ASSISTANCE PROJECT, ELECTRICITY REGULATION IN THE U.S.: A GUIDE 5 (2011).

19. *About the PSC*, MO. PUB. SERV. COMM'N, [http://psc.mo.gov/General/About\\_The\\_PSC](http://psc.mo.gov/General/About_The_PSC) (last visited Jan. 21, 2013). The Commission was established in 1913 and derives its regulatory powers from MO. REV. STAT. §§ 386, 392, 393, and 700 (2012). MO. PUB. SERV. COMM'N, MISSOURI PUBLIC SERVICE COMMISSION INFORMATION GUIDE 2 (2013) [hereinafter INFORMATION GUIDE], available at <http://psc.mo.gov/CMSInternetData/ConsumerInformation/Information%20Guide.pdf>.

adequate service at just and reasonable rates.<sup>20</sup> Pursuant to their goal, the Public Service Commission regulates many aspects of the generation process, including siting of power plants.<sup>21</sup> A finished power plant will take millions of dollars and several years to construct.<sup>22</sup>

Electricity is also generated on a smaller scale. A distributed generation system installed on a residential home can provide enough energy to power all of that home's electricity requirements.<sup>23</sup> Because distributed generation systems are not constructed by investor-owned utility companies, they are not covered by the Missouri Public Service Commission's siting jurisdiction.<sup>24</sup> However, a recent Missouri law has given the Commission a greater role in promoting and regulating the installation of distributed generation systems.

"Prop C," the "Missouri Energy Efficiency Investment Act" (MEEIA), and the "Missouri Renewable Energy Standard" are all names given to an initiative passed with the overwhelming support of a majority of Missouri voters in 2008.<sup>25</sup> Robert Kenney, Chairman of the Missouri Public Service Commission, notes that the fact that MEEIA was passed by initiative<sup>26</sup> rather than by an executive action or legislative measure is "significant to the extent that proponents of the environment argue that it's a strong manifestation of a state public policy preference."<sup>27</sup> The numbers, which indicate two-thirds majority passage statewide and three-fourths majority passage in the City of St. Louis, speak to that fact.<sup>28</sup>

---

20. INFORMATION GUIDE, *supra* note 19, at 1.

21. See DANIEL R. MANDELKER, LAND USE LAW § 4.32 (5th ed. 2003). Most states require electric utility companies to obtain a "certificate of convenience and necessity" prior to construction of a power plant. See, e.g., TEX. UTIL. CODE ANN. § 37.051 (2013); ARK. CODE ANN. § 23-3-201 (2013); VA. CODE ANN. § 56-265.3(A) (2013); see also BOSSELMAN ET AL., *supra* note 17, at 1092. "Siting" is the term by which officials refer to this process. *Id.* The Public Service Commission requires investor-owned utilities to file for a Certificate of Convenience and Necessity prior to the construction of generation facilities. MO. REV. STAT. § 386.250 (2013). The process is governed by the Missouri Public Service Commission's own rule, codified at MO. CODE REGS. ANN. tit. 4 § 240-3.105 (2013).

22. See U.S. ENERGY INFO. ADMIN., UPDATED CAPITAL COST ESTIMATES FOR UTILITY SCALE ELECTRICITY GENERATING PLANTS (2013), available at [http://www.eia.gov/forecasts/capitalcost/pdf/updated\\_capcost.pdf](http://www.eia.gov/forecasts/capitalcost/pdf/updated_capcost.pdf).

23. See Fucci, *supra* note 4, at 347.

24. See MO. REV. STAT. § 386.250; See also Fucci, *supra* note 4, at 352.

25. MEEIA is codified at MO. REV. STAT. §§ 393.1020–1030.

26. The public initiative process is explained in the Missouri Constitution as a power reserved by the people "to propose and enact or reject laws and amendments to the constitution." MO. CONST. art. III, § 49.

27. Robert Kenney, Chairman, Missouri Public Service Commission, Address at the Missouri Public Service Commission's Third Annual Public Utility Law Symposium (Oct. 11, 2013).

28. Editorial, *Power Outage*, ST. LOUIS POST-DISPATCH, Oct. 20, 2013, at A18.

In substance, MEEIA clearly advances pro-renewable causes. Under its provisions, investor-owned utilities are required to derive 15% of the electricity they generate from renewable energy sources by 2021.<sup>29</sup> Two percent of that total must come from solar photovoltaics.<sup>30</sup> The Missouri Public Service Commission adopted a regulation,<sup>31</sup> 4 CSR 240-20.100, which acts as the muscle behind the mandate, setting forth in greater detail how utilities can achieve compliance with the renewable energy portfolio standards.<sup>32</sup>

In addition, that rule affects Missouri residents who wish to install distributed generation systems. 4 CSR 240-20.100(4) includes a requirement that utility companies provide a rebate to retail customers for electricity generated by those systems.<sup>33</sup> Utility companies may purchase the renewable energy credits (RECs) generated by customers' distributed generation systems to count towards their 15% renewable sources requirement.<sup>34</sup> However, before they are connected to a utility company's grid, customers' distributed generation systems must comply with the prerequisites set forth in the Public Service Commission's rule.<sup>35</sup> Section 4 CSR 240-20.100 incorporates a set of requirements from the "net metering rule" set forth at 4 CSR 240-20.065.<sup>36</sup> That regulation reads:

Each qualified electric energy generation unit used by a customer-generator shall meet all applicable safety, performance, interconnection, and reliability standards established by *any local code authorities*, the National Electrical Code, the National Electrical Safety Code, the Institute of Electrical and Electronics Engineers (IEEE), and Underwriters Laboratories (UL) for distributed generation . . . .<sup>37</sup>

---

29. MO. REV. STAT. § 393.1030.1.

30. MO. CODE REGS. ANN. tit. 4 § 240-20.100(2)(D) (2013).

31. The Public Service Commission was authorized to adopt regulations regarding distributed generation by MO. REV. STAT. § 393.1030(6) (2013).

32. MO. CODE REGS. ANN. tit. 4 § 240-20.100. Subjects addressed in the Public Service Commission's regulations include renewable energy credits, *id.* § 240-20.100(3), retail rate impact, *id.* § 240-20.100(5), and cost recovery, *id.* § 240-20.100(6).

33. "[E]lectric utilities shall include in their tariffs a provision regarding retail account holder rebates for solar electric systems. These rebates shall be available to Missouri electric utility retail account holders who install new or expanded solar electric systems that become operational after December 31, 2009." *Id.* § 240-20.100(4). Customers within Ameren Missouri's territory apply for the rebate with a form distributed by that company. Interconnection Application/Agreement for Net Metering Systems with Capacity of 100 kW or Less, *available at* <https://www.ameren.com/sites/AUE/Rates/Documents/UECSheet171EPPNetMetering.pdf>.

34. MO. CODE REGS. ANN. tit. 4 § 240-20.100(3).

35. *Id.* § 240-20.100(1)(D).

36. *Id.*

37. *Id.* § 240-20.065(6)(A) (2013) (emphasis added).

On its face, the italicized language in the regulation above appears to contemplate some role for local involvement.<sup>38</sup> This role is grounded in municipalities' land use regulation authority, and will be examined in the next section.

*B. Land Use Regulation: The Basics*

Zoning is the method by which local governments regulate land use, density, and site development.<sup>39</sup> Zoning has grown to be a very popular practice, and is used by the vast majority of local governments.<sup>40</sup> The power to enact zoning regulations, however, fundamentally resides in the states. The power to zone flows from each state's "police power," a term describing the government's authority to protect health, safety, welfare, and morals.<sup>41</sup> Every state has delegated its zoning authority to local governments via state statute.<sup>42</sup> Nonetheless, portions of the zoning power have been removed from both municipalities and the states where a significant national interest was at stake.<sup>43</sup>

Missouri's zoning-enabling statute outlines how all cities, towns, and villages in the state are to conduct the land use regulation process.<sup>44</sup> Zoning involves a designated zoning commission<sup>45</sup> and a board of adjustment.<sup>46</sup> Both entities are composed of citizen volunteers appointed by the mayor.<sup>47</sup> Zoning begins with the zoning commission, which devises and submits a zoning ordinance to the city council for approval.<sup>48</sup> The commission may also offer

---

38. Namely, the "local code authorities" referenced in *id.* § 240-20.065(6)(A) (2013).

39. MANDELKER, *supra* note 21, § 5.01.

40. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 692 (1973). In fact, all major cities except Houston have zoning ordinances. MANDELKER, *supra* note 21, § 1.01.

41. MANDELKER, *supra* note 21, § 2.39.

42. *Id.* § 1.01. *See, e.g.*, Texas's Zoning Enabling Act, TEX. LOC. GOV'T CODE ANN. § 211 (West 2013), West Virginia's Zoning Enabling Act, W. VA. CODE § 8A-1-1 (2013), and New Jersey's Municipal Land Use Law, N.J. STAT. ANN. § 40:55D-1 (West 2013).

43. The Communications Act codified a national interest in making communications services available to all citizens of the United States. *See* Christopher Neumann, *FCC Preemption of Zoning Ordinances That Restrict Satellite Dish Antenna Placement: Sound Policy or Legislative Overkill?*, 71 ST. JOHN'S L. REV. 635, 646-47 (1997). An amendment to this act created a federal right for individuals to receive unscrambled programming signals. *Id.* at 647. To protect these rights, the Federal Communications Commission enacted the 1986 Preemption Order, preempting all local zoning ordinance that placed restrictions on satellite antennas. *Id.* at 649. *See also* MANDELKER, *supra* note 21, § 4.42.

44. MO. REV. STAT. §§ 89.020-491 (2013).

45. *Id.* § 89.070.

46. *Id.* § 89.080.

47. *Id.* § 89.320(3).

48. *Id.* § 89.340.

subsequent amendments to the ordinance,<sup>49</sup> which the city council may either adopt or reject.<sup>50</sup>

While the zoning commission formulates the ordinances, the board of adjustment is responsible for their enforcement.<sup>51</sup> When specific requirements set forth in the zoning ordinance are met, the board of adjustment will grant a variance or special exemption (also called a special use permit).<sup>52</sup> Variances allow homeowners to engage in land use that does not necessarily conform to the zoning ordinance. Variances are granted by the board of adjustment where a landowner can show that lenience is necessary to avoid undue hardship<sup>53</sup> and that the non-conforming use will not substantially interfere with the public good or the original intent and purpose of the zoning ordinance.<sup>54</sup>

### C. *How Land Use Regulation Affects Distributed Generation Systems*

The above process describes how a zoning ordinance is formulated and enforced. The zoning ordinances currently in force across the state exhibit a wide spectrum of attitudes toward distributed generation systems, ranging from express endorsement to silence. At one end are several recently enacted ordinances explicitly approving of the systems, which describe in detail where and how distributed generation systems may be installed.<sup>55</sup>

The City of Clayton, located in St. Louis County, amended its zoning regulations to include support for residential-scale distributed generation in 2012.<sup>56</sup> The ordinance amending the city's zoning regulations grounded its approval of distributed generation in the city's expressed commitment to sustainability, stating, "Whereas, the City of Clayton has already taken major steps in the area of energy conservation . . . and now wishes to promote similar success by establishing a framework for increased use of renewable energy resources within the City . . ." <sup>57</sup> To that end, the city classifies distributed generation systems as "accessory uses."<sup>58</sup> The zoning regulations contain a

---

49. MO. REV. STAT. § 89.060.

50. *Id.*

51. *Id.* § 89.340.

52. *Id.* § 89.090.1(3).

53. See MANDELKER, *supra* note 21, § 6.44.

54. MO. REV. STAT. § 89.090.1(3).

55. There are numerous examples on the national level as well. In the City of Albany, New York, for example, regulations permit solar energy equipment as accessory uses in all zoning districts, and the law explicitly states, "While there are aesthetic considerations, the City has determined that the environmental and economic benefits outweigh potential aesthetic impacts." ALBANY, N.Y., CODE § 375-93(C)(2) (1999), available at <http://ecode360.com/7688014>.

56. Clayton, Mo., Ordinance 6191 (Feb. 28, 2012), available at <http://www.claytonmo.gov/Assets/Planning+and+Development/solar+and+wind.pdf>.

57. *Id.*

58. *Id.* "Roof mounted Solar Energy Systems are a permitted accessory use in all zoning districts. Ground-mounted Solar Energy Systems are a conditional accessory use and shall be

detailed list of requirements to which systems must adhere before installation is permitted.<sup>59</sup> According to the zoning regulations, these requirements were established “to protect properties from incompatible uses in the interest of property values, public health and the welfare of the community while promoting the use of alternative energy sources, where appropriate.”<sup>60</sup> Other Missouri municipalities that have zoning regulations expressly addressing the installation of residential-scale distributed generation include Fenton,<sup>61</sup> Pattonsburg,<sup>62</sup> and O’Fallon.<sup>63</sup>

Ordinances addressing the installation of distributed generation vary widely in their content. For example, while the City of Clayton’s regulations include a detailed list of requirements to be fulfilled prior to installation,<sup>64</sup> Pattonsburg’s Solar Code emphasizes homeowners’ solar access rights subsequent to installation.<sup>65</sup> Homeowners must take care to determine the requirements of their own municipality’s law, as the laws can change drastically from town to town.

To complicate things, many municipalities have ordinances that do not include any mention of distributed generation systems.<sup>66</sup> Failure to address distributed generation technology can be nearly as detrimental as banning it outright.<sup>67</sup> Silence on the topic of distributed generation naturally leaves potential installers uncertain over whether they may proceed with installation or if a permit will be necessary.<sup>68</sup> Even if a homeowner relies on that silence, the municipality may later determine that such a project actually falls under

---

considered an accessory structure in all zoning districts subject to the approval of a Conditional Use Permit pursuant to Article VII of this Chapter.” *Id.* “Accessory uses are those uses of land found on the same lot as the principal use and that are subordinate, incidental to, and customarily found in connection with the principal use.” JOHN R. NOLON & PATRICIA E. SALKIN, *LAND USE AND SUSTAINABLE DEVELOPMENT LAW: CASES AND MATERIALS* 230 (8th ed. 2012). An example of a traditional accessory use is a garage. *Id.*

59. Clayton, Mo., Ordinance 6191 (Feb. 28, 2012), *available at* <http://www.claytonmo.gov/Assets/Planning+and+Development/solar+and+wind.pdf>.

60. *Id.*

61. FENTON, MO., MUN. CODE § 464 (2013), *available at* <http://www.fentonmo.org/DocumentCenter/View/3719>.

62. NEW PATTONSBURG, MO., SOLAR CODES & ORDINANCES art. XIV, § 14-104 to -107 (1996), *available at* <http://www.smartcommunities.ncat.org/codes/solar.shtml>.

63. *Solar Energy System Building Guide*, CITY OF O’FALLON, MO., <http://www.ofallon.mo.us/images/pubs/building/Solar%20Energy%20Guide.pdf> (last visited Jan. 11, 2014).

64. Clayton, Mo., Ordinance 6191 (Feb. 28, 2012), *available at* <http://www.claytonmo.gov/Assets/Planning+and+Development/solar+and+wind.pdf>.

65. NEW PATTONSBURG, MO., SOLAR CODES & ORDINANCES art. XIV, § 14-104 to -106.

66. For example, the City of St. Louis. *See* ST. LOUIS, MO., REV. CODE tit. 26 (2013), *available at* <http://library.municode.com/index.aspx?clientId=16330>.

67. *See* Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 253 (2008).

68. *Id.*

another category of use for which a permit is required and either assess a fine or require that the system be dismantled.<sup>69</sup> Moreover, if a permit is sought from a municipality with no written requirements for distributed generation, the zoning board lacks a standard by which to judge the applicant's request.<sup>70</sup> Installers complain that a lack of standards lead to arbitrary and subjective enforcement.<sup>71</sup> Thus, potential installers must understand that silence on the issue of distributed generation in a municipality's ordinance does not equate to a green light for their solar energy projects.

Multiply the available zoning options by the number of individual local governments in operation in Missouri (St. Louis County alone boasts 90 municipalities within its borders)<sup>72</sup> and the possibilities become quite overwhelming.

Moreover, some potential installers will have to contend with another, even more localized form of regulation. Residences within a municipality may be organized into an even smaller grouping called a "homeowners' association." Under Missouri law, each homeowners' association must set forth a declaration of the rules governing the association.<sup>73</sup> Some homeowners' associations implement rules that either restrict or prohibit the installation of distributed generation systems.<sup>74</sup> Others' regulations do not currently address the technology but could be modified to do so. While this Comment primarily concerns the actions of local municipal governments, the role of homeowners' associations is important to bear in mind when considering barriers to installation of distributed generation. The following section describes the problems that wide variation and lack of predictability in regulation cause for both installers and local governments.

## II. THE PROBLEM

The current framework of local ordinances regarding (or ignoring) distributed generation does not adequately address the interests of either local officials or potential installers. As previously discussed, zoning requirements can change dramatically from city to city. Frances Babb, a distributed generation installer and the plaintiff in *Babb v. Missouri Public Service Commission*,<sup>75</sup> noted, "If our house were only a couple hundred feet removed

---

69. *Id.*

70. *Id.* at 254.

71. *Id.*

72. *St. Louis County Communities*, ST. LOUIS CNTY., <http://ww5.stlouisco.com/scripts/communities/> (last visited June 6, 2014).

73. MO. REV. STAT. § 448.030 (2013).

74. See Ray Henry, *Homeowners' Associations and Solar Panels Don't Always Mix*, HUFFINGTON POST (Apr. 25, 2012), [http://www.huffingtonpost.com/2012/04/25/homeowners-associations-solar-panels\\_n\\_1451234.html](http://www.huffingtonpost.com/2012/04/25/homeowners-associations-solar-panels_n_1451234.html).

75. *Babb v. Mo. Pub. Serv. Comm'n*, 414 S.W.3d 64, 66 (Mo. Ct. App. 2013).

from its current location [and therefore located in the next town over], none of this [struggle with the application process] would have ever happened.”<sup>76</sup> While some municipalities have attempted to address distributed generation technology in their ordinances,<sup>77</sup> the majority do not have any enumerated regulations or standards for conducting the permit process. In order to ensure that municipalities are able to carry out their duty to protect the safety of citizens, the state should implement those regulations that do so the most effectively as a statewide standard. Without guidance, local officials may not be able to make consistent decisions about installation of distributed generation systems.

Without consistent decisions by local officials regarding installation, potential installers are unable to predict what trajectory their application process will take. While MEEIA has laid the foundation for deciding which regulations a local government may impose, the language of that statute is vague and has not lent itself to clear interpretation in the courts.<sup>78</sup> The uncertainty generated by that statute threatens to halt progress towards greater reliance on renewable resources; this is the exact opposite effect than that for which the statute was passed. The case below illustrates the uncertainty engendered by the law, and I follow it up with a suggestion for clarification.

### III. *BABB V. MISSOURI PUBLIC SERVICE COMMISSION*

#### A. *Background*

In *Babb v. Missouri Public Service Commission*, homeowners appealed a city’s denial of a special use permit for the installation of a residential-scale distributed solar energy system on their home.<sup>79</sup> The homeowners sought a court’s review of that denial.<sup>80</sup> The case exemplified the struggle between installers and municipalities, highlighting each faction’s respective interests. In an interesting twist, the appellate court’s opinion managed to both favor and disfavor both groups.

---

76. LinkedIn Message from Frances Babb to Joyce LaFontain (Jan. 15, 2014, 04:15 CST) (on file with author).

77. See Clayton, Mo., Ordinance 6191 (Feb. 28, 2012), available at <http://www.claytonmo.gov/Assets/Planning+and+Development/solar+and+wind.pdf>; FENTON, MO., MUN. CODE § 464 (2013), available at <http://www.fentonmo.org/DocumentCenter/View/3719>; NEW PATTONSBURG, MO., SOLAR CODES & ORDINANCES art. XIV, § 14-104 to -107 (1996), available at <http://www.smartcommunities.ncat.org/codes/solar.shtml>; *Solar Energy System Building Guide*, *supra* note 63.

78. See *Babb v. Mo. Pub. Serv. Comm’n*, 414 S.W.3d 64, 70 (Mo. Ct. App. 2013).

79. *Id.* at 66.

80. *Id.*

James and Frances Babb (the Babbs) are residents of the City of Clarkson Valley,<sup>81</sup> (the City), a municipality located within St. Louis County, Missouri.<sup>82</sup> Inspired by the successful passage of MEEIA in 2008, the Babbs began planning to install solar panels on the roof of their Victorian-style<sup>83</sup> home.<sup>84</sup> In September 2011, the Babbs submitted an application<sup>85</sup> for their system to Ameren Missouri, their electricity provider, and the Missouri Public Service Commission.<sup>86</sup> Ameren Missouri approved the application in October.<sup>87</sup>

On November 1, 2011, the Babbs submitted an application for a building permit to the City's Planning and Zoning Commission.<sup>88</sup> As of that date, the City's Zoning Ordinance did not contain any requirements with respect to the installation of solar energy systems at residential single-family dwellings.<sup>89</sup> Action on the Babbs' application was delayed, and on January 3, 2012, the City amended two of its ordinances.<sup>90</sup> The first change was the addition of a new subparagraph in the amended Municipal Code requiring homeowners to seek a special use permit from the City's Board of Aldermen before installing a solar distributed generation system.<sup>91</sup> The special use permit approval process allowed the Board to reject anything they found "unsightly, undesirable or not in the best interest of the city."<sup>92</sup> Second, the City amended its Building Code, adopting a new section that set forth a list of requirements for installation of a solar distributed energy system on or next to a residence.<sup>93</sup>

Wishing to continue with their plans, the Babbs submitted an application for a special use permit. Both the City's Planning and Zoning Commission and

---

81. *Id.*

82. *Basic Information About the City*, CITY OF CLARKSON VALLEY, MO., <http://www.clarksonvalley.org/information.html> (last visited Jun. 6, 2014).

83. LinkedIn Message from Frances Babb to Joyce LaFontain (Jan. 15, 2014, 04:15 CST) (on file with author).

84. *Babb*, 414 S.W.3d at 67.

85. Interconnection Application/Agreement for Net Metering Systems with Capacity of 100 kW or Less, *supra* note 33.

86. *Babb*, 414 S.W.3d at 67. The application requires completion of what is called an Interconnection Application/Agreement for Net Metering System and a design of the system. MO. CODE REGS. ANN. tit. 4 § 240-20.065(9) (2013).

87. *Babb*, 414 S.W.3d at 67.

88. *Id.*

89. *Id.*

90. *Id.* at 68.

91. *Id.*

92. Robin Whitlock, *Trouble in Missouri: The Fight for Solar Rights*, RENEWABLE ENERGY MAG. (Aug. 1, 2013), <http://www.renewableenergymagazine.com/article/trouble-in-missouri-the-fight-for-solar-20130801>.

93. *Babb*, 414 S.W.3d at 68.

the Monarch Fire Department gave their preliminary approval of the plan.<sup>94</sup> The Babbs subsequently entered into a contract with Ameren Missouri obligating them to provide an operating solar system.<sup>95</sup> With each of these agreements and approvals in place, the Babbs awaited the decision of the Board of Aldermen. However, on March 6, 2012, the City's Board of Aldermen denied the Babbs' application for a special use permit without explanation.<sup>96</sup> The Babbs filed suit.

The Babbs brought three claims to the trial court. Count one made a preemption argument, alleging that the City's ordinances effectively prohibited an activity that is otherwise authorized by a state law, namely, 4 CSR 240-20.100, and were therefore void.<sup>97</sup> The second count requested a declaration of vested rights given that they filed for a permit prior to the changes to the ordinances modifying the application process.<sup>98</sup> The final count alleged that the Board of Aldermen's denial of the Babbs' special use permit was arbitrary, capricious, unreasonable, and an abuse of discretion.<sup>99</sup>

#### B. *The Trial Court's Ruling*

The Babbs received a judgment at the trial level on June 29, 2012.<sup>100</sup> That ruling addressed both the preemption and abuse of discretion claims in the Babbs' complaint. Agreeing with the preemption argument, the court stated that the ordinances "impose requirements that are more restrictive than, inconsistent with, and in conflict with" the Missouri Public Service Commission's rules.<sup>101</sup> The court read the statute as applying to the Babbs, and excluding the City's regulatory scheme, because they were "persons having a contract with an electric utility to install a solar energy system in order to participate in the solar rebate program."<sup>102</sup>

---

94. *Id.*

95. *Id.*

96. *Homeowners Win Solar Panel Lawsuit*, JOPLIN INDEPENDENT (July 6, 2012), [http://www.joplinindependent.com/display\\_article.php/hschoen1341633074](http://www.joplinindependent.com/display_article.php/hschoen1341633074).

97. *Babb*, 414 S.W.3d at 68.

98. *Id.* For a discussion of vested rights, see MANDELKER, *supra* note 21, § 6.12.

99. *Babb*, 414 S.W.3d at 68.

100. *Id.* at 69. This case featured a particularly convoluted procedural history, with an additional count alleging a governmental takings that was added but later dismissed by the plaintiffs. *Id.* In the end, the trial court's final word on the case was to affirm a summary judgment it issued several months earlier for the plaintiffs on Count I for preemption and Count III for abuse of discretion. *Id.*

101. Findings of Fact, Conclusions of Law, Judgment and Order at 4, *Babb v. Mo. Pub. Serv. Comm'n*, No. 12AC-CC00225 (Mo. Cir. Ct. Jul. 6, 2012), available at [http://www.town-and-country.org/Uploads/Boards%20and%20Commissions/Aldermen/Aldermen\\_Min\\_092412.pdf](http://www.town-and-country.org/Uploads/Boards%20and%20Commissions/Aldermen/Aldermen_Min_092412.pdf).

102. *Id.* at 5.

The trial court explained that the enforcement scheme established by MEEIA preempted that formulated by the City.<sup>103</sup> More specifically, the court noted that requiring the issuance of a special use permit from the Board of Aldermen created an unlawful condition precedent that was inconsistent with the Public Service Commission's rules.<sup>104</sup> The trial court concluded that the Babbs' solar energy system complied with all regulatory requirements contained in 4 CFR 240-20.100, and that they were not required to conform to the City's additional requirements.<sup>105</sup>

A particularly expansive part of the court's ruling on the preemption issue interpreted 4 CFR 240-20.100 as establishing a new property right. "Section 442.012.1, RSMo confers a legally protectable right to the Babbs to use solar energy at their property, and they have a legally protectable right to participate in the solar rebate program authorized by 4 CSR 240-20.100(4)."<sup>106</sup>

The court also found in favor of the Babbs on the abuse of discretion issue.<sup>107</sup> The court built the foundation for its conclusion that there was "no reasonable basis to deny the Babbs' application for a Special Use Permit"<sup>108</sup> by placing it after discussions of how the Babbs' plan complied with the Missouri Public Service Commission's rules, gained Ameren Missouri's approval,<sup>109</sup> and received a recommendation for approval from both the City's Planning and Zoning Commission and the Monarch Fire Protection District.<sup>110</sup> This seemingly unanimous approval of the Babbs' plans led the court to conclude that the City's denial was "arbitrary, capricious, unreasonable and an abuse of discretion."<sup>111</sup> The trial judge then ordered the City of Clarkson Valley to issue a special use permit to the Babbs' within one day of the entry of his judgment, instructing the Babbs that they could lawfully proceed with construction if the City did not comply with his order.<sup>112</sup>

### C. What the City Appealed

Instead of issuing the permit, the City of Clarkson Valley appealed the trial judge's ruling to the Missouri Court of Appeals, Western District. The appeal filed by the City featured several claims—some procedural and some directly

---

103. *Id.*

104. *Id.* at 4.

105. *Id.* at 6.

106. Findings of Fact, Conclusions of Law, Judgment and Order, *supra* note 101, at 6.

107. *Id.* at 5.

108. *Id.*

109. *Id.*

110. *Id.*

111. Findings of Fact, Conclusions of Law, Judgment and Order, *supra* note 101, at 5.

112. *Id.* at 6–7.

contesting the trial court's substantive rulings.<sup>113</sup> The issues that most prominently figured into the appellate court's disposition of the case were the City's challenges to the trial court's rulings on the preemption and abuse of discretion issues. Regarding preemption, the City argued that instead of preempting the local ordinances, the Public Service Commission's regulations expressly permitted local code authority.<sup>114</sup> The appeal on the abuse of discretion claim was not as straightforward. The City did not directly appeal the trial court's finding that the Board of Aldermen's denial of the permit was arbitrary and capricious. Instead, the City raised a procedural argument, stating that instead of filing their petition under section 536.150 of the Missouri statutes, the Babbs were required to file it under section 89.110.<sup>115</sup> Because

---

113. Procedural issues raised by the City on appeal included whether the special use permit was correctly filed with the trial court, Appellants' Brief at 29–30, *Babb v. Mo. Pub. Serv. Comm'n*, 414 S.W.3d 64 (Mo. Ct. App. 2013) (No. WD 76384), whether the application for the special use permit's description of the solar installation was detailed enough, *id.* at 30, whether the Babbs' petition failed to state a claim upon which relief can be granted, *id.* at 31–34, and whether the Babbs failed to allege the specific substance of the City's building and zoning ordinances, *id.* at 37–38, among several others. One procedural issue in particular seemed to garner a significant amount of all parties' attention: whether the initial suit should have been filed pursuant to section 536.050 or 536.089 of the Missouri Revised Statutes. *See id.* at 38–41; Respondents' Brief at 29–36, *Babb*, 414 S.W.3d 64 (No. WD 76384). Although the court of appeals found for the respondent on this issue, *Babb*, 414 S.W.3d at 77, within 10 days after the deadline for appeal had passed without an appeal from either party, the Missouri Supreme Court took up a case on that very point: *DeBold v. City of Ellisville*, No. ED 99944, 2013 WL 4604198 (Mo. Ct. App. Aug. 30, 2013) (sustained and cause ordered transferred Dec. 24, 2013). The disposition of that case is expected to occur in July 2014. Telephone Interview with John Mulligan, Attorney for the City of Clarkson Valley, Mo. (Jan. 21, 2014).

114. Appellants' Brief, *supra* note 113, at 25–29.

115. *Id.* at 38. The city argued that 89.110 should have governed the Babb's suit. *Id.* That statute addresses the procedure for review of decisions from boards of adjustment. MO. REV. STAT. § 89.110 (2013). The statute reads:

Any person or persons jointly or severally aggrieved by any decision of the board of adjustment, any neighborhood organization as defined in section 32.105 of the Missouri Revised Statutes, representing such person or persons or any officer, department, board or bureau of the municipality, may present to the circuit court of the county or city in which the property affected is located a petition . . . .

*Id.* However, the Babbs argued that 536.150 should have dictated the timeline for filing the petition. Respondents' Brief, *supra* note 113, at 29. That statute provides for judicial review of a broader range of decisions, and reads:

When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, include the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, mandamus, prohibition, or other appropriate action.

MO. REV. STAT. § 536.150. This distinction is at issue here because the board of aldermen was the body denying the Babbs' special use permit, not the board of adjustment.

section 89.110's thirty-day time limit for submission of a complaint had passed by the time the Babbs filed suit, the City asserted that the original petition was not timely filed.<sup>116</sup> No argument was made that the Board of Aldermen's denial was not arbitrary and capricious.

*D. The Appellate Court's Ruling*

The appellate court disagreed with the trial court's ruling on preemption.<sup>117</sup> The court referenced specific language of the Public Service Commission's regulations, which states that "[e]ach qualified electric energy generation unit used by a customer-generator shall meet *all applicable safety, performance, interconnection, and reliability standards established by any local code authorities*, the National Electrical Code, the National Electrical Safety Code."<sup>118</sup> Thus, the appellate court concluded that rather than preempting local authority, the regulation allowed local officials to establish "safety, performance interconnection, and reliability standards."<sup>119</sup> The appellate court examined the trial court's ruling to determine if there was sufficient evidence to establish that the local ordinance did not adhere to that statutory language.

The court asserted that although an ordinance may not conflict with state law, it may impose "additional regulations."<sup>120</sup> However, the court cautioned that additional regulations are not permitted where they are prohibited or limited by express language in the statute.<sup>121</sup> Unfortunately, even though the court explained the rule, it did not reach a determination of whether the regulations in the ordinance at issue were included in the list of subjects upon which "local code authorities" could "establish standards."<sup>122</sup> Instead, the court concluded that there was insufficient evidence to make that determination at the trial court level.<sup>123</sup>

The appellate court appeared to indicate that it would have reached a different conclusion on the preemption issue if the trial court's opinion contained a more detailed side-by-side comparison between specific provisions of the state statute and conflicting wording in the local ordinances. The court stated, "while it may be that some of these provisions either individually or in concert may be 'inconsistent and irreconcilable' with the requirements of the statutes or the regulations in practical application, the motion for partial

---

116. Appellants' Brief, *supra* note 113, at 38–41.

117. *Babb*, 414 S.W.3d at 69.

118. *Id.* at 71 (quoting MO. CODE REGS. ANN. tit. 4 § 240-20.065(6)(A) (2013)).

119. MO. CODE REGS. ANN. tit. 4 § 240-20.065(6)(A) (2013).

120. *Babb*, 414 S.W.3d at 70 (citing *State ex rel. Hewlett v. Womach*, 196 S.W.2d 809, 815 (Mo. 1946)).

121. *Id.* at 70.

122. MO. CODE REGS. ANN. tit. 4 § 240-20.065(6)(A).

123. *Babb*, 414 S.W.3d at 79.

summary judgment failed to show how they were in conflict and therefore the grant of partial summary judgment on these grounds was in error.<sup>124</sup> Thus, instead of ruling with finality as to whether certain restrictions imposed by the City<sup>125</sup> conflicted with the state statute, the appellate court simply pointed to a lack of sufficient evidence at the trial level.<sup>126</sup>

The appellate court's ruling on the abuse of discretion issue was also limited to procedural considerations. As mentioned above, the City's argument on this point centered on the technical issue of whether the suit was filed pursuant to the correct statute.<sup>127</sup> Finding that the decision to deny the Babbs' special use permit was not made by a board of adjustment, as covered in 89.110, but instead by an administrative body (the Board of Aldermen), as covered in 586.150, the appellate court concluded that there was no issue over whether the Babbs had filed their suit within 89.110's required thirty-day time period.<sup>128</sup> Thus, the appellate court found the issue of whether the Board of Aldermen's decision was an abuse of discretion was raised in a timely petition and filed pursuant to the proper statutory authority.<sup>129</sup> The City's failure to contest that issue by appealing to the higher court, however, meant that the trial court's summary judgment in favor of the Babbs could not be analyzed at the appellate level.<sup>130</sup> Thus, the appellate court summarily affirmed the trial court's judgment.<sup>131</sup> Affirmation of the trial court's summary judgment on that point meant that the Babbs were free to operate their solar panel system as constructed.

#### IV. WHAT DOES THE APPELLATE COURT'S DECISION MEAN FOR THE INSTALLERS VERSUS LOCAL GOVERNMENT DEBATE?

Although a positive outcome for the Babbs, the appellate court's ruling leaves several questions unanswered. Readers of the appellate court's opinion on either side of the issue are not likely to find guidance. On each of the determinative issues, the appellate court was limited by the procedural actions

---

124. *Id.* at 73.

125. The appellate court's opinion listed several of what it termed "design specifications," including one that required systems to terminate at least three feet from the edge or ridge of the roof and one and one half feet from any valley. *Id.* at 72-73 (quoting CLARKSON VALLEY, MO., ORDINANCES § 500.020-M2300.C.3, available at <http://www.clarksonvalley.org/Michele/2012%20Codified%20-%20Clarkson%20Valley%20Code.pdf>). Also mentioned were what the court referred to as "General Requirements" including one that required that the "designer" of the system supervise the installation or personally install the system. *Babb*, 414 S.W.3d at 73.

126. *Babb*, 414 S.W.3d at 79.

127. Appellants' Brief, *supra* note 113, at 38.

128. *Babb*, 414 S.W.3d at 76-77.

129. *Id.* at 77.

130. *Id.*

131. *Id.*

of both parties. On preemption, the court could only rule that the Babbs had not shown enough evidence to earn a summary judgment.<sup>132</sup> On abuse of discretion, the court was limited to simply affirming the trial court's holding on that point absent an argument from the City.<sup>133</sup> Installers and local governments are left with many unanswered questions, each of which I will now address in turn.

Without an in-depth analysis of what limitations MEEIA imposes on local zoning regulations, installers are left wondering what protections the statute provides for their potential distributed energy projects. Because the trial court did not do a detailed analysis of individual regulations and how they conflict with the state statute, installers will have to bring suit to determine whether the regulations imposed by their particular municipality conflict with or are merely additional to the Missouri statutory requirements. With hundreds of municipalities, each potentially with dozens of regulations affecting distributed energy systems, a comprehensive source of guidance seems unlikely to materialize through the judicial process any time soon.

The court's limited discussion on MEEIA's boundaries leaves local governments without clear standards for zoning practices. The statute indicates that local governments may impose "safety, performance, interconnection, and reliability standards."<sup>134</sup> The appellate court's failure to elaborate on what types of regulations fall into those categories left that determination an open question. This phrase seems to indicate that building code restrictions are acceptable, but regulations on a system's aesthetic qualities are not. Moreover, without a discussion of what rendered the denial of the Babbs' application arbitrary and capricious, local officials are left wondering how much leeway the courts will grant to their decisions. A straightforward, comprehensive state statute would help local officials make reasoned, consistent decisions. MEEIA has not been interpreted as that straightforward, comprehensive statute.

In summary, the current application process is unclear and unpredictable. MEEIA, which purports to give guidelines on the installation of distributed generation, has not been interpreted as doing such, and therefore does not fulfill its intended purpose. Clear state level legislation is necessary to explain and synchronize local governments' powers.

---

132. *Id.* at 79.

133. *Babb*, 414 S.W.3d at 79.

134. MO. CODE REGS. ANN. tit. 4 § 240-20.065(6)(A) (2013).

## V. HOW CAN THE STATE PROVIDE GUIDANCE THAT SUPPORTS ITS GOALS OF PROMOTING RENEWABLE SOURCES OF ENERGY?

### A. *Why Should Clearer Legislation Be Enacted?*

The arguments for state-level preemption of local land use regulations could be made regarding any state, but are especially strong for Missouri. Answering the open questions left by *Babb* would, of course, be a benefit, but there are additional reasons for providing state-level guidance. First, there is a clear public mandate supporting greater reliance on renewable sources of energy. Next, the state is uniquely capable of ensuring that the interests of both installers and local officials are reasonably balanced in a consistent manner. Finally, the wealth of examples from other states, discussed below, will allow Missouri to hand pick a combination of regulations that best suits its renewable energy goals.

Missouri's citizens can contribute to a greater reliance on renewable sources of energy, but only if local land-use law allows them to do so. The broad support for renewable energy sources expressed in MEEIA indicates that a large number of Missourians are eager to advance the cause.<sup>135</sup> Increasing the number of customer-generators producing solar energy credits, which would subsequently be made available for purchase to utility companies, would help to achieve Missouri's goal of deriving 15% of energy from renewable resources by 2021.<sup>136</sup> Moreover, from the time MEEIA was passed in 2008 to the present day, support for solar energy has not waned.<sup>137</sup> Thus, the legislature would have the support of a majority of Missourians in passing clear guidelines for installation of distributed generation.

State-level action can strike a fair and reasoned balance between the interests of installers and local officials. For installers, a primary interest is a streamlined, transparent application process. MEEIA took the first step towards defining a right to solar energy, but the confusion that remains over what regulations the local government may impose on that right must be remedied. Obtaining clarity through the judicial process is unwieldy. Requiring homeowners to bring suit against local zoning authorities to determine whether a particular type of regulation "specifically conflict[s] with the statutes or

---

135. As previously stated, the law passed by public initiative with the approval of two-thirds of voters. Editorial, *supra* note 28.

136. MO. CODE REGS. ANN. tit. 4 § 240-20.100(3).

137. One annual national survey has shown that for the past five years, 9 of 10 Americans have supported greater reliance on solar energy resources. The most recent poll, from 2013, shows that eight-five percent of voters favor solar over all other forms of energy. *National Solar Survey*, SOLAR ENERGY INDUS. ASSOC., <http://www.seia.org/research-resources/national-solar-survey> (last visited Feb. 4, 2014).

regulations”<sup>138</sup> is a time consuming method unsuited for the rapid pace with which distributed generation technology is evolving.<sup>139</sup> With clear boundaries, installers’ interest in clear procedures and concrete construction guidelines will be given proper consideration.

Local governments’ interests will also be taken into account. Because it mandates a statewide standard instead of giving local officials total control, statewide preemption has been criticized for overlooking local concerns.<sup>140</sup> However, statewide preemption does not automatically mean that local governments are cut out of the regulatory process. In fact, a statewide standard would be a benefit to municipal governments that have not included any language regarding installation of distributed generation systems. Rather than preempting local regulations, in those instances a state standard *creates* an appropriate role for local officials in determining how distributed generation will be implemented within their municipal boundaries. Passing clear, effective safety guidelines is a priority for local governments.<sup>141</sup> Standardizing these guidelines balances local governments’ interest in safety with installers’ interest in a clear, predictable process. As demonstrated below, other states have written legislation that successfully incorporates local governments’ interests in determining the placement of distributed generation.

Not only can Missouri draw from other states’ examples on ensuring a role for local government, but on a wealth of other points as well. With numerous statutes to draw from, Missouri is positioned very well for a “best practices” review. Many efforts from other states directly answer the questions left unanswered by the appellate court in *Babb*.<sup>142</sup> The below described instances of state preemption of local land use regulations show a trend towards ensuring easier installation of distributed generation. Missouri’s MEEIA legislation was an effort to join this trend that simply needs to be clarified and strengthened. An examination of other states’ preemption efforts follows.

#### *B. Examples of State Legislation Providing Clear Guidance for Installation of Distributed Generation*

Legislation regarding distributed generation from other states specifically addresses the questions that MEEIA leaves unanswered. For example,

---

138. *Babb*, 414 S.W.3d at 73.

139. See Luis M. A. Bettencourt, Jessika E. Trancik & Jasleen Kaur, *Determinants of the Pace of Global Innovation in Energy Technologies*, PLOS ONE (Oct. 14, 2013), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0067864#s2>.

140. Troy A. Rule, *Renewable Energy and the Neighbors*, 2010 UTAH L. REV. 1223, 1253 (2010).

141. Telephone Interview with John Mulligan, Attorney for the City of Clarkson Valley, Mo. (Jan. 21, 2014).

142. One example, explained in detail below, is California’s clarification of what regulations fall within the health and safety categories. See CAL. GOV’T CODE § 65850.5 (West 2013).

California's statute clarifies what local regulations fall under the "health" and "safety" categories.<sup>143</sup> California's Solar Rights Act of 1978 describes in great detail what that state's local governments can regulate using the "health" and "safety" of citizens as justification.<sup>144</sup> It outlines the role of local governments as thus:

Review of the application to install a solar energy system shall be limited to the building official's review of whether it meets all health and safety requirements of local, state, and federal law. The requirements of local law shall be limited to those standards and regulations necessary to ensure that the solar energy system will not have a specific, adverse impact upon the public health or safety. . . . A "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as the existed on the date the application was deemed complete.<sup>145</sup>

California's statute allows for the local government to carry on its traditional role of preserving the health and safety of its citizens. The clear delineation of what falls into those categories offers local officials protection from making arbitrary, inconsistent decisions. Installers can predict exactly what standards with which their project must comply. Through California's Solar Rights Act, "health and safety" is transformed from a vague goal to a useful measuring stick.

Nevada's statute protects installers against regulations that affect the efficiency of their solar distributed generation systems.<sup>146</sup> Nevada's statute, titled "Prohibition Against Prohibiting or Unreasonably Restricting Use of System for Obtaining Solar Energy," also provides a useful, clear method of measuring whether or not a particular local regulation is acceptable.<sup>147</sup> In that state, unreasonable restrictions are defined thus:

[A] restriction or requirement . . . which decreases the efficiency or performance of the system by more than 10 percent of the amount that was originally specified for the system, as determined by the Director of the Office of Energy, and which does not allow for the use of an alternative system at a substantially comparable cost and with substantially comparable efficiency and performance.<sup>148</sup>

By making efficiency the benchmark, the Nevada statute seems to allow for a greater range of local regulation. For instance, it appears that a local government may impose restrictions on the aesthetic appearance of a solar

---

143. *See id.*

144. *See id.*

145. *See id.*

146. *See* NEV. REV. STAT. § 278.0208 (2011).

147. *See id.*

148. *Id.*

energy system, but not in a manner that reduces the system's efficiency by more than 10%.<sup>149</sup> While not as detailed as its California counterpart, the Nevada statute provides a clear and consistent standard.

A clear, consistent standard is essential for Missouri's professed goal of increased reliance on renewable resources. Approaches like those taken by California and Nevada can serve as models. The Missouri Legislature should use the public's broad support for renewable energy<sup>150</sup> to draw up a comprehensive, straightforward state statute that will promote the installation of distributed solar energy systems. One such law has been introduced in the Missouri legislature. Although it failed to move out of committee during the 2014 legislative session, and was thus not put up to a vote in either chamber, the bill may be reintroduced in future legislative sessions.<sup>151</sup> Discussed below, this piece of legislation would open the door to more state-level guidance on the installation of distributed generation.

### C. Senate Bill 579

Senate Bill 579 (SB 579), introduced by Senator Jason Holsman on December 2, 2013, and referred to the Senate Committee on Commerce, Consumer Protection, Energy and the Environment, attempts to clarify what regulations may be placed upon distributed solar energy generation systems. It prohibits "any restriction contained in a recorded declaration of a planned community, or any rule or regulation promulgated by a homeowners' association which prohibits, or has the effect of prohibiting, the installation of a solar energy system."<sup>152</sup> While the bill only affects regulations promulgated by homeowners' associations,<sup>153</sup> and not those enacted by local governmental entities, it is an important step in clarifying the rights of distributed generation installers.

The bill allows homeowners' associations to maintain a role in the approval process, explicitly outlining the boundaries to which their regulations must adhere.<sup>154</sup> It reads:

---

149. One important thing to note if Missouri uses this type of restriction as a model: in order to be eligible for a rebate from Ameren Missouri, installers must place systems, "in a location where a minimum of eighty-five percent (85%) of the solar resources is available to the system." See Interconnection Application/Agreement for Net Metering Systems with Capacity of 100 kW or Less, *supra* note 33. Examples of regulations that may reduce the efficiency of a solar array include setback, screening, and landscaping requirements. See *Integrating Solar Energy into Local Development Regulations*, AMERICAN PLANNING ASSOC., <http://www.planning.org/research/solar/briefingpapers/pdf/localdevelopmentregulations.pdf> (last visited Feb. 4, 2014).

150. See Editorial, *supra* note 28.

151. S. 579, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2013).

152. *Id.*

153. *Id.*

154. *Id.*

The governing board of a homeowners' association may adopt reasonable rules and regulations relating to solar energy system application procedures, design, architectural standards, location, orientation, installation, operations, maintenance, and related matters. No rule or regulation may prevent the installation, impair the functioning, restrict the use, unreasonably increase the operation costs, or reduce the efficiency of a solar energy system.<sup>155</sup>

Thus, the bill ensures that homeowners' associations will maintain enough control over distributed generation to be certain that their safety and design requirements are met.<sup>156</sup> Installers are protected from regulations that overstep the regulation safety and design to impair, restrict, or reduce the efficiency of their systems.<sup>157</sup> The legislation intends that potential installers will be adequately informed of all requirements for compliance with a particular homeowners' association's regulations by requiring the association's governing board to both publish the rules and provide them upon request.<sup>158</sup>

SB 579 requires homeowners' associations to establish a transparent, consistent application process that balances interests of installers and local officials. Similar laws involving homeowners' associations exist in several states.<sup>159</sup> If Missouri follows their example, it will be one step closer to achieving its goal of increased reliance on renewable sources of energy.

#### CONCLUSION

The State of Missouri, in seeking to achieve its goal of increased reliance on renewable sources of energy, would be best served by strong state-level control over land use regulation affecting residential-scale renewable energy systems. As use of residential-scale distributed generation becomes increasingly popular, local governments across the state will benefit from clearly articulated standards that ensure both safe operation of the technology and a consistent application process. Predictability in the application process

---

155. S. 579, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2013).

156. *Id.*

157. *Id.*

158. *Id.*

159. Hawaii law states, "[N]o person shall be prevented by any covenant, declaration, bylaws, restriction, deed, lease, term, provision, condition, codicil, contract, or similar binding agreement, however worded, from a solar energy device on any single-family residential dwelling or townhouse that the person owns." HAW. REV. STAT. § 196-7 (2013). Moreover, the same law prohibits homeowners associations from adopting any rules that "render the device more than twenty-five per cent less efficient or increase the cost of installation, maintenance, and removal of a solar energy device by more than fifteen per cent." *Id.* Colorado law also prohibits any "covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property that effectively prohibits or restricts the installation or use of a renewable energy generation device." COLO. REV. STAT. § 38-30-168 (2013). Texas law also prevents homeowners associations from completely blocking plans to install. TEX. PROP. CODE ANN. § 202.010 (West 2013).

will lead to increased installation of, and reliance upon, renewable energy sources. Increased renewables capacity will bring Missouri closer towards the 15% milestone approved of by its citizens in 2008's Missouri Energy Efficiency Investment Act. Thus, the Missouri Legislature should use the public's broad support for renewable energy to draw up a comprehensive, straightforward state statute that will promote the installation of distributed solar energy systems.

JOYCE LAFONTAIN\*

---

\* J.D. Candidate, 2015, Saint Louis University School of Law. Special thanks to Professor Peter W. Salsich, Jr. for providing valuable feedback and guidance. Thanks also to Chairman Robert Kenney and Annette Slack of the Missouri Public Service Commission for a memorable and truly enjoyable summer internship experience.

