

The County Role in Siting Renewable Energy

Wisconsin Counties Association
Annual Conference

September 28, 2021 – 8:00 a.m.

Presented by Rebecca J. Roeker, von Briesen & Roper, s.c.

Today's Discussion

Discussion Topics:

1. County regulatory authority over wind and solar energy systems.
2. Restrictions on county regulatory authority over wind and solar energy systems.
3. Wind energy systems: local approval procedures
4. Permissive authority for Counties: Solar and Wind Access Permits

Questions?

Section 1: County Regulatory Authority Over Solar and Wind Energy Systems



County Authority to Regulate: Statutory Restrictions

- County authority comes from Wis. Stat. Chapter 59.
- Counties are a body corporate that can sue and be sued.
- Powers are limited by state statute.
- Home Rule: Wis. Stat. § 59.03(1) - Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.
- Counties are governed by a board of supervisors.

County Authority to Regulate: Preemption

**Key Point: County may not regulate on issues that are preempted by Federal and State law.*

Lake Beulah Mgmt. Dist. v. E. Troy, 2011 WI 55, 335 Wis. 2d 92, 799 N.W.2d 787, the Wisconsin Supreme Court established a four-factor test to determine whether a local regulation is preempted by state law:

- Has the state legislation expressly withdrawn the powers of municipalities to act?
- Does the local regulation logically conflict with state legislation?
- Does the local regulation defeat the purpose of the state legislation?
- Does the local regulation violate the spirit of the state legislation?

County Authority to Regulate

Political subdivisions (counties, cities, villages, and towns) in Wisconsin possess unique, and somewhat limited, authority to regulate solar energy systems and wind energy systems.

- “Solar energy system” means “equipment which directly converts and then transfers or stores solar energy into usable forms of thermal or electrical energy.” Wis. Stat. § 13.48(2)(h)1.g.
- “Wind energy system” means equipment and associated facilities that convert and then store or transfer energy from the wind into usable forms of energy. Wis. Stat. § 66.0403(1)(m).

County Authority to Regulate (cont.)

How does County statutory authority and preemption impact wind and solar facility siting and regulation?

County Authority to Regulate: Siting and Approval (cont.)

Wis. Stat. § 66.0401: Sets forth statutory for siting and approval process, thereby preempting county regulation unless expressly stated.

**Key point: Wis. Stat. § 66.0401 explicitly limits the authority of political subdivisions to regulate wind and solar energy systems.*

County Regulatory Authority: Siting and Approval (cont.)

“The conditions (that may be used) are the standards circumscribing the power of political subdivisions, not openings for them to make policy that is contrary to the state’s expressed policy.”

Ecker Bros. v. Calumet County, 2009 WI App. 112, 321 Wis. 2d 51, 772 N.W.2d 240

The County Role in Siting Renewable Energy

SECTION 2: SPECIFIC RESTRICTIONS ON COUNTY REGULATORY AUTHORITY

Restrictions on Regulatory Authority - Wind

- 2009 Wis. Act 40 – provided uniform standards for the regulation of wind systems. Prior to this law, a county could regulate if one of the three standards in s. 66.0401(1m) was satisfied.
- Specific preemption language in Wis. Stat. § 66.0401(1m): A county may not place any restriction, either directly or in effect, on the installation or use of a wind energy system that is more restrictive than the PSC’s rules. *See* Wis. Admin. Code Ch. PSC 128.

Restrictions on Regulatory Authority – Wind AND Solar

- Wis. Stat. § 66.0401 (1m): A county may only place a restriction on the installation or use of a solar energy system or a wind energy system if the restriction satisfies at least one of the following conditions:
 - The restriction serves to preserve or protect the public health or safety;
 - The restriction does not significantly increase the cost of the system or significantly decrease its efficiency; or
 - The restriction allows for an alternative system of comparable cost and efficiency.

Restrictions on Regulatory Authority (cont.)

- Note that counties are not permitted to make general policies applicable to all solar and wind energy systems.
- Rather, permissible restrictions may only be made on a case-by-case basis.
- *See Ecker Brothers:*
 - The county must hear the specifics of the particular system and then decide whether a restriction is warranted.
 - It may not promulgate an ordinance in which it arbitrarily sets a “one size fits all” scheme of requirements for any system.
 - “Standards circumscribing the power of political subdivisions, not openings for them to make policy that is contrary to the state's expressed policy.”

Restrictions on Regulatory Authority (cont.)

- Wis. Stat. § 66.0401(3): Counties also may not prohibit or restrict any person from conducting testing activities.
 - “Testing activities” in this case includes tests performed to determine whether a site is suitable for the placement of a wind energy system and does not apply to solar energy systems.
- However, counties objecting to such testing may petition the PSC to impose reasonable restrictions on the testing activity (on a case-by-case basis).

The County Role in Siting Renewable Energy

SECTION 3:

WIND ENERGY SYSTEMS: LOCAL APPROVAL PROCEDURES

Wind Energy Approval: Local Procedures

- A standard process for local approval of wind energy systems is set forth in statute.
- Counties have the option to enact an ordinance to regulate wind energy systems, ***provided that the ordinance is no more restrictive than the applicable standards established by the PSC.***
- Regardless of whether a county has such an ordinance in place, the wind energy application process is subject to the statutorily prescribed procedures.
- Note, however, that there are some differences in the application process based on whether the county has an ordinance in effect (more on that point momentarily...)

Wind Energy Approval: Application Process

- In counties with an ordinance in place, the county must determine whether the application is complete upon receipt of an application for approval of a wind energy system.
- The county must make this determination and notify the applicant of its determination within 45 days of the receipt of the application.
- The county must publish a class 1 notice as soon as possible after receipt of an application stating that the application has been filed.

Wind Energy Application Process (cont.)

- If the county determines that the application is incomplete, the notice must state the reason for the determination.
- An applicant may supplement and refile an application that the county has determined to be incomplete (there is no limit on the number of times that an applicant may refile an application for approval).
- Note that the application is deemed to be complete if the county fails to make its determination within 45 days after the application is filed.

Wind Energy Application Process (cont.)

- The following differences apply when a county *does not* have a wind regulatory ordinance in effect:
 - The 45-day time period for determining whether an application is complete does not begin until the first day of the 4th month beginning after the county receives the application.
 - Giving the County time to enact an ordinance.
 - However, a county may notify an applicant at any time, after receipt of the application and before the first day of the 4th month after its receipt, that it does not intend to enact an ordinance.

Wind Energy Application Process: Public Notice

- Wis. Stat. § 66.0401(4)(a)3.: The *applicant* must also mail or deliver a written notice of the application to the owners of land adjoining the site of the wind energy system on the same day that the applicant makes its application for approval for a wind energy system.
- Wis. Stat. § 66.0401(4)(a)4.: Applicants are permitted to make “minor modifications” to the application without triggering the need for a new public notice (*i.e.*, a minor modification does not result in the filing of a new application).

Wind Energy Application Process: Record of Decision

- Wis. Stat. § 66.0401(4)(b): A county must make a record of its decision making on an application for approval, including:
 - a recording of any public hearing, copies of documents submitted at any public hearing, and copies of any other documents provided to the county in connection with the application for approval.
- The county's record must also conform to the rules promulgated by PSC (Wis. Admin. Code Ch. PSC 128).

Wind Energy Application Process: Review and Decision

- A county must base its decision on an application for approval on written findings of fact that *are supported by the evidence* in the record.
 - “Substantial” evidence?
- A county’s procedure for reviewing the application for approval shall conform to the rules promulgated by the PSC (Wis. Admin. Code Ch. PSC 128).
- The county must approve or disapprove the application no later than 90 days after the county notifies the applicant that the application is complete.
- The application is considered approved if a county fails to act within the 90 days.

Wind Energy Application Process: Extension of Time for Review – Wis. Stat. § 66.0401(4)(e)

- However, a county may extend the 90 day time period if, within that 90-day period, *the county authorizes* the extension in writing.
- Any combination of the following extensions may be granted, except that the total amount of time for all extensions granted may not exceed 90 days:
 - An extension of up to 45 days if the county needs additional information to determine whether to approve or deny the application for approval.
 - An extension of up to 90 days if the applicant makes a material modification to the application for approval.
 - An extension of up to 90 days for other good cause specified in writing by the county.

Wind Energy Application Process: Limitations on Denial and Restrictions

- Wis. Stat. § 66.0401(4)(f): A county may not deny or impose a restriction on an application for approval unless the county enacts an ordinance that is *no more restrictive than the rules promulgated by PSC* (Wis. Admin. Code Ch. PSC 128).
- However, a county may deny an application for approval if the proposed site of the wind energy system (that has a nominal capacity of at least one megawatt) is in an area primarily designated for future residential or commercial development, as shown in a map that is adopted, as part of a comprehensive plan, before June 2, 2009, or as shown in such maps after December 31, 2015, *as part of a comprehensive plan that is updated as required under Wis. Stat. s. 66.1001(2)(i).*
 - *Amendment of Comprehensive Plan is key.*

Wind Energy Application Process: Appeals

Wis. Stat. § 66.0401(5)(a):

A county's decision to approve, disapprove, or impose a restriction upon a wind energy system, or an action of a county to enforce a restriction on a wind energy system, may be appealed to the PSC.

Wind Energy Application Process: Appeals (cont.)

Three (3) Options for Appeal:

1. An aggrieved person to follow the county's administrative review process.

The person may then file an appeal with the PSC within 30 days of the conclusion of the administrative review process if the person is still aggrieved after the conclusion of the administrative review process.

Additionally, the county's administrative review process is deemed completed if the process is not concluded within 90 days.

Wind Energy Application Process: Appeals (cont.)

2. An aggrieved person may choose to appeal directly to PSC.
 - Such an appeal may not be filed later than 30 days after the county's decision or the county's initiation of the enforcement action.
3. Finally, an applicant may appeal directly to PSC if the applicant's application for approval is denied because the proposed site is located in an area primarily designated for future residential or commercial development.
 - The PSC may grant the appeal notwithstanding the inconsistency of the application for approval with the county's planned residential or commercial development if the PSC determines that granting the appeal is consistent with the public interest.

The County Role in Siting Renewable Energy

SECTION 4: PERMISSIVE REGULATORY AUTHORITY FOR COUNTIES

Permissive Regulatory Authority – What May We Adopt?

- Counties may choose to enact policies to promote siting of renewable energy systems within their jurisdiction by enacting an ordinance relating to:
 - The trimming of vegetation that blocks solar energy from a collector surface or that blocks wind energy from a wind energy system.
 - Access permit requirements (not your traditional “access” permit).
 - Zoning permits.

**Key point: all ordinances are subject to preemption requirements. Example: A county may not curtail the requirements and limitations set forth in Wis. Stat. § 66.0401 and Wis. Stat. § 66.0403 by adopting a conditional use permit requirement that will regulate in a more restrictive fashion.*

Permissive Regulatory Authority: Trimming

- Counties may adopt an ordinance relating to the trimming of vegetation that blocks solar energy from a collector surface or that blocks wind energy from a wind energy system.
- The ordinance may include a designation of responsibility for the costs of the trimming.
- The ordinance may not require the trimming of vegetation that was planted by the owner or occupant of the property on which the vegetation is located before the installation of the solar or wind energy system.

Permissive Regulatory Authority: Solar and Wind Access Permits

- Counties with a zoning ordinance may also choose to grant permits for solar and/or wind access (*i.e.*, to preserve access to sunlight or wind).
- A permit may only affect land except land which, at the time the permit is granted, is within the territorial limits of the municipality or is subject to an extraterritorial zoning ordinance adopted under Wis. Stat. § 62.23(7a).
- A permit issued by a city or village may not affect extraterritorial land subject to a zoning ordinance adopted by a county or a town.
- The county board may appoint itself as the “agency” to process applications or may create or designate another agency to grant permits.

Solar and Wind Access Permits (cont.)

- The county board may require a fee to cover the costs of processing applications. The fee must be prescribed in ordinance.
- The ordinance may also contain any provision the board deems necessary for granting a solar or wind access permit, including but not limited to:
 - (a) Specifying standards for permit approvals.
 - (b) Defining an impermissible interference to include vegetation planted before the date the application is determined to be completed (provided that the permit holder shall be responsible for the cost of trimming such vegetation).

Solar and Wind Access Permits (cont.)

- Wis. Stat. § 66.0403(3)(b): The county agency responsible for the application process must determine if a submitted application is satisfactorily completed and must notify the applicant of its determination.
- If an applicant receives notice that an application has been satisfactorily completed, the *applicant must then deliver a notice* to the owner of any property which the applicant proposes to be restricted by the permit.
- The applicant must also submit a copy of a signed receipt from every property owner to whom notice is delivered to the agency.

Solar and Wind Access Permits: Notice Form

- Note: the agency must supply the property owner notice form.
- The information on the form may include (without limitation):
 1. The name and address of the applicant, and the address of the land upon which the solar collector or wind energy system is or will be located.
 2. That an application has been filed by the applicant.
 3. That the permit, if granted, may affect the rights of the notified owner to develop his or her property and to plant vegetation.
 4. The telephone number, address and office hours of the agency.
 5. That any person may request a hearing within 30 days after receipt of the notice, and the address and procedure for filing the request.

Solar and Wind Access Permits: A Unique Hearing Process

- Any person receiving a notice for an access permit may request a hearing on the granting of a permit within 30 days after receipt of the notice.
- Likewise, the county agency may determine that a hearing is necessary even if no request is filed.
- If a request is filed or if the agency determines that a hearing is necessary, the agency must conduct a hearing on the application within 90 days after the last notice is delivered.
- The agency must notify the applicant and all persons receiving the notice at least 30 days prior to the hearing date, and any other person filing a request of the time and place of the hearing.

Solar and Wind Access Permits: Granting the Permit

- Wis. Stat. § 66.0403(5)(a): The agency *shall* grant a permit if the agency determines that:
 - The granting of a permit will not unreasonably interfere with the orderly land use and development plans of the county;
 - No person has demonstrated that she or he has present plans to build a structure that would create an impermissible interference; and
 - The benefits to the applicant and the public will exceed any burdens.
- Note: Any person aggrieved by a determination by a county to grant an access permit may appeal the determination to the circuit court for a review.

Solar and Wind Access Permits: Permit Conditions

- An agency may grant a permit subject to any condition or exemption the agency deems *necessary* to minimize the possibility that the future development of nearby property will create an impermissible interference or to minimize any other burden on any person affected by granting the permit.
- Such conditions or exemptions may include (but are not limited to) restrictions on the location of the solar collector or wind energy system and requirements for the compensation of persons affected by the granting of the permit.

Solar and Wind Access Permits: Record of Permit

- Wis. Stat. § 66.04003(6): If an agency grants a permit, the agency must specify the property restricted by the permit and must prepare notice of the granting of the permit.
- The notice must include certain required identifications for the permit for the owner and the property upon which the solar collector or wind energy system is or will be located and for any owner and property restricted by the permit.
- The notice must also indicate that the property may not be developed and vegetation may not be planted on the property so as to create an impermissible interference with the solar collector or wind energy system unless the permit is terminated or unless an agreement affecting the property is filed.

Solar and Wind Access Permits: Record of Permit (cont.)

- The applicant must then record with the register of deeds of the county in which the property is located:
 - The notice for each property receiving the notice of application; and
 - For the property upon which the solar collector or wind energy system is or will be located.

Solar and Wind Access Permits: Remedies for Impermissible Interference

- Any person who uses property which he or she owns or permits any other person to use the property in a way which creates an impermissible interference under a permit which has been granted or which is the subject of an application is liable to the permit holder or applicant for damages.
- Damages include any loss due to the impermissible interference, court costs and reasonable attorney fees unless:
 - The building permit was applied for prior to receipt of an application notice or the agency determines not to grant a permit after a hearing.
 - A permit affecting the property is terminated.
 - An agreement affecting the property is filed.

Solar and Wind Access Permits: Remedies for Impermissible Interference (cont.)

- A permit holder is entitled to an injunction to require the trimming of any vegetation which creates or would create an impermissible interference.
- If the court finds on behalf of the permit holder, the permit holder shall be entitled to a permanent injunction, damages, court costs and reasonable attorney fees.

Solar and Wind Access Permits: Termination of Rights

- Any right protected by a permit under this section is terminated if the agency determines that the solar collector or wind energy system which is the subject of the permit is:
 - Permanently removed or is not used for 2 consecutive years (excluding time spent on repairs or improvements).
 - Not installed and functioning within 2 years after the date of issuance of the permit.
- However, the agency must give the permit holder written notice and an opportunity for a hearing on a proposed termination.
- If the agency terminates a permit, the agency may charge the permit holder for the cost of recording and record a notice of termination with the register of deeds.

Solar and Wind Access Permits: Waiver of Rights by Agreement

- A permit holder may waive all or part of any right protected by a permit.
- A waiver must be evidenced by written agreement.
- A copy of such agreement shall be recorded with the register of deeds, who shall record such copy with the recorded notice.

Solar and Wind Access Permits: Important Caveats

- A county *may not* require an owner to obtain a permit prior to installing a solar collector or wind energy system.
 - Rather, the permit is a benefit to property owners and intended to promote investment in solar and wind energy systems.
- The acquisition of a renewable energy resource easement under Wis. Stat. § 700.35 is not contingent upon the granting of a solar or wind energy access permit.

Final Thoughts?



