# DIGGING DEEPER ON SOLAR PROJECTS

# What Exactly is the County Role in Regulating?

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With several high profile applications pending before the Wisconsin Public Service Commission seeking certificates of public convenience and necessity (CPCN), including the Langdon Mills and High Noon projects in Columbia County, the Northern Prairie project in St. Croix County, the Elk Creek project in Dunn County, the Portage project in Portage County, and the Saratoga project in Wood County (all of which are solar projects), some have questioned the role of counties once certificates have been submitted to the PSC. The June 2022 edition of the Wisconsin Counties magazine detailed what counties can do to generally regulate alternative energy systems. What follows is a specific analysis of possible preemption challenges counties may face when attempting to regulate a renewable energy project that has already been submitted to the PSC for review.

## Preemption framework

Wis. Stat. § 66.0401(1m) addresses regulation relating to solar and wind energy systems, providing that: "No political subdivision may place any restriction, either directly or in effect, on the installation or use of a solar energy system, as defined in s. 13.48 (2) (h) 1. g., or a wind energy system, unless the restriction satisfies one of the following conditions: (a) Serves to preserve or protect the public health or safety. (b) Does not significantly increase the cost of the system or significantly decrease its efficiency. (c) Allows for an alternative system of comparable cost and efficiency."

Wis. Stat. § 66.0403 provides a process for solar and wind access permits.[1] Specifically with respect to counties, "municipality" under the statute means any county with a zoning ordinance under Wis. Stat. § 59.59. A county may provide for granting a permit and may appoint itself as the agency to process applications or may create or designate another agency to grant permits. After submitting an application for a permit, an agency shall grant a permit if it determines that: 1. The granting of a permit will not unreasonably interfere with the orderly land use and development plans of the municipality; 2. No person has demonstrated that she or he has present plans to build a structure that would create an impermissible interference by showing that she or he has applied for a building permit prior to receipt of a notice under sub. (3) (b), has expended at least $500 on planning or designing such a structure or by submitting any other credible evidence that she or he has made substantial progress toward planning or constructing a structure that would create an impermissible interference; and 3. The benefits to the applicant and the public will exceed any burdens.[2]

What makes the statutory framework unique is a permit's impact on other, adjacent property owners. For example, Wis. Stat. § 66.0403(7) provides (with a few exceptions) that "[a]ny 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 shall be liable to the permit holder or applicant for damages." The section "may not be construed to require that an owner obtain a permit prior to installing a solar collector."[3]

The ability of a local ordinance to impact a solar energy project is also greatly affected by the PSC CPCN process. Wis. Stat. § 196.491(3) provides that "no person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity under this subsection." After a public hearing on the application, the PSC shall approve an application for a CPCN if it determines several conditions are met, including, among others, "(i) that the proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy; (ii) the design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors; (iii) the proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use; (iv) the proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved; and (v) the proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market."

Most importantly for this review, "[i]f installation or utilization of a facility for which a certificate of convenience and necessity has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility *may nevertheless proceed*."[4]

## Application by Wisconsin courts

Wisconsin courts have directly weighed in on the application of the above statutory framework to local efforts to regulate renewable energy projects. Three cases in particular are instructive.

First, in State ex rel. Numrich v. City of Mequon Bd. of Zoning Appeals, the court addressed a situation where two lot owners wished to construct a wind energy system on their respective lots and applied for conditional use permits for construction of the systems.[5] Following a public hearing, the planning commission unanimously voted to deny the applications.[6] The board of zoning concluded that the commission "acted in accordance with 66.031(1)[7] … in denying conditional use permits."

The court began its analysis by emphasizing the owner of an energy system does not need a permit under § 66.032 to construct such a system. Therefore, "barring any other enforceable municipal restrictions, an owner may construct such a system without prior municipal approval. In fact, § 66.032(3) envisions that such a system might already be in place when an application for a permit is made."[8] Second, it noted the unique nature of the statute, which "serves to benefit and protect the owner of a solar or wind energy system permit by restricting users or owners of nearby property from creating an 'impermissible interference' with the energy system."[9] Third, it observed "§ 66.031 represents a legislative restriction on the ability of local governments to regulate solar and wind energy systems … The statute is not trumped, qualified or limited by § 66.032 or by a municipality's zoning and conditional use powers."[10]

Looking to the legislative history, the court explained "the legislature expressed concern about the diminishing supplies of nonrenewable energy resources, and it observed that renewable energy systems could address this concern."[11] Specifically, it highlighted the Legislature's resolve to remove legal impediments to systems by: "codifying the right of individuals to negotiate and establish renewable energy resource easements, by clarifying the authority of, and encouraging, local governments to

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employ existing land use powers for protecting access rights to the wind and sun, by creating a procedure for issuance of solar access permits to owners and builders of active and passive solar energy systems and by encouraging local governments to grant special exceptions and variances for renewable energy resource systems." [12]

Focusing on the city's argument that Wis. Stat. § 66.032 (now § 66.0403) and the city's zoning and conditional use powers served to broaden the scope of the inquiry beyond the limited restrictions set out in Wis. Stat. § 66.031 (now § 66.0401),[13] the court concluded the following: "We conclude that the Board erred by factoring Wis. Stat. § 66.032 into its determination. As we have noted, the owners were not seeking permits under § 66.032. To the contrary, they continuously argued against the application of § 66.032. Instead, they were seeking conditional use permits. Because Wis. Stat. § 66.031 places limitations on the authority of local governments to regulate wind energy systems, the Board's reliance on § 66.032 or its traditional zoning and conditional use powers was misplaced. Instead, the Board was duty bound to confine its consideration of the conditional use applications in light of the restrictions placed on local regulations pursuant to § 66.031. Therefore, the Board proceeded on an incorrect theory of the law."[14]

Ecker Brothers v. Calumet County involved a challenge by property owners against the county, arguing that the county ordinance restricting construction of wind energy turbines was ultra vires under state statute.[15] Specifically, the county passed a moratorium on further wind turbines and eventually passed a wind turbine ordinance restricting all wind energy systems uniformly based on a system's classification as a large or small system.[16]

The court described Wis. Stat. § 66.0401 as "a state legislative restriction that expressly forbids political subdivisions from regulating solar and wind energy systems."[17] While the statutory scheme also allows political subdivisions to issue "wind access permits," they cannot require owners to apply for a wind access permit.[18] The Ecker Brothers contended that the local restrictions could not be the same for all systems and could not be created before the fact without knowledge of the facts of an individual project.[19] The court explained "this argument boils down to the proper method for restricting wind energy systems: (1) a conditional use permit procedure that restricts systems as needed on a case-by-case basis, or (2) an ordinance creating a permit system with across-the-board regulations based on legislative policy-making."[20] The county had decided its restrictions would never conflict with the three conditions of Wis. Stat. § 66.0401(1m).[21]

The court didn't "buy" the county's argument that "the legislature actually authorized localities to make their own policy regarding alternative energy systems."[22] "Counties have no inherent power to govern."[23] Instead, "[w]hatever power of local, legislative or administrative power they have is delegated to political subdivisions by the legislature."[24] Going on, the court observed "[w]e are unconvinced that just because the legislature provided for three conditions under which political subdivisions can restrict a wind energy system, that it granted political subdivisions the authority to determine as a matter of legislative fact a "cart before the horse" method of local control."[25] A county must instead "rely on the facts of an individual situation to make case-by-case restrictions."[26]

The scope of this exercise is narrow and must be conducted through a conditional use process. The court found: "Wis. Stat. § 66.0401(1) requires a case-by-case approach, such as a conditional use permit procedure, and does not allow political subdivisions to find legislative facts or make policy. The conditions listed in § 66.0401(1) (a)-(c) 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."[27] The court

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concluded by focusing on the partnering role of the county and by pointing out if a county wished to alter the relationship, it could lobby the Legislature: "These strategies indicate that the legislature determined it appropriate to give political subdivisions the power to assist in the creation of renewable energy systems and thus become an integral and effective factor in the State's renewable energy goal. But, this history does not indicate that the State intended to delegate the power of policymaking. Instead, the evidence is that the State delegated the authority to execute and administer its established policy of favoring wind energy systems, and the statutory scheme was intended to create avenues for political subdivisions to assist the State. If the County and other similarly situated localities believe that localities should be able to decide for themselves whether and to what extent wind systems are welcome in their geographical area, their argument is best made to the legislature."[28]

Finally, it is important to factor in the role of the PSC and Chapter 196. The court in American Transmission Co., LLC v. Dane County found "in Wis. Stat. § 196.491(3)(i), the legislature has expressly withdrawn the power of municipalities to act, once the PSC has issued a certificate of public convenience and necessity, on any matter that the PSC has addressed or could have addressed in that administrative proceeding."[29] In addition, "the local power that is withdrawn by the statute includes requiring the application for local permits of the type that are in dispute in this case."[30]

After the first of the three PSC certificates were issued, Dane County took the position that construction could not begin until ATC obtained a shoreland erosion control permit.[31] ATC did not apply for the permits because of its view the county process would "inhibit" the construction of the projects within the meaning of Wis. Stat. § 196.491(3)(i).

In order to arrive at its conclusion, the court first had to address the preemption doctrine. It explained the process as follows: "Under the preemption doctrine, where a matter is of statewide concern, local control must yield if: (1) the legislature has clearly and expressly withdrawn the power of municipalities to act; (2) the local regulation logically conflicts with state legislation; (3) the local regulation defeats the purpose of state legislation; or (4) the local regulation violates the spirit of state legislation."[32]

The court applied the framework and agreed with the circuit court and ATC that there was preemption on the first ground — express withdrawal in Wis. Stat. § 196.491(3)(i). In arriving at its conclusion, the court relied on RURAL v. PSC, 2000 WI 129, 239 Wis.2d 660, 619 N.W.2d 888. There, the court addressed a situation where the village of Rockdale opposed some of the conditions the PSC had imposed in a CPCN on the ground that the conditions "had the effect of wrongfully excluding Rockdale from its extraterritorial zoning authority over the town of Chistiana."[33] The court rejected Rockdale's position, concluding that the PSC had "reasonably interpreted and applied statutory authority [Wis. Stat. § 196.491(3)(i)] that precludes zoning or other local ordinances from inhibiting the construction or operation of a facility."[34] Again, looking to legislative history, the RURAL court highlighted the Legislative Council staff's summary and analysis, which explained "one of the three effects of a certificate is to abrogate those local zoning ordinances that would impede the construction of a facility that was found to be of public convenience and necessity."[35]

The court agreed that RURAL does not hold that all local regulations are preempted, but in so doing, focused on the similarity between "impede" and "inhibit." The court "presume[d] 'inhibit' does not have the same meaning as 'preclude' in § 196.491(3)(i). The phrase 'preclude or inhibit' conveys the legislature's intent that a certificate of public convenience and necessity preempts not only those local ordinances that would prevent the project entirely ('preclude')

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but also those that would only hinder ('inhibit') the project."[36]

Applying this standard, the court found Dane County's position was inconsistent with the court's analysis in RURAL because it did not examine the specific regulations that Rockdale wished to enforce and then determine the effect each requirement would have on the subject. Instead, "based on the general subject matter of the regulations the court concluded the regulations would impede or inhibit the project."[37] Therefore, "The only reasonable reading of RURAL is that Wis. Stat. § 196.491(3)(i) 'abrogates,' in the court's own words, local regulations that govern the same subject matter that the PSC is required by statute to consider in granting a certificate for public convenience and necessity. Id., ¶¶ 65–68. The necessary implication of the court's analysis is that any enforcement of local regulations governing those matters impedes or inhibits the project."[38]

Turning to the Dane County ordinances, the court observed that the factors the PSC is required to consider encompassed the same subject matter of the local ordinance sections of the Dane County permits. Therefore, "Even if Dane County intends to do nothing more than have American Transmission apply for permits so that it can locally enforce what American Transmission is required to do under the PSC orders, the permit process in itself is an additional impediment or inhibiting factor in the installation and utilization of the transmission lines."[39] Any "deficiencies" identified by the county would add time and/or cost.[40] The solution in the mind of the court was to participate in the PSC proceedings and to petition for review of the PSC decision in the circuit court if it so desired.[41]

## Conclusion

The above statutory framework, as interpreted and applied by three key Wisconsin cases, makes clear that any attempt by counties to regulate renewable energy projects that have already been submitted to the PSC for review and approval are likely to face significant hurdles. It is important that counties work closely with their corporation counsel to determine whether local ordinances are in conflict with this statutory framework. If you have any questions surrounding this complex topic, please do not hesitate to contact the association or the authors at jcurtis@attolles.com or aphillips@attolles.com. ■

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1. See Wis. Stat. § 66.0403(2).
2. Wis. Stat. § 66.0403(5)(a)1.-3.
3. Wis. Stat. § 66.0403(12).
4. Wis. Stat. § 196.491(3)(i) (emphasis added).
5. 2001 WI App 88, ¶2, 242 Wis.2d 677, 626 N.W.2d 366.
6. Id.
7. The relevant sections of Chapter 66 were subsequently renumbered.
8. Id., ¶15. Unless expressly noted, for ease of reading internal quotation marks, alterations, and citations have been omitted from quotations (i.e. "cleaned up").
9. Id., ¶16 (emphasis in original).
10. Id., ¶17.
11. Id., ¶18.
12. Id., ¶18 (quoting Laws of 1981, ch. 354, §1, ¶(2)(b)).
13. Id., ¶21.
14. Id., ¶23 (emphasis in original).
15. 2009 WI App 112, 321 Wis.2d 51, 772 N.W.2d 240.
16. Id., ¶2.
17. Id., ¶10.
18. Id., ¶11.
19. Id., ¶13.
20. Id.
21. See id., ¶16.
22. Id., ¶¶17-18.
23. Id., ¶18.
24. Id.
25. Id. ¶20 (emphasis in original).
26. Id.
27. Id. ¶22.
28. Id. ¶23 (emphasis in original).
29. 2009 WI App 126, ¶2, 321 Wis.2d 138, 772 N.W.2d 731.
30. Id.
31. Id., ¶4.
32. Id., ¶9.
33. Id., ¶12 (quoting RURAL, 2000 WI 129, ¶64).
34. Id., ¶12 (quoting RURAL, 2000 WI 129, ¶65).
35. Id., ¶13.
36. Id., ¶14, n.7.
37. Id., ¶15.
38. Id. (emphasis in original).
39. Id., ¶17.
40. Id.
41. Id., ¶18.