



Wisconsin Counties Association  
**ANNUAL CONFERENCE**  
*& Exhibit Hall* **2023**

**9:15 – 10:15 AM**

**Renewable Energy: Local Regulation and Financial Implications**

Speakers: Jacob J. Curtis, Attorney, Attolles Law, s.c.; Rebecca J. Roeker, Attorney, Attolles Law, s.c.

Moderator: Donna Rozar, County Supervisor, Wood County

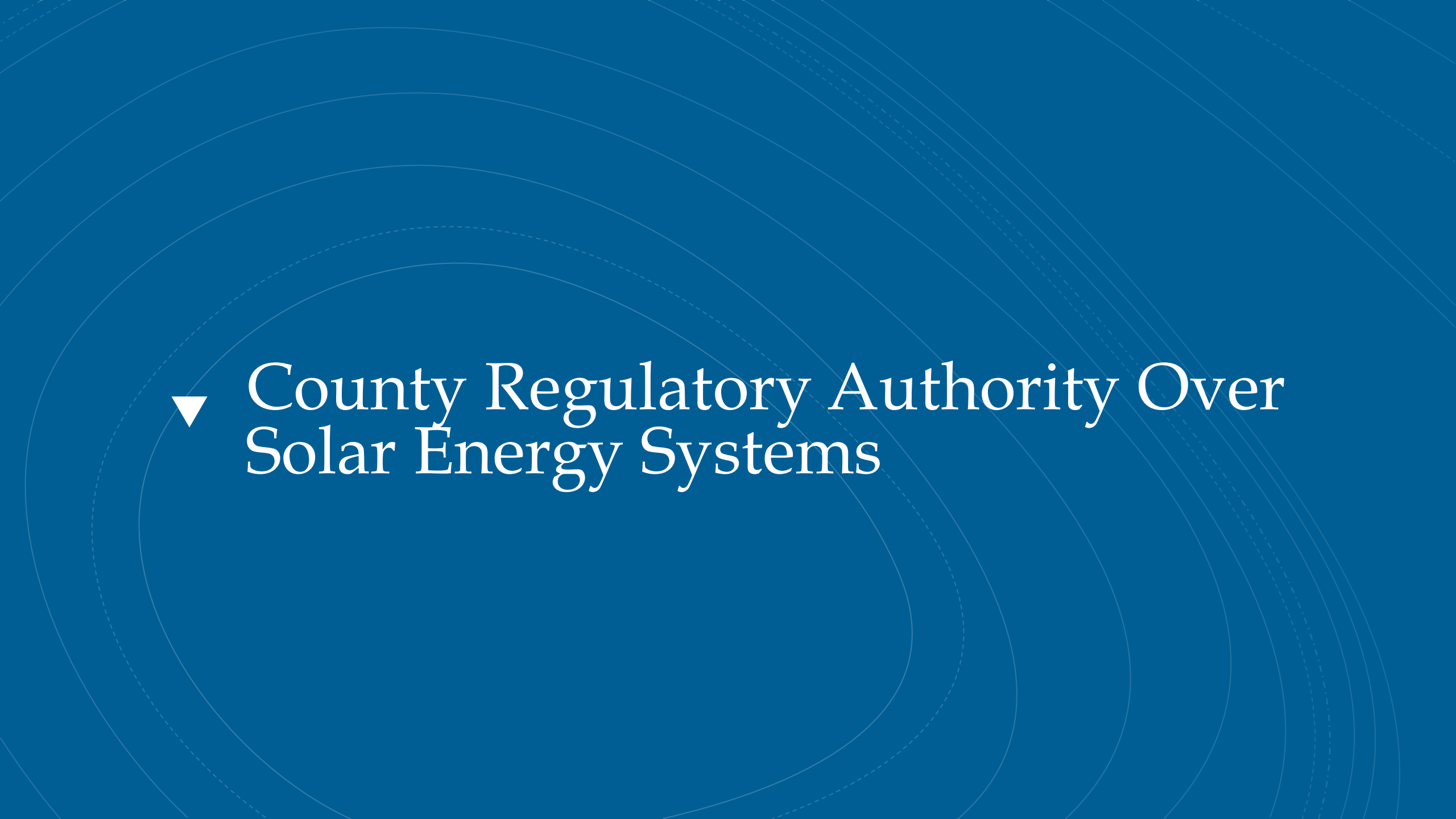
# County Role in Siting Solar Energy

2023 WCA Annual Conference

Jake Curtis & Rebecca Roeker

## Agenda

- General County Regulatory Authority Over Solar Energy Systems
- Specific Restrictions on County Regulatory Authority
- Permissive Regulatory Authority for Counties: So What May a County Adopt?



▼ County Regulatory Authority Over  
Solar 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*, 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- Has the state legislation expressly withdrawn the powers of municipalities to act?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

# County Authority to Regulate

- Political subdivisions (counties, cities, villages, and towns) in Wisconsin possess unique, and somewhat limited, authority to regulate solar 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: Siting and Approval

Wis. Stat. § 66.0401: Sets forth statute 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 solar energy systems.*



## County Authority to Regulate: Siting and Approval

“The conditions (that may be used) are the standards circumscribing [i.e. constricting] 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



▼ Specific Restrictions on County  
Regulatory Authority

# Restriction on Regulatory Authority: PSC

- No person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity (“CPCN”) from the PSC. See Wis. Stat. § 196.491(3).
- Facility means a “large electric generating facility” designed for nominal operation at a capacity of 100 megawatts or more.
- ***\*Key point: If installation or utilization of a facility (i.e. ≥ 100 MW) for which a CPCN has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed. Wis. Stat. 196.491(3)(i).***
- PSC must then hold a public hearing on an application and **shall approve** an application for a certificate of public convenience and necessity if all 8 statutory factors are met, which include:

# Restriction on Regulatory Authority: PSC Factors

- The proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy.
- 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.
- 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.
- The proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved.
- The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market.

# Wholesale Merchant Plant

- 2 of the CPCN factors do *not* apply to Wholesale Merchant Plants – (2) reasonable needs of the public for an adequate supply of electric energy and (3) design and location or route is in the public interest.
- Wholesale Merchant Plant means “electric generating equipment and associated facilities located in this state that do not provide service to any retail customer and that are owned and operated by ... an affiliated interest of a public utility [subject to PSC approval] [or] a person that is not a public utility.”

# Restriction on Regulatory Authority: County Role in PSC Process?

- No local ordinance may prohibit or restrict testing activities undertaken by an electric utility for purposes of determining the suitability of a site for the placement of a facility. Any local unit of government objecting to such testing may petition the commission to impose reasonable restrictions on such activity.
- **If 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.**
  - This expressly withdraws 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. *American Transmission Co., LLC v. Dane County*, 2009 WI App 126, 321 Wis. 2d 138, 772 N.W.2d 731.

## Restriction on Regulatory Authority

- Wis. Stat. § 66.0401 (1m): A county may only place a restriction (either directly or in effect, i.e. BROADLY Interpreted) on the installation or use of a solar energy system (as defined in Wis. Stat. § 13.48(2)(h)1.g.) 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.

## Restriction on Regulatory Authority

- Note that counties *are not* permitted to make general policies applicable to all solar energy systems.
- Rather, permissible restrictions may only be made on a case-by-case basis – “**A** solar energy system.”
- *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.”



## How has this statutory framework been applied? *Numrich*

- 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. 2001 WI App 88, ¶2, 242 Wis.2d 677, 626 N.W.2d 366.
- First, the Court concluded “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.”
- 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.”
- 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.”

## How has this statutory framework been applied? *Ecker Brothers*

- *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 (in excess of legal authority) under state statute. 2009 WI App 112, 321 Wis.2d 51, 772 N.W.2d 240.
- The Court didn't "buy" the County's argument that "the legislature actually authorized localities to make their own policy regarding alternative energy systems."
- 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."

## How has this statutory framework been applied? *Ecker Brothers*

- 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.***

## How has this statutory framework been applied? *Ecker Brothers*

- The Court 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.***

## How has this statutory framework been applied? *American Transmission*

- 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.
- 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).
- 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.”
- 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.”

# How has this statutory framework been applied? *American Transmission*

- 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”) but also those that would only hinder (“inhibit”) the project.*

- 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.*



▼ Permissive Regulatory Authority for  
Counties

## So What May A County Adopt?

- Counties may choose to enact policies consistent with Wis. Stat. § 66.0403 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.
  - 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.



# The CUP Process

- Under *Ecker*, Sub. (1m) 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 local governing arm 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.
- The conditions listed in sub. (1) (a) to (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.

## The CUP Process: Post 2017 Act 67

- Act 67 was response to *AllEnergy Corp. v. Trempealeau County*.
- The County voted to adopt 37 conditions for a frac sand mine CUP, which AllEnergy agreed to meet. But the County ultimately voted to deny the CUP, in part relying on public testimony in opposition to the mine.
- Divided SCOWIS upheld the County's denial of the CUP. The Dissent opined "An application for a conditional use permit is not an invitation to re-open that debate. A permit application is, instead, an opportunity to determine whether the specific instantiation of the conditional use can be accomplished within the standards identified by the zoning ordinance."

# The CUP Process: Wis. Stat. § 59.69(5e)

- If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the county ordinance or those imposed by the county zoning board, the county **shall** grant the conditional use permit. (5e)(b)1.
- Any condition imposed must be related to the purpose of the ordinance and be based on **substantial evidence**. *Id.*
- “Substantial evidence” means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion. (5e)(a)2.
- The requirements and conditions described under subd. 1. must be **reasonable** and, to the extent practicable, **measurable** and may include conditions such as the permit’s duration, transfer, or renewal.
- The applicant must demonstrate that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The county’s decision to approve or deny the permit must be supported by substantial evidence.



## Permissive Regulatory Authority: Trimming

- Counties may adopt an ordinance relating to the trimming of vegetation that blocks solar energy from a collector surface.
- 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 energy system.

## Permissive Authority: Solar Access Permits

- Counties with zoning ordinance under Wis. Stat. § 59.69 may also choose to grant permits for solar access (*i.e.*, to preserve access to sunlight).
- A permit may only affect 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.

## Permissive Authority: Solar Access Permits

- 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 access permit, including but not limited to:
  - Specifying standards for permit approvals.
  - 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).

## Permissive Authority: Solar Access Permits

- 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 Access Permits: Notice Form

- 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 Access Permits: 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 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 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 and requirements for the compensation of persons affected by the granting of the permit.

## Solar 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 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 unless the permit is terminated or unless an agreement affecting the property is filed.

## Solar Access Permits: Record of Permit

- 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 is or will be located.

# Solar 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 Access Permits: Remedies for Impermissible Interference

- 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 Access Permits: Termination of Rights

- Any right protected by a permit under this section is terminated if the agency determines that the solar collector 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 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 Access Permits: Important Caveats

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



# QUESTIONS & ANSWERS

# Contact Information

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