Wisconsin Counties Association

2025 ANNUAL CONFERENCE GAME DAY

10:30 – 11:30 AM

Regulating Renewable Energy: Are Counties Full of Hot Air?

Regulating Renewable Energy: Are Counties Full of Hot Air?

WCA Annual Conference

September 23, 2025

Attorney Malia Malone, Attolles Law, s.c.
Attorney Rebecca J. Roeker, Attolles Law, s.c.

ATTOLLES LAW, s.c.

GENERAL OVERVIEW:

1. General Restrictions on County Regulatory Authority

2. Specific Restrictions on County Regulatory Authority

3. Permissive Regulatory Authority for Counties

4. Options for Counties

GENERAL RESTRICITONS ON COUNTY REGULATORY AUTHORITY

County Authority to Regulate: Statutory Restrictions

- County authority comes from Wis. Stat. Ch. 59.
- Counties are a corporate body 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.

General Restriction on County Authority to Regulate: Preemption

- 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  - Has the state legislation expressly withdrawn the powers of municipalities to act?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 legislation?

General Restriction on County Authority to Regulate: Preemption and Other Applicable Statutes

- Wis. Stat. § 700.111 – Solar energy systems and wind energy systems exempt from personal property taxation.
- Wis. Stat. § 236.292 – Subdivision plats may not prevent or unduly restrict the construction and operation of solar energy systems or wind energy systems.
- Wis. Stat. § 700.41 – Interests in solar and wind access as property interests.
- Wis. Stat. § 101.175 – Local Energy Resource Systems (construction and building requirements under DSPS jurisdiction).
- Wis. Stat. § 844.22 – Obstruction of solar or wind energy system is considered to be a private nuisance.

General Restriction on County Authority to Regulate: Preemption and Other Applicable Administrative Codes

- Wis. Admin. Code Ch. PSC 128 – Wind Energy Systems. Establishes rules for all local governments when reviewing applications for wind energy projects with a maximum generating capacity of less than 100 megawatts.
- Wis. Admin. Code Ch. SPS 371 – Solar Energy Systems.
- Wis. Admin. Code Ch. TAX 12 – Property Tax.

Specific Restrictions on County Regulatory Authority

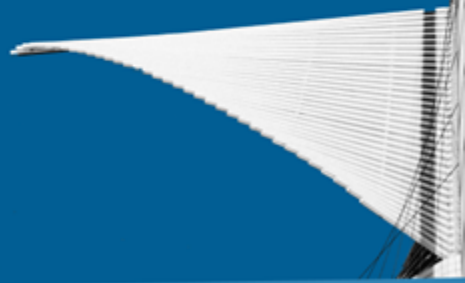
County Authority to Regulate Solar and Wind Energy Systems: Preemption

- Political subdivisions (counties, cities, villages, and towns) in Wisconsin possess unique and 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: Solar Energy Systems Siting and Approval

- Wis. Stat. § 66.0401: Sets forth statute for siting and approval process for both solar and wind energy systems, 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 and wind energy systems.



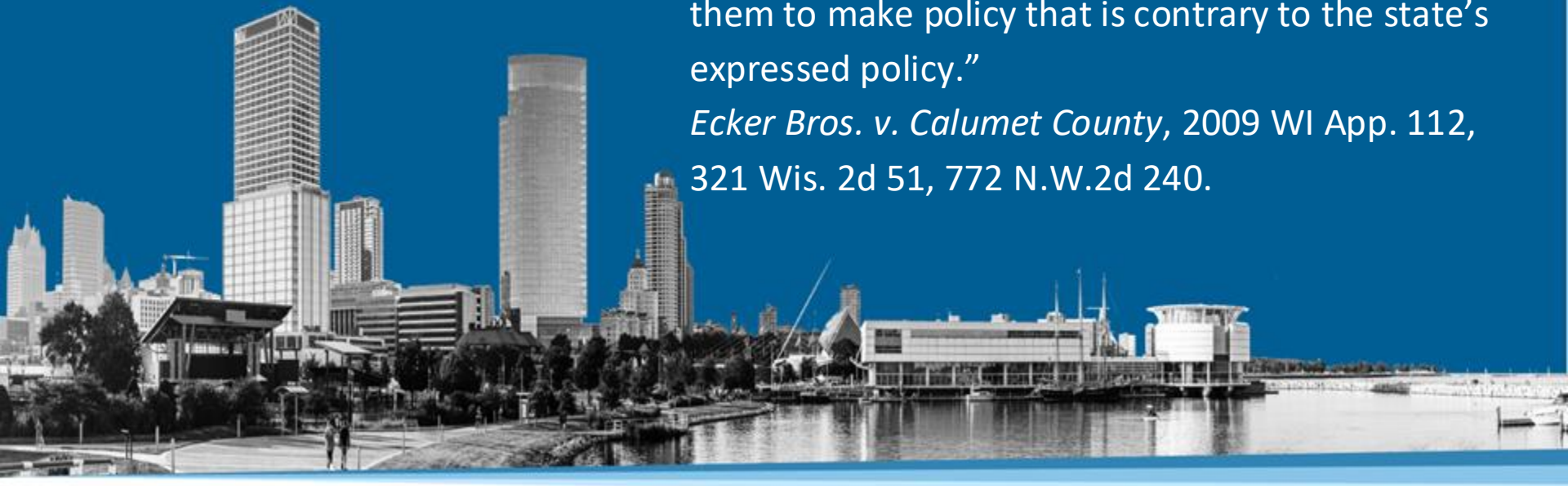
County Authority to Regulate: Solar Energy Systems Siting and Approval

- Wis. Stat. § 66.0401 (1m): A county may only place a restriction (either directly or in effect) 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.

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.

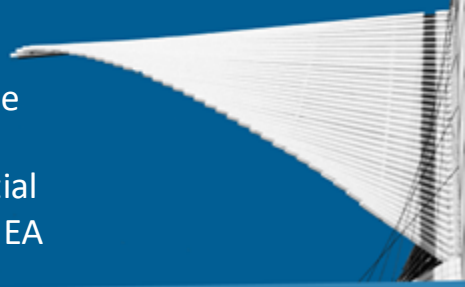


County Authority to Regulate Renewable Energy Systems: Background and PSC Process

- 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).***

County Authority to Regulate Renewable Energy Systems: Background and PSC Process

- Application Process
  - Once application is filed, a vast majority of the "work" is done.
- Environmental review – how the project will affect "the quality of the human environment."
  - Level of "environmental review" depends upon scope and potential impact of the project.
    - Type I – Major actions that significantly affect the quality of the human environment; require an EIS
    - Type II – Actions that have the potential to significantly affect the quality of the human environment; require an EIS or EA
    - Type III – Actions requiring PSC approval, but normally do not have the potential to significantly affect the quality of the human environment; may require and EA or EIS.

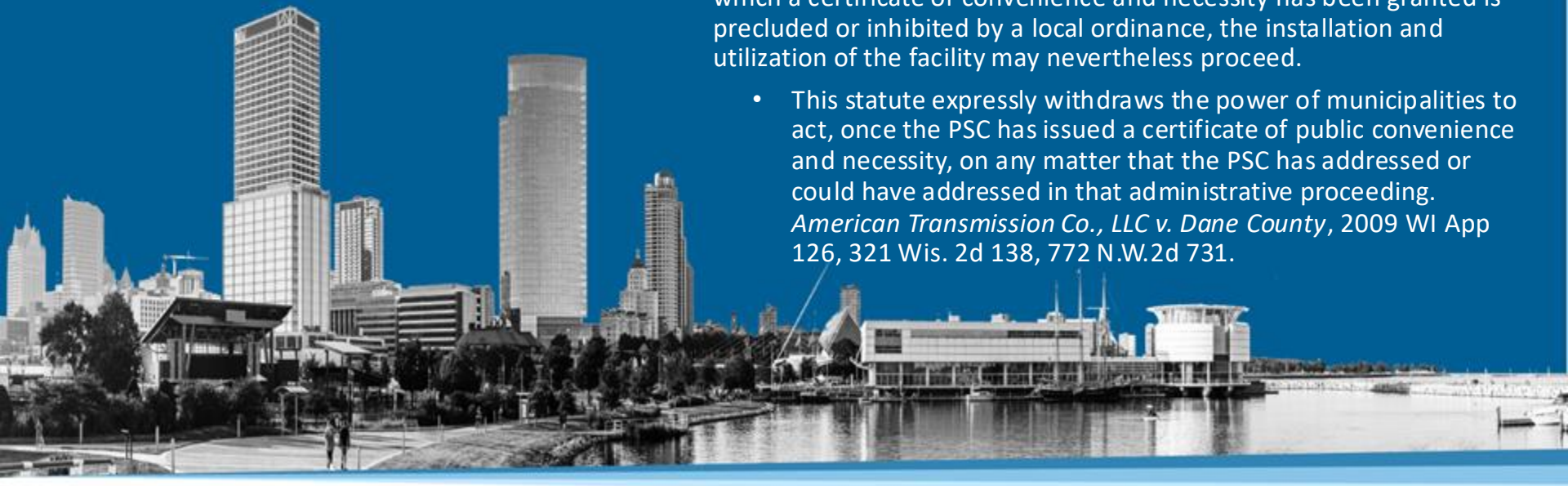


County Authority to Regulate Solar Energy Systems:
PSC Process

- 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:
  - 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.

County Role in the PSC Solar Siting Process?

- Wis. Stat. § 196.491(2g): 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.
- Wis. Stat. § 196.491(3)(i): 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 statute 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.

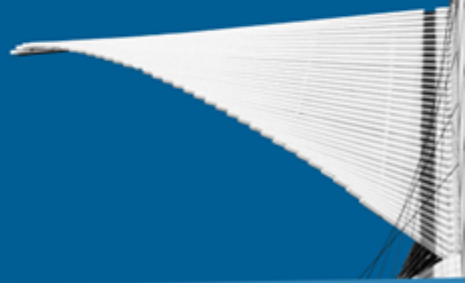


County Role in the PSC Solar Siting Process?

- Prohibition on restricting testing activities.
  - Wis. Stat. § 196.491(2g): 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.
- How else to gain a seat at the PSC table?
  - Public involvement process
  - Joint Development Agreement
  - Intervene as an interested party pursuant to Wis. Admin. Code Ch. PSC 2.21

Specific Restrictions on Regulatory Authority

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

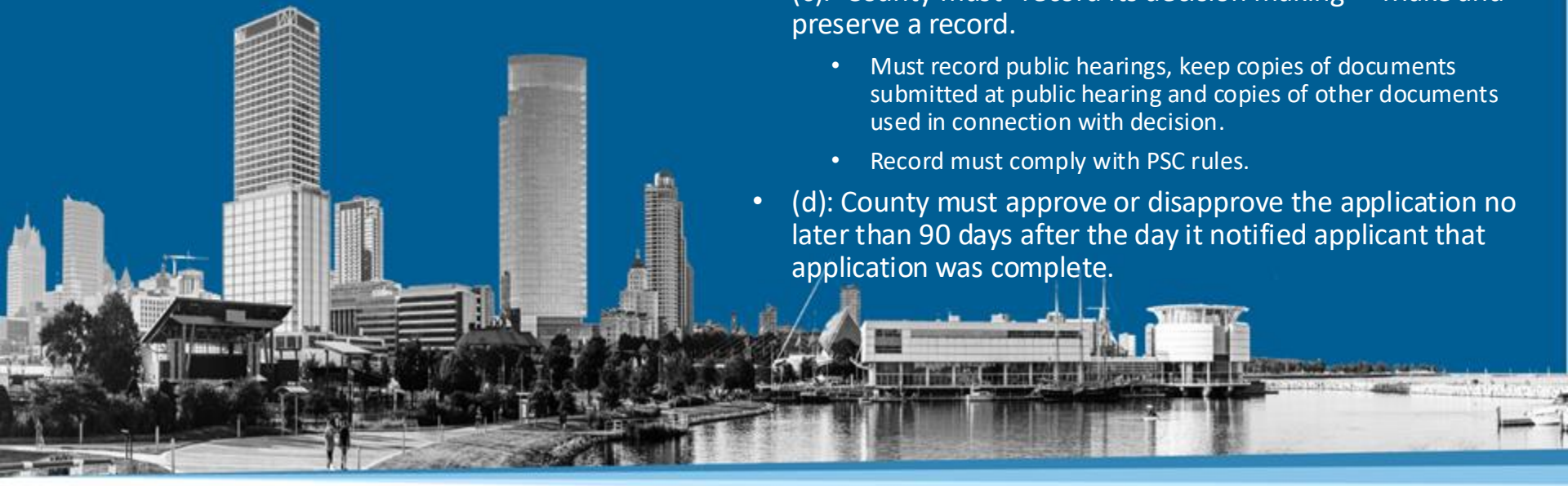


Specific Restrictions on Regulatory Authority

- 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.
- *See Ecker Brothers:*
  - A county must hear the specifics of the particular system and then decide whether a restriction is warranted.
  - A county may not promulgate an ordinance in which it arbitrarily sets a “one size fits all" scheme of requirements for any system.
  - The statutes restrict, not expand, local authority by setting forth “standards circumscribing the power of political subdivisions, not openings for them to make policy that is contrary to the state's expressed policy.”

Specific Restrictions on Regulatory Authority

- Wis. Stat. § 66.0401 (4): Restrictions on local procedure:
  - (a)1. - Determine whether application is complete within 45 days of filing.
  - (a)4. - "Minor modification" in application may not be considered a "refiling."
  - (c): County must "record its decision making" - Make and preserve a record.
    - Must record public hearings, keep copies of documents submitted at public hearing and copies of other documents used in connection with decision.
    - Record must comply with PSC rules.
  - (d): County must approve or disapprove the application no later than 90 days after the day it notified applicant that application was complete.



Application of Regulatory Framework:

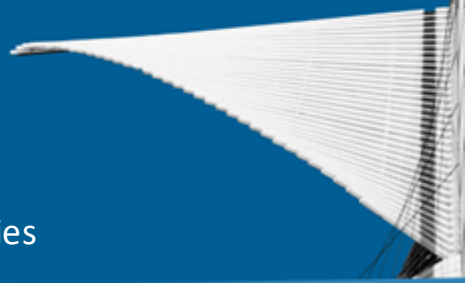
In *State ex rel. Numrich v. City of Mequon Bd. of Zoning Appeals*, Wisconsin Court of Appeals analyzed the predecessor statutes to Wis. Stat. § 66.0401(1m) and Wis. Stat. § 66.0403. 2001 WI App 88, ¶2, 242 Wis. 2d 677, 626 N.W.2d 366.

- The Court concluded "the owner of an energy system does not need a permit under Wis. Stat § 66.032 (the predecessor to Wis. Stat. § 66.0401(1m)) to construct a wind energy system. Therefore, barring any other enforceable municipal restrictions, an owner may construct such a system without prior municipal approval."
- The unique nature of the statute "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."
- Wis. Stat. § 66.031 (predecessor to Wis. Stat. § 66.0401(1) 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."

Application of Regulatory Framework:

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 statutes demonstrate the Legislature's favor of alternative energy systems, and therefore the statutes "disfavor wholesale local control which circumvents this policy."
- Pursuant to Wis. Stat. § 66.0401(1)(a)-(c), only three conditions exist in which a county may regulate wind energy systems or solar energy systems:
  - Where necessary to preserve or protect the public health or safety,
  - Where the restriction does not significantly increase the cost of the system or significantly decrease its efficiency, or
  - Where the locality allows for an alternative system of comparable cost and efficiency.
- While the "statutory scheme" allows counties to issue access permits, a county may not require an owner to apply for a wind access permit.
- The Court rejected the County's argument that "the legislature actually authorized localities to make their own policy regarding alternative energy systems."

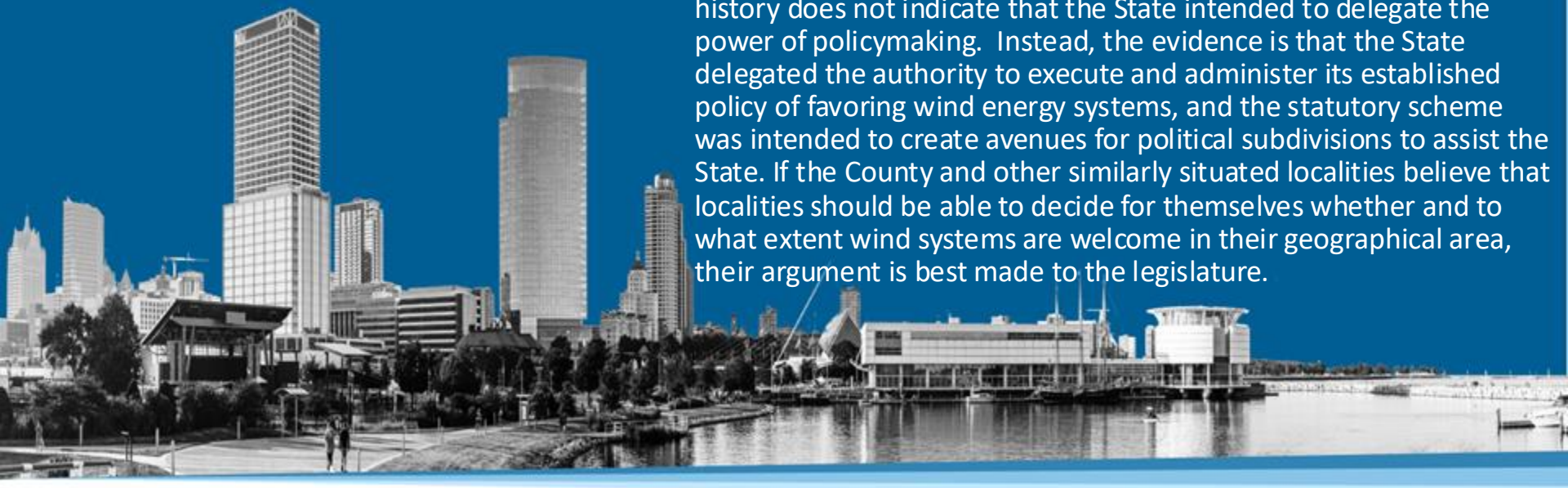


Application of Regulatory Framework: Ecker Brothers

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."

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.

Application of Regulatory Framework: 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.

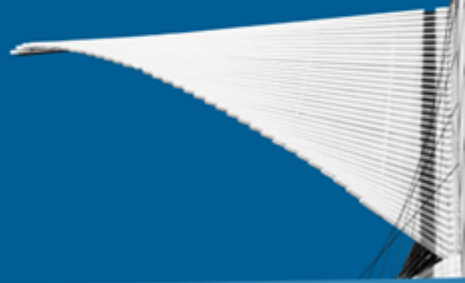
Application of Regulatory Framework:

American Transmission Co., LLC v. Dane County:

- Prior case law: Local ordinances, such as zoning ordinances, cannot impede what has been determined to be of public convenience and necessity.
- 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."

Wholesale Merchant Plants

- Two 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."
  - Not a wholesale merchant plant if owned and operated by a public utility.
- *Town of Christina v. PSC*, 2025 WI App 41 (unpublished)



Permissive Regulatory Authority for Counties

So What May a County Adopt??

- Counties may choose to enact ordinances consistent with Wis. Stat. § 66.0401(1m) requirements:
  - County restriction, either directly or in effect, on the installation or use of a solar energy system must satisfy 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.
- *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.*

So What May a County Adopt?

A Note on Zoning Permits

All ordinances are subject to preemption requirements.

A county may adopt a conditional use permit process for solar siting, but it must be consistent with Wis. Stat. § 66.0401 and Wis. Stat. § 66.0403.

County Regulations – Zoning Authority and Renewable Energy Siting

- *Ecker* 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 Wis. Stat. § 66.0401 (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.

County Regulations: Zoning Authority, Conditional Use Permits and Renewable Energy Siting

- Wis. Stat. § 59.69(5e) sets for specific requirements when reviewing a conditional use permit application:
- 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.
- Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence. "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. The requirements and conditions 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.

Permissible County Regulations for Solar Energy Systems: Trimming

Wis. Stat. § 66.0401(2): Counties may adopt an ordinance relating to the trimming of vegetation that blocks solar energy from a collector surface.

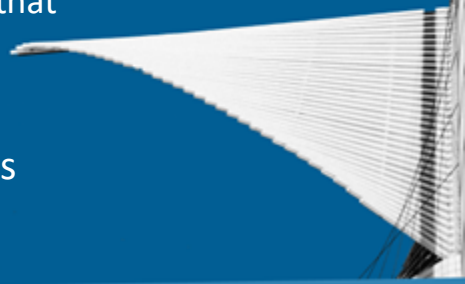
- The ordinance may include a designation of responsibility for the costs of the trimming.
- The ordinance may not require the trimming of vegetation that was planted by the owner or occupant of the property on which the vegetation is located before the installation of the solar energy system.

Permissible County Regulations for Renewable Energy Systems:

Access Permits

Wis. Stat. § 66.0403: Counties with a zoning ordinance under Wis. Stat. § 59.69 may also choose to grant permits for solar access (to preserve access to sunlight) and wind access (to preserve access to wind power).

- 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.



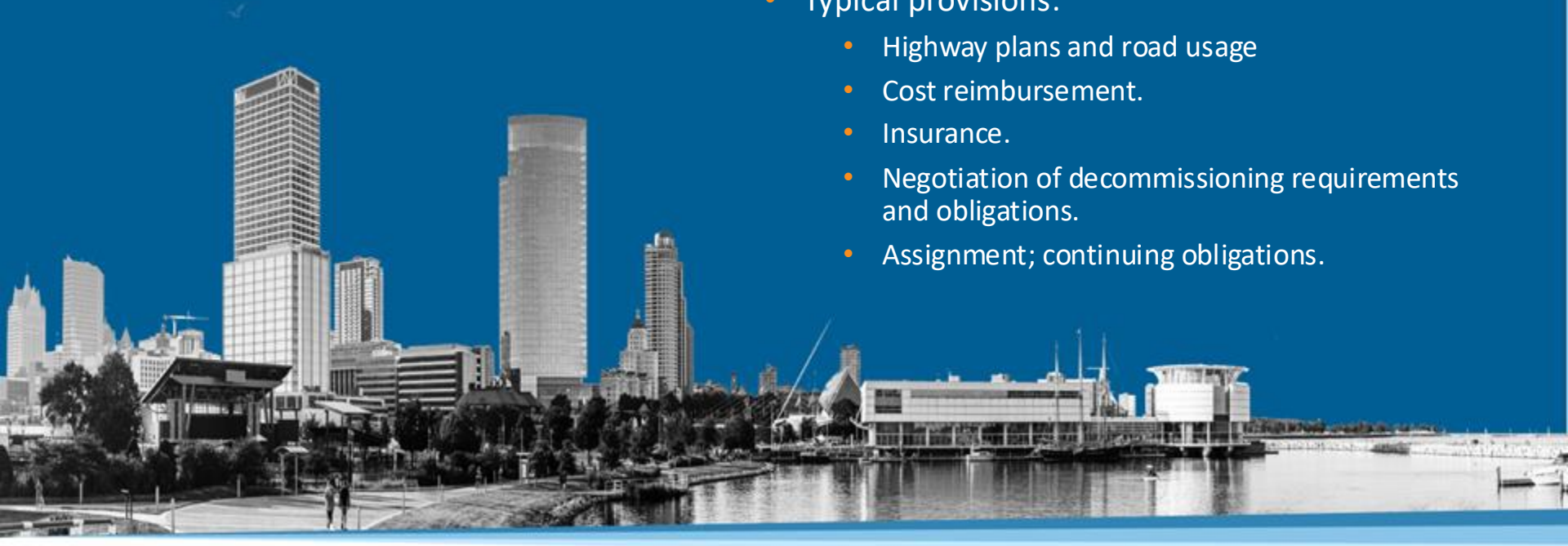
Any Other Regulatory Options for Counties?

What Are Other Options for Counties?

- Ordinance Review
  - Make sure your County's development ordinances and comprehensive planning are up to date and legally sound.
- Start discussions early!
  - Meet with the applicant early.
  - Communicate with PSC, particularly regarding comprehensive plan issues, land use issues, or particular environmental impacts that are unique to the area.
- Know what is and is not required of your county
- Know what is and is not required of the developer
- Revenue Sharing – Statutory formula
  - More than lost property tax revenue?
  - Other options to negotiate shared review.
- Alternative Agreements
  - Land lease for facilities.
- Joint Development Agreement Negotiation
  - Applicant may agree to provisions otherwise preempted by state law.
  - Cost reimbursement.
  - Insurance.
  - Negotiation of decommissioning requirements and obligations.
- Intervene in PSC Process

Joint Development Agreement

- Start discussions early.
- Applicant may agree to provisions otherwise preempted by state law.
- Typical provisions:
  - Highway plans and road usage
  - Cost reimbursement.
  - Insurance.
  - Negotiation of decommissioning requirements and obligations.
  - Assignment; continuing obligations.



Monitor PSC Process

- Developer should directly communicate with county and other municipalities.
- Monitor PSC docket
  - County should receive notice:
    - Notice of application per Wis. Stat. § 196.491 (3)(a)1. within 10 days of CPCN application.
    - Completeness determination
    - Environmental analysis.
  - EA vs. EIS? Wis. Admin. Code Ch. PSC 4.20(1m)(c).
  - Representations made to the PSC regarding statements to the county?
- Compare information to PSC application and other docket materials.

Intervene in PSC Process?

- Where representations to PSC vs. reality meet.
- Monitoring of PSC docket is always important regardless of intervention status.
- Timing:
  - County right to intervene per Wis. Stat. s. 196.491(3)((j).
  - Proceeding: No later than 60 days after the issuance of the notice of proceed, or as set by the ALJ at final prehearing conference.
  - Docket: No later than 60 days after the opening of the docket.
  - "Intervene out of time" option.
- Wis. Admin. Code Ch. 2.21:
  - Intervention by right – "substantial interests may be affected by the PSC's action or inaction…"
  - Permissive intervention: "Person's participation likely will promote proper disposition of the issues to be determined…"

Intervene in PSC Process?

Benefits of intervening:

- Represent county interests beyond public comment.
  - True “voice at the table.”
- Direct input in proposed findings.
- Intervenor compensation per Wis. Stat. s. 196.31; Wis. Admin. Code Ch. PSC 3.02.
- Right to notice of judicial review under Wis. Stat. s. 227.53.
- Right of participation in judicial review.

Intervene in PSC Process?

Drawbacks of intervening:

- Time and cost:
  - Monitoring of docket and deadlines
  - Legal costs
- Perceived as a more aggressive approach.
- Pressure to participate in judicial review.
- Remedy: Remand back to PSC.
  - Valuable remedy?

ATTOLLES LAW, s.c.

QUESTIONS?

THANK YOU!

Rebecca J. Roeker

414.285.0894

rroeker@attolles.com

Malia T. Malone

414.293.0877

mmalone@attolles.com