In the Boardroom:

County Strategies in Regulating Renewable Energy and Data Center Projects

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GENERAL OVERVIEW:



1. Preemption, state law and PSC regulatory overview:
   a. PSC Process
   b. Preemption and state law impact on county regulation
2. Options for Counties
   a. County goals – what is realistic?
   b. WCA Guide to County Regulation of Renewable Energy and Data Center Projects

Public Service Commission of Wisconsin

Kara Pennoyer, Chief of Staff to Chair Strand

Cara Coburn Faris, Chief Legal Counsel

The Commission makes final determinations and we cannot pre-judge any future decision. Any perspectives offered here are not intended to be legal determinations as to how the Commission could interpret the relevant statutes or administrative rules based upon the facts presented.

State Regulators: Public Service Commission



Commissioner Kristy Nieto



Chairperson Summer Strand



Commissioner Marcus Hawkins

Quasi-judicial

Ex parte communications
Any correspondence or communication with an individual commissioner about an application that is or will soon be before the Commission is an ex parte violation and is strictly prohibited. This law is in place to ensure that commissioner actions are not influenced by any information received outside the official record.

Structure & Meetings

PSC Construction Authority

- Two kinds of certificates that Wisconsin utilities or independent/merchant developers must obtain prior to constructing large electrical projects:
  - **Certificate of Authority (CA)**: any construction project that meets the review threshold based on size and cost of the project.
  - **Certificate of Public Convenience and Necessity (CPCN)**: required for large electric generation facilities and proposed high-voltage electric transmission lines.
- Generation construction developers must receive PSC approval in the form of a CPCN under Wis. Stat. § 196.491 and PSC Admin Code Chapter 111.
- CPCN thresholds/triggers
  - Large Electric Generation defined as electric generating equipment and associated facilities designed for nominal operation at a capacity of **100 megawatts or more.**
  - **High-voltage** defined as “a conductor of electric energy exceeding one mile in length designed for operation at a nominal voltage of 100 kilovolts or more, together with associated facilities.
  - Applicable to Electric Utility as well as Wholesale Merchant Facilities.

Before an Application is Filed at the PSC

- Best time to get changes to a proposed project.
- Best time to start or complete JDA and JOA discussions and agreements.
- Decide how your government entity wants to engage.
  - Public Comment
    - Written or testified at public hearing
    - Commission considers equal to intervention
    - Can inform data requests
  - Intervention
    - Intervene as an interested party pursuant to Wis. Admin. Code Ch. PSC 2.21
    - Big commitment, legal counsel encouraged

Application Filing and Completeness Determination

- A CPCN applicant must submit an engineering plan 60-days prior to submitting an application to the PSC.
- An applicant must upload a transmittal letter to the PSC ERF verifying that all application documents have been submitted.
- PSC and DNR staff have 30 calendar days to examine CPCN applications for completeness. Staff utilize the Application Filing Requirements (AFR) to determine completeness.
- If an application has been found to be incomplete, PSC will send the applicant a letter identifying the deficiencies. This letter is public on ERF.
- The applicant must then submit a new application and transmittal letter, restarting the 30 day review.

CPCN Review Process

1. PSC Public Notification
2. PSC Scoping Meetings
3. Environmental Review

   Type 1: Defined as a significate action affecting the quality of the human environment requiring an Environmental Impact Statement (EIS).

   Type 2: Actions that have the potential to significantly affect the quality of the human environment; require an EIS or Environmental Assessment (EA).

   Type 3: Defined as an action requiring PSC approval but normally do not have the potential to significantly affect the quality of the human environment, may require EAs or EIS.

4. Staff Review & Record Development
5. Party Hearings
6. Public Hearings / Comment Period
7. Decision

PSC Standard of Review

- Wis. Stat. § 196.491(3)(d): PSC **shall approve** an application for a certificate of public convenience and necessity if all 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

PSC Process Overview

- Preliminary filings; Engineering Reports
- Once application for CPCN is filed, a vast majority of the "initial work" is done
  - Ongoing communications between staff and Applicant
  - Data Requests
- 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 WPSC 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

- Wis. Stat. § 196.491(3)(d): WPSC **shall approve** an application for a certificate of public convenience and necessity if all 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(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.
    - Once CPCN is approved, county leverage significantly diminishes.

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
  - Notify PSC of negotiations surrounding a Joint Development Agreement / Local Operating Agreement
  - Intervene as an interested party pursuant to Wis. Admin. Code Ch. PSC 2.21

Preemption and State Law Restrictions On County Regulatory Authority





Restrictions on Meeting County Goals:



- County authority comes from Wis. Stat. Ch. 59
- Preemption: County may not regulate on issues that are preempted by Federal and State law
- Wis. Stat. § 66.0401: Establishes siting and approval process for both solar and wind energy systems, thereby preempting county regulation unless expressly allowed





Wis. Admin Code Ch. PSC 128

- Specifically addresses restrictions on local regulation of wind energy systems.
- Key points:
  - Setbacks: May require a large wind turbine to be set back to 1,250 feet from a neighboring residence (if that neighbor is not also a wind turbine host)
  - Sound: Maximum threshold is 50 decibels (dBA) during the day and 45 dBA at night
  - Shadow flicker:
    - May prohibit a large wind turbine from producing shadow flicker more than 30 hours per year
    - May require a wind turbine owner to mitigate shadow flicker that occurs more than 20 hours per year. Neighbors are allowed to waive these standards under a written contract

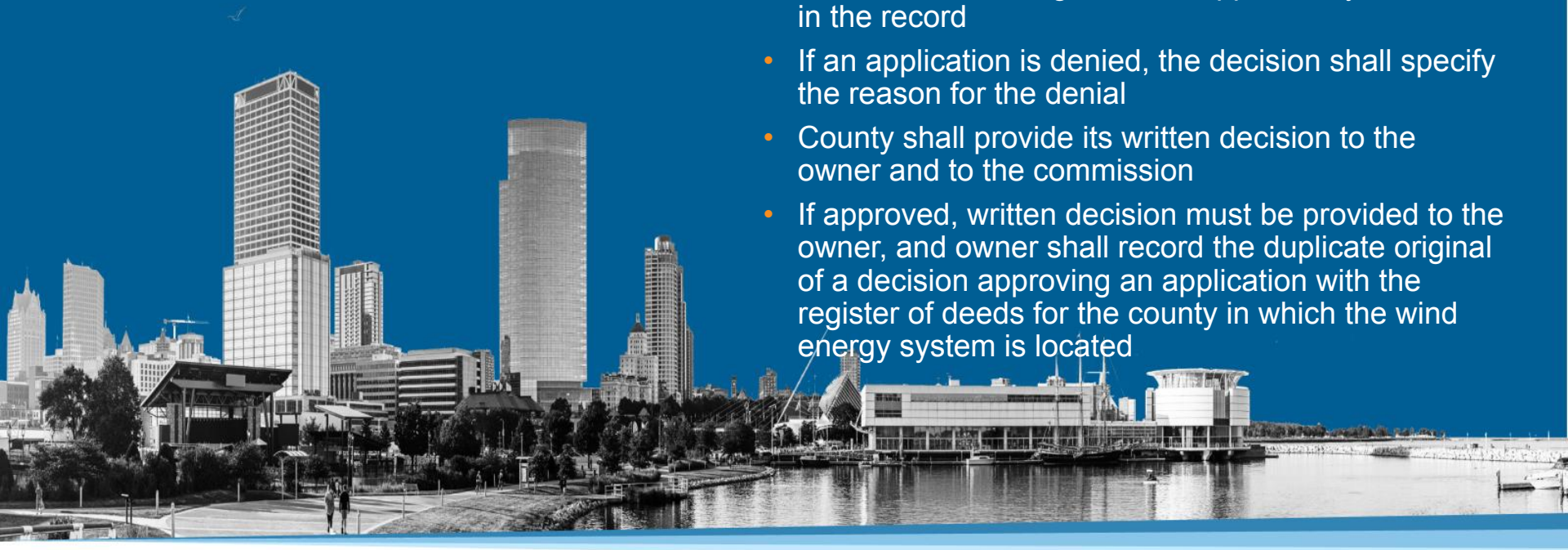


Wis. Admin Code Ch. PSC 128: Approval Standards

- County may require an owner to obtain approval from the political subdivision before constructing any of the following:
  - A wind energy system
  - An expansion of an existing or previously-approved wind energy system
- A political subdivision may not unreasonably deny an application for a wind energy system or impose unreasonable conditions

Wis. Admin Code Ch. PSC 128

- Written Decision Required
  - County shall issue a written decision to grant or deny an application for a wind energy system
  - Shall include findings of fact supported by evidence in the record
  - If an application is denied, the decision shall specify the reason for the denial
  - County shall provide its written decision to the owner and to the commission
  - If approved, written decision must be provided to the owner, and owner shall record the duplicate original of a decision approving an application with the register of deeds for the county in which the wind energy system is located

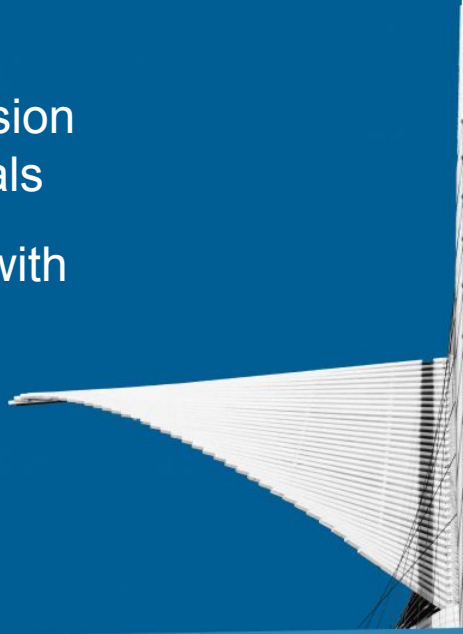


Wis. Admin Code Ch. PSC 128.32 – A County May Require…

- Timely notice of any change in the owner of the wind energy system. Approval by a political subdivision of a wind energy system remains in effect if there is a change in the owner of the wind energy system
- Aerial spraying in specific circumstances and upon specific findings
- Monetary compensation – Require an owner of a WES to offer an agreement that includes annual monetary compensation to the owner of a nonparticipating residence based on formula within PSC 128.33(3)

Wis. Admin Code Ch. PSC 128.33 – A County May Require…

- Permits – Require the owner to submit to the political subdivision copies of all necessary state and federal permits and approvals
- Annual Reports – Require the owner to file an annual report with the political subdivision documenting the operation and maintenance of the wind energy system during the previous calendar year
- Fee requirements



Restrictions on Meeting County Goals:



- Wis. Stat. § 66.0401 (1m): A county may only place a restriction, either directly or in effect, on the installation or use of a wind or 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

- 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.

Restrictions on Meeting County Goals:

"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.



Life After *Ecker Bros.*

- Counties are not permitted to make general policies applicable to all renewable energy systems
- Permissible restrictions may only be made on a case-by-case basis
- 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.”

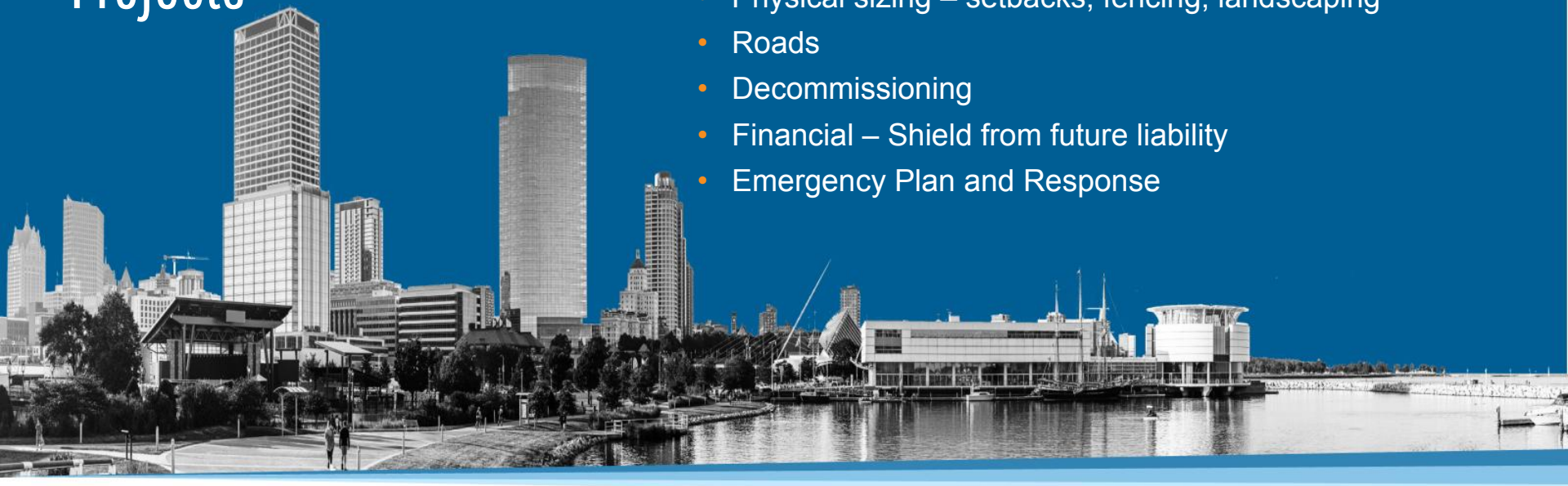
Options for Counties





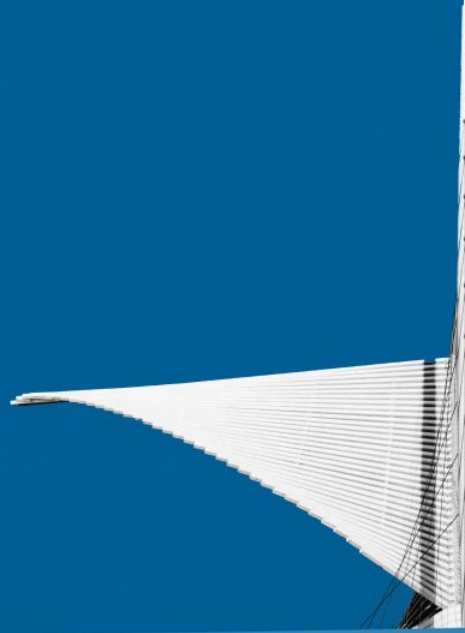
County Interests and Goals: Large-Scale Solar Projects

- Minimize liability
- Environmental – Ground water, water bodies, wildlife corridors, other natural resources
- Noise
- Light
- Physical sizing – setbacks, fencing, landscaping
- Roads
- Decommissioning
- Financial – Shield from future liability
- Emergency Plan and Response



County Interests:
What is a Realistic Goal?

- Minimize the impacts of wind, solar, and BESS development and operation
- Protect the County, its residents and resources long term within the existing legal framework
- Avoid goal of “stop the project”
- *Key point: Any regulatory ordinances should be discussed and adopted before a project arrives*



WCA Guide to Renewable Energy and Data Center Projects Template Documents

- Template Ordinance Requiring Notice for Large-Scale Data Center Developments
- Template Zoning Ordinance Regulating Data Centers
- Template Ordinance Regulating Utility Scale Standalone Battery Energy Storage Systems (BESS)
- JDA/LOA for Solar Developments

WCA Guide: Template Ordinance Requiring Notice for Large-Scale Data Center Developments

A starting point to identify goals and extent of regulation:

- Identify and define what is a “data center”
- Establish coordination requirements for county-provided services
- An opportunity for discussion with other stakeholders

Notice For Large-Scale Data Center Tailoring Example

A. *Definitions.*

1. A "large-scale data center" is any project with one or more buildings owned, leased, or operated by the same entity or by one or more affiliates of the entity, with the primary purpose of housing computing and networking equipment in order to centralize the processing, storage, management, retrieval, communication, or dissemination of data and information, that:

[Option A]

i. Consists of one or more principal buildings that aggregate at least [25,000] square feet;

ii. Consists of a single contiguous tract of land, which may include one or more parcels, totaling [10] acres or more; and

iii. Consists of at least [5,000] servers.

[Option B]

i. Consists of one or more principal buildings that aggregate at least [10,000] square feet;

ii. Consists of at least [5,000] servers; and

iii. Has an electric power rating, or power draw, greater than 100 megawatts.

[Option C]

i. Consists of one or more principal buildings that aggregate at least [100,000] square feet; and

ii. Consists of a single contiguous tract of land, which may include one or more parcels, totaling [200] acres or more.

- What do you care about most?
- Broad definition?
- Power usage?
- Land footprint?

WCA Guide: Template Zoning Ordinance Regulating Data Centers

- Set forth definition of “data center”
  - Avoid overbroad definition that may lead to unintended consequences
- Identify proper zoning district(s) and whether permitted or conditional use.
- Define extent of regulations and address key components:
  - Development Agreement requirement
  - Standards for setbacks, street access, parking, and buffers
  - Address offset of impacts to public infrastructure
  - Emergency response requirements
  - Decommissioning and financial assurance

Large-Scale Data Center Tailoring Example

1. Setbacks. A [Hyperscale Data Center] shall be setback from property lines the greater of: (a) the setback requirements for the zoning district in which the [Hyperscale] Data Center is located; or (b) [200 feet.]

2. Street Access. The [Hyperscale] Data Center shall have physical access to a public road capable of providing safe and adequate access for the [Hyperscale] Data Center, as demonstrated by a traffic impact analysis or other information reasonably required by the [Zoning Administrator] [Zoning Committee]. Where the [Hyperscale] Data Center proposes to access a county road or highway, the applicant shall obtain all approvals required by the County Highway Department. Where the [Hyperscale] Data Center proposes to access a state or municipal road or highway, the applicant shall obtain all approvals required by the government that has jurisdiction over that road or highway. The vehicular access points between the public road and the [Hyperscale] Data Center shall be located to minimize conflict with through traffic movement.

- How large of a setback do you want?
- Who is deciding what information is required regarding traffic impact?

WCA Guide: Template Ordinance Regulating Utility Scale Standalone Battery Energy Storage Systems (BESS)

- More thorough regulation based on county authority
- Establish framework for application and review process
- Define extent of regulations and address key components:
  - Standards for setbacks, street access, parking, and buffers
  - Noise, light, and dust mitigation
  - Identify remedy for impacts to public infrastructure
  - Address potential impacts to adjoining properties
  - Emergency response and training requirements
  - Decommissioning and financial assurance

BESS Tailoring Example

F. *Conditions*. In approving a conditional use permit related to SA-BESS, the [Zoning Committee] may impose one or more conditions of approval deemed necessary to further the intent and purposes of this Section and to reduce adverse impacts on surrounding properties. Conditions may address any factor considered by the [Zoning Committee] in the decision-making process and shall be based on substantial evidence, as such term is defined in Wis. Stat. § 59.69(5e). Such conditions may relate to, but are not limited to:

1. [setbacks]
2. [lighting requirements]
3. [security and screening]
4. [noise]
5. [safety requirements, including the Emergency Response Plan and equipment certification, which depending on the nature of the SA-BESS, might include requirements about automatic fire control and suppression systems, access roads adequate for fire department access and water for firefighting purposes]
6. [decommissioning, including the decommissioning plan and related financial assurance].

- What size setbacks?
- What, if any, lighting requirements?
- Noise limits?
- Other conditions?
- What does your County need?



WCA Guide: A Note for Counties Without County-Wide Zoning

May a county without county-wide zoning:

- Adopt a Standalone BESS ordinance? No
  - Look to alternate authority - Licensing ordinance?
- Adopt a data center zoning ordinance? No
  - Look to alternate authority - Licensing ordinance?
- Underlying goal: Offset the project impacts
- Adopt a data center notice ordinance? Yes
- Enter into a JDA/LOA? Yes

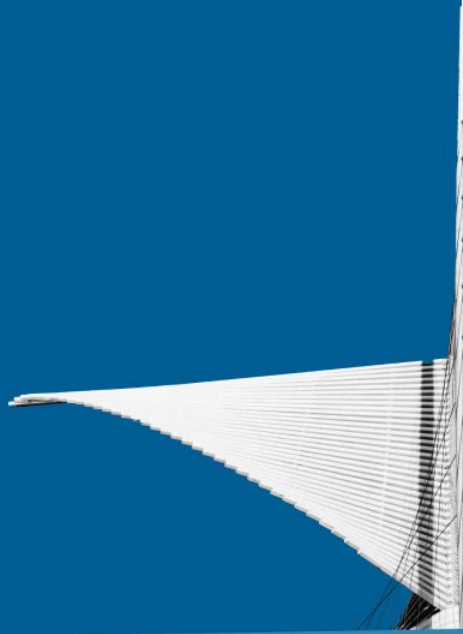
WCA Guide: Template JDA/LOA for Solar Developments*

- Does not require adoption of an ordinance
- Underlying goal: Offset the project impacts
- A contract – let's negotiate!
- Terms must be consistent with PSC's CPCN approval, but may include additional details to address project impacts

**Note: A county may consider using the LOA Template as a starting point for a wind, BESS, or data center project.*

JDAs/LOAs In General:
What do they look like?

- Different project to project
- Some similarities between projects such as:
  - Road use
  - Setbacks
  - Decommissioning
- But many project-specific details as well



JDA / LOA Considerations: Minimize Project Impacts

- Minimize liability – Insurance requirements and future liability
- Environmental – Ground water, water bodies, wildlife corridors, other natural resources
- Emergency Response Plan
- Noise and light monitoring
- Physical siting – Setbacks, fencing, landscaping, buffers
- Roads
- Decommissioning
- The JDA/LOA may not be inconsistent with a CPCN or CA approval
  - “Supplement” rather than duplicate or create inconsistencies

Template JDA / LOA for Solar Tailoring Example

f. **[SOLAR COMPANY]** shall make a one-time **$XXXXX** payment to the County, which sum is to be divided amongst the responding emergency units as determined by the County based on invoiced costs, as full and complete reimbursement to the County for their reasonable expenses related to any training, training materials, and equipment necessary to implement the draft and final Emergency Response Plan, including reasonable expenses related to the emergency response drill. All such costs have been listed out in **[COUNTY]** Sheriff's Department Office of Emergency Management's Emergency Preparedness Plan in the section titled Fire Safety Impact Fee, and specifically under the Initial Impact and Annual Impact Fee subsections which are included in this Agreement in Appendix [ ]. Unless otherwise directed in the Emergency Response Plan, **[SOLAR COMPANY]** shall issue the reimbursement to the County within thirty (30) days of **[SOLAR COMPANY]**'s submission of the final Emergency Response Plan to the PSCW in accordance with Order Point **X** of the CPCN.

- What is your desired reimbursement?
- What is the cost to your emergency response units?

Options Beyond the Templates: Goals + Restrictions



- Option 1: No intervention; negotiate JDA / LOA
- Option 2: Negotiate JDA / LOA and attempt to intervene in PSC proceeding
- Option 3: Negotiate JDA / LOA and active involvement in PSC proceeding if approved as intervenor
- Option 4: Litigation – Strategy of attrition **($$$)**
- *Litigation follows

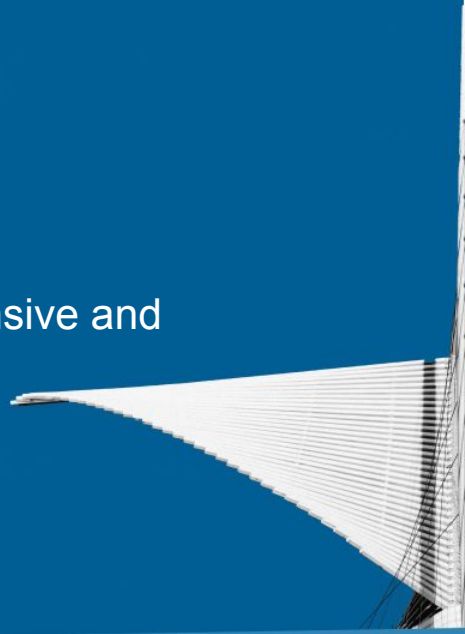


**Key point: Discuss and enact any regulatory ordinances before a project arrives!*



JDA/LOA Considerations and Achieving the Goal

- Identify concerns and develop mechanisms to offset concerns
- Utilize County Leadership to lead negotiations
  - County Board Chair
  - County Administrator
  - Attorneys
- Utilize experts within the County to development the most comprehensive and beneficial JDA / LOA possible
  - County Highway Commissioner
  - County Emergency Management Director
  - County Planning and Zoning Director
  - County Conservationist



Achieving the County's Goals – Additional Considerations



- Negotiating and entering into a JDA/LOA does not mean the County endorses the project
- Balance of effective leadership and negotiation with ongoing communication and transparency
  - Allow the experts to bring expertise to the table
  - Standing committee report and update
  - Ongoing reports to the County Board of Supervisors
- Final decision lies with County Board of Supervisors
  - Providing updates allows the County Board of Supervisors to stay up to date and informed, which leads to effective review of the draft JDA / LOA





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QUESTIONS?



Thank You!



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