

LOCAL REGULATION OF

By Claire Silverman, Legal Counsel

Local governments' ability to regulate wind energy systems¹ has been greatly curtailed by legislation passed in 2009 and by new Wisconsin Public Service Commission (PSC) rules stemming from that legislation that are anticipated to be effective March 1, 2011.² In order to regulate wind energy systems, municipalities must enact an ordinance. The ordinance cannot be more restrictive than the standards set by the PSC in its new rules. This Legal Comment provides a brief history of the new rules and then explains the new framework and rules that will govern local regulation of wind energy systems.

BACKGROUND HISTORY

Prior to October 2009, wind projects 100 megawatts or larger, and wind projects proposed by utilities and meeting a certain cost threshold were subject to PSC regulation. Wind projects under 100 megawatts were subject to local permitting requirements but Wis. Stat. sec. 66.0401(1) prohibited local governments from placing restrictions on wind energy systems unless the restrictions:

1. served to preserve or protect public health or safety; or
2. did not significantly increase the cost of the system or significantly decrease its efficiency, or
3. allowed for an alternative system of comparable cost and efficiency.

Some municipalities regulated wind energy systems; others did not. Among the municipalities that did have regulations in place, regulations varied.

In 2008, in response to claims by Wind Developers that the wind siting environment in Wisconsin was difficult to navigate given the wide variation in local regulations, the Governor's Task Force on Global Warming recommended that the legislature create uniform standards for siting wind projects at the local level. The result was 2009 Wis. Act 40, effective October 2009. Act 40 created a Wind Siting Council³ within the PSC. The legislation tasked the PSC, with the advice of the Wind Siting Council, with promulgating rules

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1. Wind energy system means "equipment and associated facilities that convert and then store or transfer energy from the wind into usable forms of energy." Secs. 66.0401(1e) and 66.0403(1)(m).
 2. On December 29, 2010, the PSC adopted modified Final Rules creating Wis. Admin Code ch. PSC 128 relating to Wind Energy Systems. See Clearinghouse Rule 10-057 in PSC Docket 1-AC-231 and Attachment A. According to the February 4, 2010 Wheeler Report, the Legislature's Joint Committee for the Review of Administrative Rules may suspend the PSC's recently adopted rules, keeping open the possibility of modifications to the PSC rule in the future or passage of legislation in the regular session.
 3. The Wind Siting Council is appointed by the PSC and consists of members representing certain interests or having certain expertise (e.g., wind energy system developers, towns and counties, energy industry, realtors, public, environmental groups, landowners living near wind energy systems who have not received compensation from wind energy systems, and a UW System faculty member with expertise regarding the health impacts of wind energy systems). See Wis. Stat. sec. 15.797.

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specifying the restrictions municipalities (referred to as political subdivisions) may impose on the installation or use of wind energy systems consistent with the conditions specified in sec. 66.0401 and set forth in the first paragraph under Background History.⁴ It also required the PSC to develop a framework for the application process. Act 40 renumbered sec. 66.0401(1) as 66.0401(1m) and amended it to restrict, in addition to the limitations noted earlier, a political subdivision's ability to "place any restriction, either directly or in effect, on the installation or use of a wind energy system that is more restrictive" than the rules promulgated by the PSC.

In August 2010, the PSC adopted draft rules and sent them to legislative committees for review. One committee requested modifications to the rule. The PSC adopted minor modifications to the rules and resubmitted the modified final rules to the legislature. After the legislative review period expired, the PSC adopted the Modified Final Rules on December 29, 2010. The PSC rules were anticipated to take effect March 1, 2011 but shortly before our publica-

tion deadline, the Legislature's Joint Committee for the Review of Administrative Rules was considering whether to suspend the rules. When effective, these rules, in conjunction with sec. 66.0401 as amended by 2009 Wis. Act 40, will establish the framework for local review of applications for approval of wind energy systems, substantive regulation of such systems, and appeal of such decisions.

SECTION 66.0401 AND WIS. ADMIN CODE CH. PSC 128

Projects under 100 megawatts are still reviewed at the local level, but 2009 Act 40 gave the PSC authority to establish rules specifying the restrictions a political subdivision may impose on the installation or use of a wind energy system. The PSC was given specific authority to set standards for the following matters:

- Decommissioning of systems (dismantling and site restoration)
- Visual appearance
- Lighting
- Electrical connections to the power grid
- Noise (maximum audible sound levels and proper means of measuring noise)
- Shadow flicker
- Interference with radio, telephone or television signals or other matters.

In addition to setting standards in these different areas, the PSC rules also create a framework for municipal review of applications to site wind energy systems that ties in to an existing framework established in sec. 66.0401.

LOCAL REGULATION AND THE APPLICATION PROCESS

In order to regulate wind energy systems, local governments must adopt an ordinance that complies with Wis. Admin. Code PSC 128 and Wisconsin Statutes (namely secs. 66.0401,

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4. 2009 Wis. Act. 40, section 12, creating Wis. Stat. sec. 196.378(4g)(b).

5. Sec. 66.0401(4)(f)1 and (g); Wis. Admin. Code PSC 128.03. A limited statutory exception allows a municipality to deny an application to site a wind energy system in an area primarily designated for future residential or commercial development, as shown in a map adopted as part of a comprehensive plan before June 2, 2009 or as shown in such maps after December 31, 2015 as part of a comprehensive plan that is updated. Sec. 66.0401(4)(f)2. However, that denial may be appealed to the PSC which can grant the appeal even if it is inconsistent with the municipality's planned residential or commercial development if the PSC determines that granting the appeal is consistent with the public interest. Sec. 66.0401(5).

6. Wis. Stat. sec. 66.0401(1m) and (4)(g); Wis. Admin. Code PSC 128.03 and 128.10(2).

7. These exceptions include certain notice requirements, constraints on long-term land use planning requirements and decommissioning requirements.

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66.0403 and 196.378(4g)).⁵ Local ordinances cannot be more restrictive than the standards adopted by the PSC rule but can be less restrictive.⁶ With limited exceptions,⁷ it must be emphasized that the substantive requirements in ch. PSC 128 **do not apply** unless the municipality has enacted an ordinance.⁸ Thus, most cities and villages will likely opt to enact an ordinance.

Regardless of whether a municipality has an ordinance in place, the statute requires that the developer apply to the local government for a permit.⁹ The application must contain information detailed in PSC 128.30(2). Before submitting an application, the developer must give the municipality and specified others 90 days notice that it will be submitting an application.¹⁰ As "soon as possible" after the municipality receives the application, it must publish a class 1 notice under ch. 985 stating that an application has been filed. The notice must briefly describe the proposed wind energy system and its location, and also describe locations where the application is available for public review, the method and time period for the public to submit comments to the municipality, and the approximate schedule for the municipality's review of the application.¹¹

Local governments that do not have an ordinance in place when the application is filed, have four months from the time the application is filed to evaluate whether to adopt an ordinance.¹²

If the municipality does not have an ordinance in effect by four months or notifies the applicant that it does not intend to enact an ordinance, the application is automatically approved.¹³ At the end of the four months, a municipality with an ordinance in place has 45 days to review the application to determine whether it is complete. An application is complete when it contains information required by PSC 128.30(2) and 128.50(1). If the municipality determines that the application is incomplete or that it needs more information, the municipality must notify the developer or owner in writing stating the reasons for the determination. Such a determination can be appealed through the municipality's administrative review process or to the PSC.¹⁴ If additional information is submitted, the municipality has another 45 days to review the application to determine whether it is complete. If a municipality fails to make a completeness determination within the applicable review period, the application is deemed complete.

After it makes a determination regarding completeness, the municipality has 90 days to review the application and approve or deny it on its merits. Municipalities must establish a process for accepting and considering written public comments on an application for a wind energy system and must hold at least one public meeting to inform the public about the proposal and obtain public comments.¹⁵ A municipality can extend the review period in writing, up to 45 days if the municipality

needs additional information to decide and up to 90 days if the applicant materially modifies the application for approval or if the municipality sets forth other good cause in writing. The total amount of time for all extensions may not exceed 90 days.¹⁶ If the municipality fails to act within the 90-day period or extended time period, the application is deemed approved.¹⁷

Municipal decisions to grant or deny an application for a wind energy system must be in writing and contain findings of fact supported by evidence in the record. The record must contain a recording of any public hearing (an electronic recording, a transcript prepared from an electronic recording, or a transcript prepared by a court reporter or stenographer), copies of documents submitted at any public hearing, copies of any other documents provided to the political subdivision in connection with the application for approval, minutes of any governing body or committee meetings held to consider or act on the application, a copy of the written decision, and a copy of any municipal ordinance cited in or applicable to the decision. A record relating to denial of an application for a wind energy system must be kept for at least seven years following the year in which the application was denied. A record relating to an approval must be kept for at least seven years after the year in which the wind energy system is decommissioned.

A decision to deny must specify the reason for denial. The municipality

8. PSC 128.10(3).

9. PSC 128.30(1)

9. PSC 128.105.

10. PSC 128.30(5)(b).

11. Sec. 66.0401(4)(a)2.

12. PSC 128.302(2)(b).

13. Sec. 66.0401(5).

14. PSC 128.30(6).

15. Sec. 66.0401(4).

16. Sec. 66.0401(4)(d).

17. PSC 128.32(5).

must provide its written decision to the developer or owner and the PSC. If approved, the municipality must provide the owner with a duplicate original of the decision for recording in the county register of deeds office.

Municipalities can charge application fees for reasonable expenses relating to review and processing of an application, including the cost of services necessary to review an application by outside experts or consultants such as attorneys, engineers, environmental specialists or planners. Municipal ordinances can also set standardized application fees based on the size and complexity of a proposed system.¹⁸ A municipality may require prepayment of up to 50 percent of the total estimated amount of the fee before issuing its decision if it notifies the owner in writing of its intent to do so within ten days of the time the application is deemed complete and the notice contains an estimate of the amount.

Municipalities can establish certain conditions for approval as set forth in PSC 128.33. These include the following:

- requiring the owner to provide information about consultations with and recommendations of state or federal agencies;
- requiring that the owner cooperate with studies coordinated by state agencies of effects of wind energy systems;

- requiring certain record-keeping and reporting requirements;
- requiring limited monetary compensation (“good neighbor” payments) to nonparticipating residences within 0.5 miles of constructed wind turbines and/or to non-participating farm owners within a specified distance who can demonstrate certain economic effects as a result of the wind energy system’s effect on their aerial spraying practices.

FRAMEWORK FOR APPEAL OF LOCAL DECISIONS

Within certain time limitations (typically within 30 days of the decision) an “aggrieved person” can appeal the municipality’s decision either through the municipality’s administrative review process followed by PSC review, if still aggrieved, or directly to the PSC. If appeal is to the PSC, the municipality must provide the PSC with a certified copy of the record upon which it based its decision within 30 days of receiving notice of the appeal. The PSC may confine its review to the records it receives from the municipality or expand the record if it finds additional information would be relevant to its decision.¹⁹ The PSC may treat a municipality’s determination that an application is incomplete as a decision to disapprove an application if the PSC determines the municipality has unreasonably withheld its determination that an application is complete. The PSC’s decision or order is then subject

to judicial review under Wis. Stat. ch. 227. The court reviews the PSC decision rather than the municipality’s decision.²⁰

SUBSTANTIVE REGULATIONS UNDER PSC CH. 128

The proposed rules under PSC ch. 128 include siting requirements, as well as construction and operation requirements for wind energy systems. Small Wind Energy Systems (those with a capacity of 300 kilowatts or less and that consist of individual wind turbines with a capacity of not more than 100 kilowatts) are exempt from some of the requirements in PSC 128 or subject to modified provisions as set forth in sec. PSC 128.60.

The PSC Rules include the following:

Setbacks

The PSC rules contain setback distances from occupied community buildings (schools, places of worship, daycare facilities, or public libraries), participating residences, nonparticipating residences, nonparticipating property lines, public road right-of-way, overhead communication and electric transmission or distribution lines.

The maximum setback from occupied community buildings or nonparticipating²¹ residences is the lesser of 1,250 feet or 3.1 times the maximum blade tip height. The maximum setback from public road right-of-way, participating

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18. 66.0401(5).

19. *Id.*

20. Participating property owners include the turbine host or other person who contracts to become a participating landowner. Everyone else is considered non-participating.

21. PSC 128.13.

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residences, overhead communication/electric transmission/distribution lines is 1.1 times the maximum blade height.²²

Noise

The PSC rules limit noise attributable to the wind energy system. Measured at the outside wall of a nonparticipating residence or occupied community building, the limit is 50 dBA during daytime hours (6:00 a.m. until 10:00 p.m.) and 45 dBA during nighttime

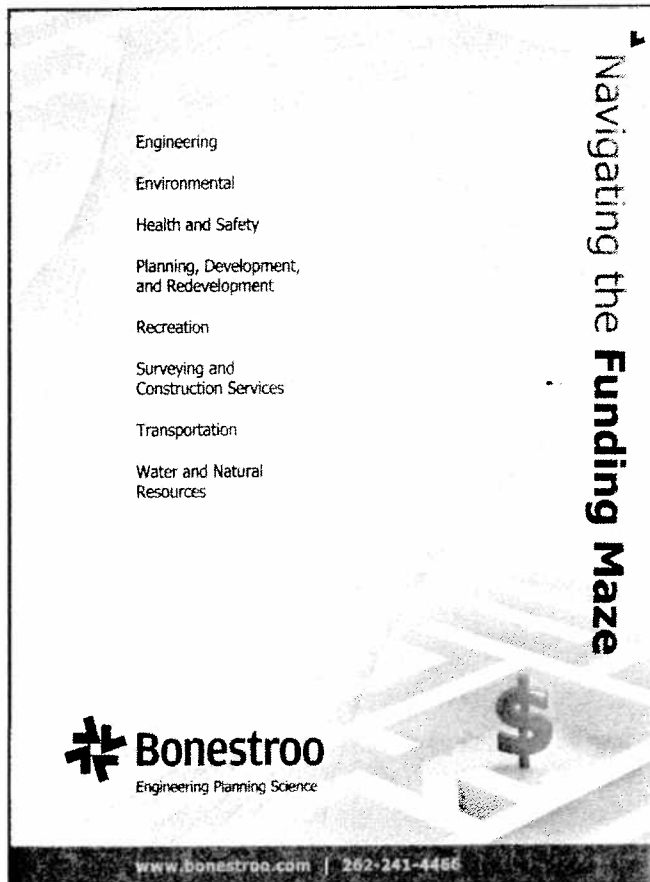
hours (10 p.m. - 6 a.m.). Noise that is a steady, pure tone (whine, whistle, screech, hum) not produced under normal operating conditions must be eliminated regardless of level.²³ Municipal ordinances can require pre and post-construction noise studies at the developer's expense.

Shadow Flicker

Shadow flicker is defined as "a pattern of moving shadows cast on a residence or occupied community building caused by sunlight shining through moving wind turbine blades resulting

in alternating changes in light intensity." The PSC rules limit shadow flicker attributable to the wind energy system to 30 hours per year at nonparticipating residences or occupied community buildings. Mitigation is required for shadow flicker of 20 hours or more per year. Examples of mitigation include planting trees or shrubs to avoid or minimize shadow or shadow mitigating blinds. Municipal ordinances can require the developer to demonstrate, before the project is build, that shadow flicker would be below the absolute limit or require mitigation.²⁴

22. PSC 128.14.
23. PSC 128.01(19) and PSC 128.15
24. PSC 128.16.

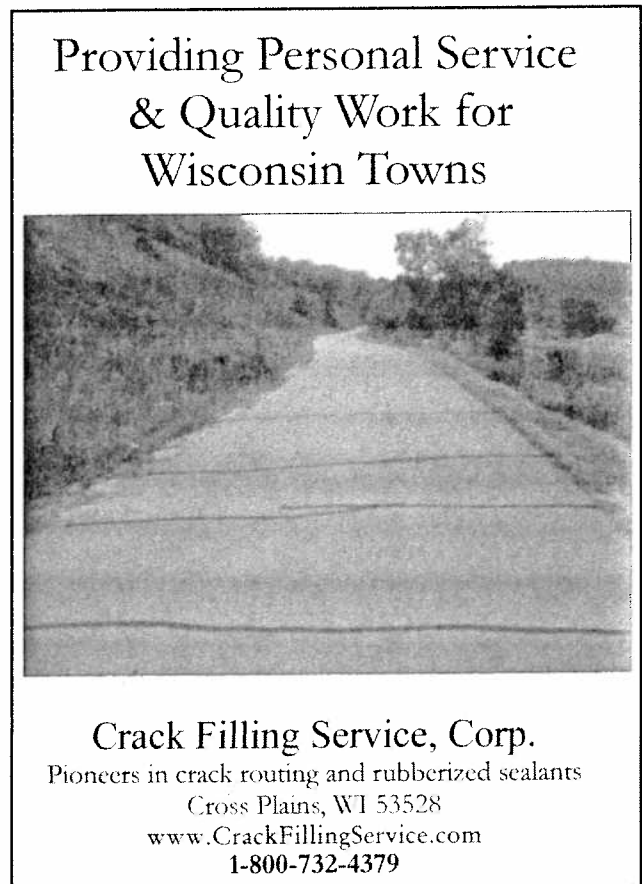


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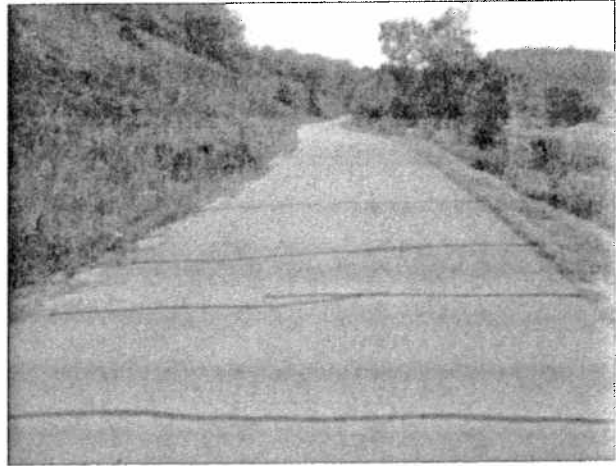
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Signal Interference

The PSC rules prohibit owners from constructing facilities within existing line-of-sight communication paths used by government or military entities to provide services essential to public safety and require the owner to use “reasonable efforts” to avoid causing interference with commercial and personal communications to the “extent practicable.” The rules also require certain mitigation interference for the life of the wind energy system.²⁵

Stray Voltage

The PSC rules require the owner to work with local electric distribution companies to test for stray voltage at dairy and confined animal operations within a certain distance.

Construction and Operation

The PSC rules require conventional or unobtrusive finishes and prohibit advertisements on wind turbines. They require lighting in compliance with FAA standards, 24-hour emergency contact information and signage. The rules also require compliance with national electric code, national electric safety code, Wis. Admin Code ch. PSC 114 and require underground collector circuits to the “extent practicable.” The regulations include site restoration requirements for land not occupied by wind energy systems and restoration of the site to preconstruction condition. Municipal ordinances can require owners to develop emergency plans and procedures, and require owners to

provide annual training for fire, police and first responders.²⁶

Decommissioning

Decommissioning means removal of the above ground portion of a wind energy system, including wind turbines and related facilities, except for access roads if the property owner has waived removal. It also means removal of all below ground facilities except underground collector circuit facilities and those portions of concrete structures 4 feet or more below grade.²⁷ Under the rules, decommissioning is presumed to be required if the wind energy system generates no electricity for a continuous 360-day period. The presumption may be rebutted with a plan to return the system to service.

When decommissioning is required, decommission must begin within 360 days after the wind energy system has reached the end of its useful life and the owner must complete decommissioning within 540 days. Municipalities may require financial assurance (bond, deposit, escrow account, irrevocable letter of credit or some combination) based on the estimated cost to decommission. Local ordinances can require that the developer take bids and provide that information to the local government and can review the information every 5 years. The municipality can include site restoration requirements such as restoring the site to preconstruction condition.²⁸

Complaint Process

The owner of a wind energy system must develop a complaint resolu-

tion process and maintain a log of complaints. This complaint process is available and applicable regardless of whether a municipality has adopted an ordinance. The owner must use reasonable efforts to resolve complaints and make a good faith effort to resolve the complaint within 45 days. The complaint must first be made to the wind energy system owner. If not resolved within 45 days, the complainant may petition the municipality for review of the complaint handling process. Municipalities may establish a committee to monitor resolution of complaints.²⁹

Conclusion

The State has sharply curtailed municipal ability to regulate wind energy systems. Municipalities that wish to regulate wind energy systems must be aware of the constraints on local regulation and must enact local ordinances that are no more restrictive than rules established by the PSC.

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In preparing this Comment the author was assisted by materials prepared by Deborah Erwin at the Public Service Commission and presented at a November 10, 2010 UW Extension Local Government Center WisLine program entitled “Wind Siting in Wisconsin.”

25. PSC 128.18.
 26. Wis. Admin Code sec. PSC 128.01(5)
 27. PSC 128.19
 29. PSC 128.40 and 128.41.