

**WISCONSIN TOWNS ASSOCIATION  
60<sup>th</sup> ANNUAL CONVENTION  
October 23, 2007**

**“Regulating Wind Farms: What Towns Can and Cannot Do”**

Atty. John A. St. Peter  
Edgerton, St. Peter, Petak & Rosenfeldt  
10 Forest Avenue, P.O. Box 1276  
Fond du Lac, WI 54936-1276

**I. Economic/Regulatory Background.**

**A. Economics**

1. American energy use is high and continues to rise.
2. The U.S. has been a net importer of energy since the 1950s, and imports have risen dramatically in that time. Nearly all U.S. energy imports are oil.
3. Largely because of technical improvements in blade design, materials and computerized controls, wind turbines are now a competitive option for power (usually less than 6 cents a kilowatt hour).
4. Electric energy deregulation is enhancing competition in energy production creating opportunities for private merchant generation facilities.
5. Climate change has focused attention on air pollution resulting in growing support for renewable energy sources.
6. 2003 Wisconsin Act 31 created a new formula for calculation of utility shared revenue payments related to power plants built or substantially renovated (repowered) after December 31, 2003.
  - (a) Every new or repowered facility generates a base payment of \$2,000 times the facility's capacity. The Act distributes the payment between the municipality and county in the same manner as under the former value-based formula for old

facilities (2/3 to county and 1/3 to town or 1/3 to county and 2/3 to incorporated municipality.)

(b) Every new or repowered facility powered by alternative fuel generates an additional payment of \$1,000 times the facility's capacity to both the county and the local municipality.

## **B. Regulatory Background**

1. Federal policy encourages development of wind energy through production tax credits and Renewable Portfolio Standards.
2. Wis. Stat. §1.12(3)(b) declares state policy to increase renewable energy resources.
3. Wis. Stat. §196.377 requires the PSC to encourage the development of renewable sources of energy.
4. State Renewable Portfolio Standards require 2.2% renewable energy by 2011.
5. April 6, 2007 announcement by Governor Doyle creating an Office of Energy Independence (launching program for trading renewable energy credits in the Midwest and in Manitoba; establishing target to derive 25% of state electricity from renewable energy sources by 2025).
6. Wind turbines are not subject to property tax.  
See Wis. Stat. §70.111.
7. The Federal Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the Endangered Species Act all establish federal authority to protect avian species. Although the Fish and Wildlife Service may initiate enforcement action under any of these laws, no enforcement actions have been taken against wind farms.
8. The Federal Aviation Administration (FAA) has jurisdiction over design features such as warning beacons, etc.

## II. Legal Background.

- A. PSC Certificate of Public Convenience and Necessity is required for energy generation facilities of more than 100 megawatts. See Wis. Stat. §196.491. (PSC will assert that Wis. Stat. §196.491 pre-empts local regulations.)
- B. Wis. Stat. §66.0401 prohibits counties, cities, towns and villages from placing any restrictions, directly or indirectly, on the installation of solar or wind energy systems unless the restriction satisfies one of three 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.
- C. See attached AG correspondence stating that Wis. Stat. §66.0401 "... is not trumped, qualified or limited by ... a municipality's zoning and conditional use powers."
- D. *State ex rel. Numrich v. City of Mequon*, 2001 WI App. 88, 242 Wis. 2d 67, 626 N.W.2d 366.
  1. Legal effect of Wis. Stat. §66.0401: Towns can impose health and safety related restrictions on the construction and operation of wind farms, but may not enact or impose regulations that increase the wind farm's cost or decrease their efficiency, or that completely bar the installation of the system.
    - (a) "Health and safety" refers to humans not birds or bats.
    - (b) Visual/aesthetic concerns alone are insufficient to block project.
    - (c) See <http://www.nationalwind.org/events/siting/presentations.htm> for excellent resource materials on aesthetics.

## III. Town Options.

- A. Do nothing, *i.e.* defer to the PSC, County or private property easement negotiation process.

- B. Amend local zoning ordinance to specifically allow a wind energy facility located in an agricultural district if a permit has been obtained from the County. For example:

“Section 5.07 Wind Energy Facility. The Town of Badger Zoning Ordinance is not applicable to a Wind Energy Facility located in an Agricultural district that has received a Wind Energy Siting Permit from Badger County.”

- C. Regulate as permitted or conditional use under town zoning ordinance. (Caution: recall PSC pre-emption for large project and Wis. Stat. §66.0401.)
1. Gas and electric utility uses not requiring authorization under Wis. Stat. §196.491 are permitted uses under Farmland Preservation law. (Projects larger than 100 megawatts)
  2. Conditional use permit regardless of megawatts is highly recommended;
    - (a) Allows the use of a site-specific development agreement (see comments, below).
    - (b) Facilitates formal hearing processes.
    - (c) Familiarity of CUP process encourages developer application/participation.
  3. See “Wisconsin Model Wind Ordinance” developed by the PSC, DNR and Department of Administration (a/k/a the “Wisconsin Windpower Siting Collaborative”).

- D. Consider moratorium

1. Moratorium must have reasonable factual basis;
2. Moratorium can be temporary only;
3. Adopt in same fashion as amendment to zoning ordinance (not simply by resolution);
4. Should allow exceptions for emergencies; and

5. Describe legislation as "Interim Control Ordinance" not "moratorium." (See U.S. Supreme Court decision *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), holding that a temporary moratorium does not amount to a *per se* or categorical taking under the takings clause.)
6. Caution: The law relating to moratoria is unsettled and controversial. See Richard Nordeng "*Defending Wisconsin Towns in Challenges to Moratoria*" (2007 Wisconsin Town Lawyers Conference)

E. Use non-zoning ordinance

1. Licensing/permit ordinance (see Town of Herman, Dodge County ordinance)
2. Driveway/culvert ordinance.
3. Land clearing/erosion control/stormwater management regulations.

F. Development Agreements

1. Comprehensive means of "regulating" project.
2. Recognized legal authority. See *Save Elkhart Lake, Inc. v. Village of Elkhart Lake*, 181 Wis.2d 778, 512 N.W.2d 202 (Ct. App. 1993).
3. Suggested general conditions.
  - (a) Definition of default.
  - (b) Non-assignability.
  - (c) Prohibition on project modifications absent town board approval.
  - (d) Restrictive definition of *force majeure* event.
  - (e) Severability clause.

- (f) Anti-waiver provision.
- (g) Requirement to follow "Good Utility Practice" (as technically defined).
- (h) Term renewal provision.
- (i) Indemnification of town and town officials.
- (j) Completion/time is of the essence/liquidated damages.
- (k) Legal authority for specific performance, without bond and recovery of attorneys' fees and costs.

**4. Special Conditions.**

- (a) Specified term.
- (b) Reference to building codes/safety standards.
- (c) Compliance with state and federal regulatory requirements.
- (d) Height and design requirements.
- (e) Maintenance, repair and replacement provisions.
- (f) Restrictions on signs.
- (g) Lighting regulations.
- (h) Aesthetic design provisions.
- (i) Requirement to minimize stray voltage or EMF on non-participating property.
- (j) Wind turbine generator removal provisions.
- (k) Setbacks.
- (l) Noise restrictions.
- (m) Signal interference protection.

- (n) Safety standards.
- (o) Emergency shutdown.
- (p) Special insurance provisions.
- (q) Defense of land use decision made by town, including the duty to reimburse town for its reasonable attorneys' fees in defending development agreement or permit.
- (r) Tax hold harmless.

“The Parties acknowledge that the shared revenue payments payable to the Town under current state law may be revised or revoked by future Legislatures. If the shared revenue payments payable to the Town are eliminated by the Legislature, Developer will pay to the Town an amount equal to \$\_\_\_\_\_ per megawatt for the wind turbines actually installed and operating in the Town.”

- (s) Requirement for field representative/site manager.
- (t) Local inspections, particularly of roads.
- (u) Decommissioning and site restoration plan with appropriate security to enforce plan.
- (v) Road repair/bonding requirements.
  - (i) pre-project and post-construction roadway condition survey;
  - (ii) definition of road repair obligations;
  - (iii) insurance specific to road requirements/construction;
  - (iv) letter of credit or comparable security.
- (w) “Nuisance” payments to non-participating neighbors.

IV. Miscellaneous Observations.

A. Determine developer's will to proceed.

1. Will developer "force" project on unreceptive local government?
2. Identify and distinguish identity and basis of local opposition.
3. Note well: easements are likely to be secured before local elected officials have official, or even actual, knowledge of project.

B. Meet early and often with representatives of developer.

1. Encourage public informational meetings prior to initiating formal application process under applicable ordinance.
2. Avoid premature support or opposition to proposed project (unless town board is certain of its opposition).

C. Conflict of interest statute (see attached AG letter regarding solicitation of local government officials for wind energy contracts).

D. Recovery of attorneys/engineering fees.

1. Use preliminary project development agreement to require reimbursement of reasonable fees and expenses.
2. Require reimbursement of all reasonable fees and expenses relating to the investigation, issuance, administration and enforcement of relevant permit, license or agreement.
3. Require developer reimbursement of reasonable attorneys' fees incurred in defending any legal actions brought by third parties challenging the legality or enforceability of permit, license or agreement.

E. Engage professional assistance early.

1. Identify legal and political options.
2. Designate spokespersons.

3. Clarify ethics/open meeting/public records obligations (*e.g.* developer-sponsored tour of another wind energy project constitutes a “meeting” under Wis. Stat. §19.82(2). See *State ex rel. Badke v. Village Board*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993)).
  4. Caution: See *State ex rel. Citizens for Responsible Development v. City of Milton*, 206 WI App. 427 for a very narrow construction of Wis. Stat. §19.85(1)(e) on the use of closed sessions for bargaining purposes.
- F. Develop a disciplined, coordinated negotiation strategy akin to labor negotiations.