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Wisconsin Supreme Court Upholds Condemnation of Land for Sidewalks

On June 19, 2024, the Wisconsin Supreme Court issued a decision in *Sojenhomer LLC v. Village of Egg Harbor,* 2024 WI 25, a case clarifying the scope of municipal condemnation authority. In its 4-3 decision, the Court held that a 2017 law that prohibits Wisconsin municipalities from condemning land to extend or establish "pedestrian ways" does not prevent municipalities from condemning land for road projects that include sidewalks.

The case arose from a highway improvement project in the Village of Egg Harbor. The Village had received complaints from residents about the busy intersection of County Highway G and State Highway 42, so the Village Board engaged an engineering firm to study issues with the intersection and develop a plan to address them. Along with the addition of street lighting, storm sewers, and buried utility lines, the resulting plan included limiting parking to the west side of Highway G and adding a new sidewalk on the east side. The Village followed the process under Wis. Stat. § 32.05 to condemn the land necessary to complete the project.

That land included 0.009 acres belonging to Sojenhomer LLC, which operates the Shipwrecked Brew Pub and Restaurant on the east side of the highway. The condemned land had been used by Sojenhomer for parking in connection with the restaurant, but the Village intended to build a new sidewalk there and restrict parking to the opposite side of the street.

Sojenhomer challenged the Village's right to condemn the land on the basis of Wis. Stat. § 32.015, which provides that "Property may not be acquired by condemnation to establish or extend a recreational trail; a bicycle way, as defined in s. 340.01(5s); a bicycle lane, as defined in s. 340.01(5e); or a pedestrian way, as defined in s. 346.02(8)(a)." Sojenhomer argued that the proposed sidewalk was a "pedestrian way" and therefore, under Wis. Stat. § 32.015 and the related § 61.34(3)(b), the Village could not exercise its condemnation authority to acquire land from Sojenhomer to build the sidewalk.

The Wisconsin Court of Appeals agreed with Sojenhomer and held that the condemnation of Sojenhomer's land violated state law. This Village of Egg Harbor appealed that decision to the Wisconsin Supreme Court and both the Wisconsin Department of Transportation and the League of Wisconsin Municipalities filed amicus briefs in support of the Village's position. The Wisconsin Supreme Court reversed the Court of Appeals, holding that condemnation of Sojenhomer's land to build a sidewalk did not violate Wis. Stat. §§ 32.015 or 61.34(3)(b).

The Supreme Court concluded that a sidewalk is not a "pedestrian way" under Wis. Stat. § 346.02(8)(a), and therefore the statutory prohibition on condemnation for pedestrian ways does not apply to sidewalks. The Court reached this conclusion after a close analysis of Wis. Stat. § 346.02(8), which defines pedestrian way as "a walk designated for the use of pedestrian travel" and provides that the rules of the road set out in Chapter 346 that apply to "highways, streets, alleys, roadways, and

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Restrictive Renewable Energy Ordinances May Be Vulnerable to Legal Challenge

With the continued push toward development of large-scale wind and solar projects, some municipalities have responded by passing restrictive ordinances protecting against perceived threats to local health and agriculture.

Restrictive local ordinances are the leading cause of wind project cancelation and second leading cause of solar project cancelation. ("Survey of Utility-Scale Wind and Solar Developers", Berkely Lab, January, 2024). At least 19 Wisconsin towns have passed ordinances imposing restrictions on wind and solar development. This is according to the nonprofit organization "Farmland First", which has promoted the use of such ordinances (See https://www.farmlandfirst.com/new-page-2).

A lawsuit filed by wind developer Marathon Wind Farm LLC on June 20th targets two of these ordinances. The outcome of the case will test the enforceability of ordinances that are more restrictive than state standards.

The project at issue is a 99 MW wind farm being built by a subsidiary of EDF Renewables. According to the complaint, plans for the facility began in 2017 after research identified the towns of Brighton and Eau Pleine as desirable locations for siting a wind generating system based on the availability of wind, proximity to transmission lines, and community support. The subsidiary executed dozens of leases with local landowners and initiated communications with both towns in 2019 to facilitate development of the project. The complaint alleges that the company has incurred over $5 million dollars in predevelopment costs, all of which would be lost if development is not allowed to proceed under the two ordinances at issue.

In 2023, both towns enacted ordinances setting minimum requirements for the establishment, operation and permitting of wind energy systems proposed to be located in the town. The ordinances impose maximum noise limits enforceable by shut down orders; minimum setbacks; guarantees against property value diminution from the developer; annual compensation to nonparticipating property owners; and insurance requirements. All of these restrictions are alleged by the developer to exceed what is permissible under state law.

Under Wis. Stat. sec. 66.0401, political subdivisions are prohibited from placing restrictions on wind energy systems that are more restrictive than the rules promulgated by the Public Service Commission of Wisconsin (PSCW), unless they are justified by health and safety considerations. The complaint seeks a declaratory judgment from the Circuit Court of Marathon County that the Brighton and Eau Pleine ordinances violate sec. 66.0401 and asks the court to enjoin the towns from enforcing their ordinances.

The litigation is notable because recently there is an almost gold rush atmosphere where developers such as EDF seek siteable land in rural counties with solar or wind development potential and sign up landowners under leases that allow long development lead times. For projects under 100 MW, PSCW approval is not required, so only local approvals are needed. To avoid litigation, many developers negotiate directly with town boards and permitting authorities. The Marathon Wind Farm lawsuit will be closely watched by municipalities and renewable developers alike.

It is important that municipalities developing ordinances intended to protect the health and safety of their residents be cognizant of existing statutory and regulatory standards. With respect to wind systems, Wis. Admin. Code PSC 128 provides detailed rules governing the installation of wind systems and expressly states that political subdivisions "may not place any restriction, either directly or in effect" on such installations "except by adopting an ordinance that complies with this chapter."

Section 66.0401(m) provides that political subdivisions may impose a restriction on the installation or use of a solar or wind energy system only if the restriction preserves or protects the public health and safety; does not significantly increase the cost of the system or decrease its efficiency; or allows for an alternative system of comparable cost and efficiency. While many such restrictions, including those of the towns of Brighton and Eau Pleine, are intended to address concerns for public health and safety, current research challenges many claims frequently made about renewable energy systems regarding the dangers they are alleged to pose to humans, as well as to animal and plant life. (See Columbia Law School Scholarship Archive, "Rebutting 33 False Claims About Solar, Wind and Electric Vehicles" (April, 2024)); see also, "Wind Turbine Siting-Health Review and Wind Siting Policy Update Pursuant to Wis. Stat. sec. 196.378(4g)(e)", from the Wisconsin Wind Siting Council (May, 2024). Hence, local governments should proceed cautiously when developing restrictive renewable energy ordinances intended to "preserve or protect" public health and safety.

This is true for ordinances intended to limit the siting of renewable generating systems or the construction of transmission lines needed to interconnect with such generating facilities. Although municipalities do have authority to regulate their rights of way, including the use by public utilities, the reasonableness of such ordinances may be challenged and invalidated by the PSCW under Wis. Stat. sec. 196.58. (See also Wis. Stat. sec. 182.017 related to transmission utility use.) Local ordinances specifically designed to limit use of right of way expressly to restrict the ability of utilities to interconnect renewable generating resources are unlikely to meet such a reasonableness standard.

— Richard Heinemann

Court of Appeals Invalidates PSCW Demand Response Order as Unpromulgated Rule

In a recent decision in *Midwest Renewable Energy Association v. Public Service Commission of Wisconsin* (2024 WI App 34), the Wisconsin Court of Appeals has invalidated a 2009 order by the Public Service Commission of Wisconsin (PSCW) as an unpromulgated rule. The decision reinforces a longstanding principle that agency decisions with the force of law and intended to be generally applicable must follow rulemaking procedures under chapter 227.

The PSCW order concerned the practice known as "demand response." In the electric utility market, demand response essentially pays consumers for commitments to curtail their power usage during peak hours. This allows wholesale market operators to curb peak wholesale energy rates and reduce peak demand on the energy grid. Retail customers can participate in demand response through Aggregators of Retail Customers (ARCs).

In 2008, the Federal Energy Regulatory Commission (FERC) issued an order currently codified as 18 C.F.R. § 35.28(g)(1) (2024) intended to facilitate participation in demand response programs by retail customers. It provided that regional market operators such as MISO must accept demand response bids from large-utility ARCs unless the state regulatory authority prohibited the practice. In response, the PSCW issued its order in 2009 titled "Order Temporarily Prohibiting Operation of Aggregators of Retail Customers." The PSCW indicated that it was concerned the use of ARCs may be discriminatory under the Wisconsin statutes and thus prohibited retail customers of Wisconsin's four largest utilities and third-party ARCs from transmitting demand response bids directly to MISO markets while the PSCW investigated. Despite being titled as "temporary," the order stood from 2009 until Midwest Renewable Energy Association filed a complaint in 2021 challenging the order as an unpromulgated rule and appealed the case to the court of appeals.

Administrative agencies such as the PSCW may issue rules so long as they follow the procedures set forth in Wis. Stat. ch. 227. Any rule issued without following these procedures is invalid and cannot be enforced. As there was no question that the PSCW did not follow the procedures set forth in Wis. Stat. ch. 227, the question the court of appeals addressed was whether the PSCW's 2009 Order constituted a "rule" as defined by Wis. Stat. § 227.01(13) or qualified as some other type of Order such as a guidance document or a statement of policy.

After dispatching with various preliminary issues, the court of appeals applied the familiar five-element test articulated in *Citizens for Sensible Zoning Inc. v. DNR,* 90 Wis. 2d 804, 280 N.W.2d 702 (1979) to determine if the 2009 PSCW Order constituted a "rule." The test asks whether the order (1) is a regulation, standard, statement of policy or general order, (2) of general application, (3) having the effect of law, (4) issued by an agency, (5) to implement, interpret or make specific legislation enforced or administered by such agency. The court of appeals held that all five elements were met, making the order an unpromulgated rule, and therefore invalid.

The primary point of discussion by the court was whether the Order satisfied the second element of the test requiring it to be of "general application." When considering whether an order is of general application, the court considers whether it applies to a class of people, even if the class is small, or whether it applies to only a specific, fixed set of individuals under specific factual circumstances. The court of appeals determined that the Order applied to regulate a class of people, namely ARCs and customers of large utilities, and did not merely regulate the four named large utilities in the state. As such, the Order was of general application.

The effect of the court of appeals decision is immediate—the order is invalidated and cannot be enforced until the PSCW properly follows the rulemaking procedures in Wis. Stat. ch. 227. This means that retail customers of the state's four largest electric utilities may now participate in ARCs that may submit demand response bids to MISO.

— Liz Leonard

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sidewalks also apply to pedestrian ways." The Court reasoned that, if sidewalk and pedestrian way meant the same thing, there would be no need for a statute to specify that the rules that apply to one also apply to the other. In addition, Wis. Stat. § 346.02(8) provides that assessments may be made for the installation of public utilities above or below a pedestrian way "as if" such pedestrian way were a sidewalk (or highway, street, alley, or roadway). This language suggests that sidewalk and pedestrian way have separate, non-overlapping meanings, because there would be no need for a statute allowing pedestrian ways to be treated "as if" they were sidewalks if the two were already one and the same thing. The Court also relied on an analysis of statutory history, other related statutes, and the text of Wis. Stat. § 32.015 in support of its conclusion that sidewalks are not pedestrian ways.

This decision is a significant one for Wisconsin municipalities. It prevents a single hold-out property owner from thwarting road projects that include sidewalks and makes clear that, in spite of Wis. Stat. § 32.015, municipalities may still condemn land for such purposes. However, when planning for projects involving condemnation, municipalities should be sure to keep in mind the distinction between sidewalks, for which condemnation is permitted, and recreational trails, bicycle ways, bicycle lanes, and pedestrian ways, for which condemnation remains prohibited under Wis. Stat. § 32.015 and related statutes.

— Julia K. Potter

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