



COLUMBIA COUNTY

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To: Columbia County Chair Chris Polzer

From: Corporation Counsel

RE: A Moratorium on Solar Energy and related Actions and Costs

Date: April 13, 2023

On March 15, 2023, before the full Columbia County Board of Supervisors, Supervisor Kohlberg motioned for Columbia County to hold a public hearing on a solar energy moratorium in Columbia County. The motion and related action is as follows:

Motion by Kolberg to hold a Public Hearing at the next full Board meeting to consider an act on a moratorium on issuance of any zoning or conditional use permits for the purpose of constructing a solar facility or battery storage system. Second by Groves. The motion carried, not unanimously.

It was clarified the public hearing would be for discussion only and no action would be taken. Groves stated this would need to be legally and publicly noticed 30 days prior to County Board meeting.

Draft Minutes, March 15, 2023, Columbia County Board meeting, page 24.

This memorandum was requested after the above motion was made and passed by the Columbia County Board of Supervisors. It summarizes the applicable law, both generally on solar energy as well as regarding this moratorium, and the accrual of related costs to date as well and into the future.

I. Summary

Wisconsin law limits what Wisconsin counties like Columbia County may do when considering solar energy. No Wisconsin law provides Columbia County with the authority to adopt a moratorium on solar energy facilities or their related permits. Despite the County staff's many attempts to provide information on the law and process, those County resources have been largely

ignored. The continued pursuit of legally prohibited actions, such as this moratorium, has and will continue to directly cause the accrual of unnecessary and unbudgeted for expenses by the County.

II. Applicable Energy Law

Before turning to the applicable energy law, several general concepts are essential to know.

First, Wisconsin law defines the ability to regulate solar energy projects in this State. While this may appear to be a self-evident statement, multiple references and statements have been made throughout this matter concerning what other states have done or are doing on solar energy. However, those are inapplicable and are therefore irrelevant. Notwithstanding Federal law, only Wisconsin law applies to Wisconsin.

Second, preemption applies to this subject matter. Preemption is a legal concept, that when looking at the hierarchy of laws, the higher law supplants, or preempts, the lower regulation. For example, unless by exception, Federal law preempts state law; and state law preempts local law.

Turning next to the subject of solar energy, note, the Wisconsin legislature adopted a policy, and goal, for newly installed capacity for electricity be from renewable forms, including solar, years ago. *See* Wis. Stat. § 1.12(3)(b). In doing so, the Legislature enacted law limiting local authority over solar energy. Instead, Wisconsin solar energy law vests most regulatory authority with the State. Aside from that allowed by Wis. Stat. § 66.0401(1m)(a-c), local restrictions on solar energy are preempted by State law.

Solar energy projects are divided and considered by size in Wisconsin.

Those at or over one hundred megawatts are regulated by the Wisconsin Public Service Commission (PSC). *See* Wis. Stat. § 196.491. Projects of this size are reviewed by the PSC and it alone decides whether a certificate of public convenience and necessity is appropriate. *Id.* “Local ordinances, such as zoning ordinances, cannot impede what has been determined to be of public convenience and necessity.” *RURAL v. Public Service Commission of Wisconsin*, 239 Wis.2d 660, ¶¶ 65, 619 N.W.2d 888 (2000). If a local ordinance is enacted attempting to limit these projects, the projects may still continue. *See* Wis. Stat. § 194.491(4)(c)3. (“If construction or utilization of a high-voltage transmission line described in subd. 1m. or 1s. is precluded or inhibited by a local ordinance, the construction and utilization of the line may nevertheless proceed.”).

When considering Dane County’s attempt to locally regulate shoreland zoning and erosion control, the Court of Appeals found against that county and held that Wis. Stat. § 196.491(3)

preempts local regulation on those matters already regulated by the PSC, including on issues such as environmental factors, land use, and development plans. Going beyond this, it also held:

The only reasonable reading of *RURAL* is that WIS. STAT. § 196.491(3)(i) “abrogates,” in the court's own words, local regulations that govern the same subject matter that the PSC is required by statute to consider in granting a certificate for public convenience and necessity. The necessary implication of the court's analysis is that any enforcement of local regulations governing those matters impedes or inhibits the project.

Id., 2008 WI AP 2604, ¶ 15, 321 Wis.2d 138. Otherwise stated, local attempts to restrict or enforce matters through the permitting process that are to be considered by the PSC are preempted. *See American Transmission v. Dane County*, 2008 WI AP 260, ¶ 19.

Local governments have some control over those facilities under one hundred megawatts but it is that specifically allowed by Wis. Stat. § 66.0401(1m)(a-c).¹ This statute states:

(1m) Authority to restrict systems limited. No political subdivision may 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 commission under s. 196.378 (4g) (b). No political subdivision may place any restriction, either directly or in effect, on the installation or use of a solar energy system, as defined in s. 13.48 (2) (h) 1. g., or a wind energy system, unless the restriction satisfies one of the following conditions:

- (a) Serves to preserve or protect the public health or safety.²
- (b) Does not significantly increase the cost of the system or significantly decrease its efficiency.
- (c) Allows for an alternative system of comparable cost and efficiency.

Id.

Wisconsin Courts have considered Wis. Stat. § 66.0401(1m) and reinforced its limits on local control. Local authorities are bound to these statutory restrictions when considering an application for a permit. *State ex rel. Numrich v. City of Mequon*, 626 N.W.2d 366, 2001 WI App 88. When reviewing that permit, a “case-by-case approach” to solar energy is required and not widespread or broad tactic. *Ecker Brothers v. Calumet County*, 772 N.W.2d 240, 321 Wis.2d 51 (Ct. App. 2009).

¹ Wis. Stat. § 66.0401 considers both solar and wind energy.

² Note, the preservation or protection of “welfare” was not included within these restrictions which is found within Wis. Stat. § 59.69(1).

The *Ecker Brothers* court also discussed the limited authority counties have, with that authority being insufficient to make legislative policy under Wis. Stat. § 66.0401(1m)(a-c). *Id.* at 18-21.

Next looking at the permit process, under the current law, small scale solar energy projects are subject to County review through the conditional use process subject to Wis. Stats. §§ 66.0401(1m) and 59.69(5e). Conditional use permits (CUPs) are reviewed by the Planning and Zoning Committee. “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.” Wis. Stat. § 59.69(5e). “Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.” *Id.* State law further provides, “As part of its approval process for granting a conditional use permit under this section, a county may not impose on a permit applicant a requirement that is expressly preempted by federal or state law.” Wis. Stat. § 59.69(2)(bs) (emphasis added). In other words, Wis. Stat. § 66.0401(1m) applies when a small-scale solar energy project developer seeks a CUP, with its conditions measured by both Wis. Stats. §§ 66.0401(1m) and Wis. Stat. § 59.69; and the application may not be denied if there is agreement to or satisfaction of the legally imposed requirements and not without substantial evidence supporting the denial.

Solar energy is contemplated by the Columbia County Ordinance through both permitting and conditional use permitting processes. Per Columbia County Ordinance §§ 12.105.01, 12.105.02, and 12.125.27, electric transmission and utilities, such as small-scale solar energy projects, are permissible in agriculturally zoned land, including residential areas; and by Columbia County Ordinance § 12.115.02, on commercially, including highway interchange, and industrially zoned land.

While the above largely focuses on conditional use permits, the consideration of other permits possibly issued by the County would still be subject to Wis. Stat. § 66.0401(1m).

III. Solar Energy Moratorium in Columbia County

Columbia County does not have the legal authority to adopt a moratorium on solar energy in the County.

A “moratorium” is defined as a “legally authorized period of delay in the performance of a legal obligation,” or a “suspension of activity” by Merriam-Webster. See Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/moratorium>.

The motion for the moratorium includes two interwoven issues to be halted through the moratorium itself, namely those regarding (1) solar energy facilities or projects generally and (2) then their battery storage facilities.

As discussed herein, review and permitting of large-scale solar projects are controlled by the PSC. While various steps, such as providing public input to the PSC, may be performed by counties, the County has no jurisdiction over these types of projects, including over whether to delay or to stop their existence in the County. State law then prevents any locally-derived moratorium.

There is also no legal authority for a moratorium on small-scale solar energy projects in Columbia County. Small-scale projects are limited by the restrictions within Wis. Stat. § 66.0401(1m). No political subdivision, such as Columbia County, may impose “any restriction, either directly or in effect on the installation of solar energy...” unless one of the conditions within (1m)(a-c) is satisfied. Wis. Stat. § 66.0401(1m)(a-c).

The three criteria in Wis. Stat. § 66.0401 (1m)(a-c) must be reviewed individually, through the conditional use permit (CUP) process for example, and not by an universal prohibition such as a moratorium or ordinance. In the past, a moratorium was in fact utilized by another Wisconsin county and an ordinance adopted. *See Ecker Brothers v. Calumet County*, 772 N.W.2d 240, 321 Wis.2d 51 (Wis. Ct. App. 2009). Finding that Calumet County had exceeded its legal authority, the Court of Appeals clarified that counties do not have the ability to legislate, unless by grant of authority and found against the county. More specifically, this court held:

We 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. Instead, the language of WIS. STAT. § 66.0401(1) indicates that political subdivisions must rely on the facts of an individual situation to make case-by-case restrictions. We initially point out that § 66.0401(1) refers to local restrictions placed on *a* wind energy system. The statute's limit on local control does not refer to *any* wind energy system nor to wind energy *systems*.

The focus on the term "*a* system" is also evident from the character of the three conditions, which, though stated in qualitative terms, require political subdivisions to make quantitative determinations. What is needed to protect public health depends on the facts of a particular situation, just as whether a restriction will increase costs, decrease efficiency, or prevent an alternative system from being constructed. When a political subdivision creates restrictions without sufficiently developed facts about *a* particular wind energy system, it is impossible for it to determine if its ordinance is in conflict with the statute. We therefore conclude that 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.

Ecker, ¶ 20-21. As a result of *Ecker*, the ***only*** proper function a county may perform under Wis. Stat. § 66.0401(1m) is to review each small-scale project individually through a case-by-case process such as through a CUP. A moratorium stopping all solar projects is a direct and widespread restriction prohibited by Wis. Stat. § 66.0401(1m); and to the degree that three factors under (1m)(a-c) may be even considered, a moratorium outright avoids the case-by-case analysis *Ecker* required.

Turning to the second issue of battery storage, this issue is directly tied to solar energy regulation. Therefore, this, too, cannot avoid the application of Wis. Stats. §§ 196.491, 66.0401, or 59.69 or Wisconsin caselaw. In summary, larger solar projects, including their battery storage, are within the PSC's jurisdiction. A solar project of this size would not have to follow an ordinance attempting to restrict or inhibit battery storage. *See* Wis. Stat. § 196.491(4)(c)3. and *American Transmission v. Dane County*, 2008 WI AP 2604. Wis. Stat. § 66.0401(1m) still applies to small scale solar projects, requiring the statutory criteria to be met, using the appropriate evidentiary burden, and applied on a case-by-case basis by the local governmental authority. *See Ecker Brothers v. Calumet County*, 772 N.W.2d 240, 321 Wis.2d 51 (Ct. App. 2009).³ Attempting to regulate a battery storage system is an indirect regulation prohibited by Wis. Stat. § 66.0401(1m). Even to the extent that a factor under Wis. Stat. § 66.0401 (1m)(a-c) could be met, an universal moratorium is prohibited as it avoids the required individual analysis. Dependent on the issue, a host of Federal and State law and various governmental agencies may have jurisdiction over issues such as batteries, waste, point and nonpoint source water run-off, environmental concerns, etc. which may once again preempt any local regulation.⁴

Regardless of whether the focus is one battery storage or solar energy facilities, the contemplated moratorium is not rooted in Wisconsin law. The motion itself was insufficient - it lacked any reference to or grounding in State law as its authority allowing for the contemplated moratorium.

³ The very discussion on holding a moratorium on solar projects as contemplated may be interpreted as creating a record demonstrating the County's intent to not comply with *Ecker Brothers* or State law. This, too, is concerning.

⁴ For many reasons, the County has never regulated batteries. Ignoring the nature and the volume of the above-stated concerns and the reasons why the County has not gotten involved in this area previously, proceeding with any battery storage regulation may require new staff to be hired as current staff neither have the applicable expertise or the related tasks as their job duties. This position would then result in additional costs to be accrued which were not part of the annual budgetary process.

Both by reference and through related board discussion, this moratorium involves permits issued by the Planning and Zoning Department. Given this, it may have been intended to have been made pursuant to Wis. Stat. § 66.1002, which is regarding comprehensive planning and development moratoriums. Should that be the case, such a moratorium would be legally prohibited. First, Wis. Stat. § 66.1002 expressly limits its applicability to only cities, villages, and towns. *See* Wis. Stat. § 66.1002(1)(d) and (2). This statute does not apply to counties whatsoever. This statute also requires an ordinance; there is no ordinance drafted at this time. *See* Wis. Stat. § 66.1002(3). That ordinance is also required to provide certain things and to be publicly available for review at the time notice is given, with information on how to find that. *Id.* None of that has occurred. Likewise, a solar energy moratorium is not even a stated basis for a moratorium under Wis. Stat. § 66.1002(4).

Furthermore, Wis. Stat. § 59.69, which provides Wisconsin counties with their direct statutory authority to plan and zone, expressly prohibits development moratoriums. Per Wis. Stat. § 59.69(4), “The **board may not enact a development moratorium, as defined in s. 66.1002 (1) (b), under this section or s. 59.03, by acting under ch. 236, or by acting under any other law,** except that this prohibition does not limit any authority of the board to impose a moratorium that is not a development moratorium.”⁵ *Id.* (emphasis added).

No reference to any other law was directly or indirectly made on March 15th through this motion. Nonetheless, a review of Wisconsin law was performed for other possible grounds for this moratorium. No legal basis to support this solar moratorium could be identified within Wisconsin law.

Whether intended to be as a development moratorium or otherwise, holding a moratorium as contemplated is not allowed. It goes against any case-by-case analysis required for each small-scale solar energy project and would overall exceed the County’s authority regardless of the project’s size.

IV. Costs to Columbia County

Because of the consistent failure to utilize County Department expertise and input, significant costs to the County have directly accrued involving this subject matter since September. It is also reasonably foreseeable that those costs will continue to accrue if this current practice continues.

⁵ Reflecting State law, the Columbia County Ordinance, Chapter 12 also provides no authority to hold a solar energy moratorium.

A. Review of County Resources

While multiple other departments may be impacted by solar projects in Columbia County, two departments have been more involved two date. Those being the Corporation Counsel Office and the Planning and Zoning Department.

The Planning and Zoning Department acquires its authority through Wis. Stat. § 59.69. Its role and scope of duties is more fully described within Columbia County Ordinance ch. 12. Pursuant to Columbia County Ordinance § 12.150.02, the Planning and Zoning Administrator has the responsibility to interpret and apply this chapter when considering comprehensive planning, conditional use permits, and other permits. *Id.* By the duties and responsibilities set forth within County Ordinance, this Department possesses the required expertise to review these types of issues.

Columbia County Corporation Counsel Office represents the County itself and the interests of the public dependent on the matter. The duties of Corporation Counsel are provided by statute and detailed within Columbia County Code of Ordinance. *See* Wis. Stat. § 59.42 and Columbia County Code of Ordinance §§ 8.301-8.303.

Historically, County supervisors have requested Corporation Counsel's opinion when there was a legal issue needing to be resolved as well as whether there was a concern about County liability. This practice has been memorialized into Columbia County Ordinance, which provides,

The Corporation Counsel shall, when requested, provide advice to the County Board or any commission, committee, departments, agencies or officers of the County, in all civil matters in which the County, the County Board, or any commission, committee or officer thereof is interested or relating to the discharge of official duties of such departments, boards, commissions, committees, agencies or officers and examines all claims against the County for officers, interpreters, witnesses, and jurors fees and costs in civil actions and examinations when presented to the Board of Supervisors and reports, in writing thereto, as to the potential liability of the County for any and all claims of whatever nature files against it; and acts as legislative counsel for the Board of Supervisors when so authorized. The Corporation Counsel shall hire outside counsel for the execution of these duties only when deemed necessary.

Columbia County Code of Ordinance § 8.302(1)(b).

By State law as well as County Ordinance, the two departments are available to be utilized in a manner reflective of their duties.

B. Applicable Actions

Despite the availability of County staff and expertise, a review of the County's records demonstrates that much of what has occurred has been without any utilization or attempt to utilize such resources.

C. Resolutions Drafted

Seven resolutions have been drafted involving solar energy to date.

Regarding the first two, after an informational presentation in September on the law and solar energy by Corporation Counsel staff to the Agriculture, Extension, Land and Water Conservation Committee, the first two resolutions were presented by Supervisor Groves. Those resolutions were not publicly noticed on the agenda; their existence unknown to County staff until introduced, including those responsible for the agenda. No vote was taken on those resolutions. Also, at this September's meeting, Corporation Counsel staff then advised that the proper forums to modify Wisconsin law and to discuss the solar related concerns were before the PSC and the Wisconsin Legislature. For further information, *see* the September 12, 2022, Agriculture, Extension, Land and Water Conservation Committee meeting.

The third resolution was presented by Supervisor Groves directly to the full County Board in November. Meeting the deadline for notice, he had shared his draft resolution with the County Clerk and Corporation Counsel Office the Wednesday before the next County Board meeting that following Tuesday. However, again, no request for review was made prior to or with his submission; and like before, multiple issues were present with its form, its content, and the practice followed. At that full board meeting, this resolution was then sent to the Planning and Zoning Committee for its consideration. It was later denied by that Committee.

A fourth resolution was drafted by Supervisor Brusveen, who chairs the Planning and Zoning Committee, and passed by the full County Board in December 2022 requesting an environmental assessment to be performed on the High Noon Solar project. *See* County Board minutes, December 21, 2022. This was not contemplated until after the regular Planning and Zoning Committee meeting was held, so this resolution required a special Planning and Zoning Committee meeting to be held right before the full board meeting on December 21st. Again, little time for staff review or assistance was provided.

The fifth resolution, one to the Wisconsin legislature requesting changes in State law, was requested to be drafted by Corporation Counsel by the Planning and Zoning Committee at the December 2022. The draft resolution was presented to that Committee and was later denied by it in January 2023.

The sixth was drafted by and then presented by Supervisor Brusveen in February 2023. That Committee met on February 7th. On February 6th, Supervisor Brusveen shared with that Committee her proposed resolution for their consideration with an updated version sent the morning of the 7th. Again, no request for staff review was made prior to this submission.

At that same February meeting, Corporation Counsel staff asked that the supervisors share with that office any proposed draft resolutions as soon as possible rather than waiting to the time of publication.

Pursuant to Columbia County Board of Supervisors Standing Rule 1(9), committee chairs establish the agendas for their applicable standing committees. Upon the inquiry of Planning and Zoning staff about the March 2023 agenda, Supervisor Brusveen shared two proposed resolutions, one to the State legislature and one to the PSC, on Monday, February 27th, to be publicly noticed on Thursday, March 2nd. The one to the PSC was the same as that presented on February 7th; the one to the State legislature was new and is the seventh resolution proposed to date. This resolution requested the removal of portions within State law, including Wis. Stat. § 66.401(1m). Corporation Counsel submitted a response back on March 1st with additional clarification and direction on the drafting of resolutions. However, no substantive changes were made to either resolution.

At the March 7th Planning and Zoning meeting and regarding the seventh resolution, outside counsel pointed out that the omission of red-lined statutory language could result in the removal of any local control within Wis. Stat. § 66.0401(1m) - in other words, that the drafted resolution had the opposite effect and meaning of what was being raised as a concern by solar opponents. Without proposed replacement language, it could be easily interpreted that the County was requesting that the current local regulatory authority under Wis. Stat. § 66.0401(1m)(a-c) be removed, leaving the County with no authority if ever adopted by the Wisconsin Legislature. No amendment was made to the seventh resolution despite the provision of this advice. Both resolutions were reviewed by and approved of by this Committee.

At the March 15th County Board meeting, no request for advice was made regarding either resolution. One supervisor, Supervisor Carr, raised the same issue Attorney Curtis had earlier presented about the elimination of local control in the proposed resolution. Her point was too ignored. Both resolutions⁶ were ultimately approved of by the County Board without any amendment.

Later, at that meeting on March 15th, Supervisor Kohlberg also moved to hold a public hearing on the issue of a moratorium on solar energy in Columbia County. No attempt was made to consult with Corporation Counsel or Planning and Zoning staff about the legality or validity of that motion prior to making it.

At the time of drafting this memo, a public hearing has been scheduled to consider a solar energy moratorium for the morning of April 18th.

D. Other Actions

Despite the foregoing actions, County staff and outside counsel has provided various County committees and the full Board technical and legal information on solar energy, Wisconsin law, Columbia County Code of Ordinance, related processes, and issues like preemption on numerous occasions. At minimum, information has been shared at the seven times identified below:

- 1) September 12, 2022: Agriculture, Extension, Land and Water Conservation Committee meeting. *See* the approved Minutes, item 11.
- 2) November 15, 2022: Full County Board Meeting, which included a presentation by Attorney Curtis. *See* the approved Minutes, page 9.
- 3) December 6, 202: Planning and Zoning Committee. *See* the approved Minutes; multiple references throughout.
- 4) January 3, 2023: Planning and Zoning Committee. *See* approved Minutes, page 2.
- 5) February 2, 2023: For their review, through an email from Corporation Counsel staff to Planning and Zoning Committee members on February 2nd containing memorandum drafted by Atty. Curtis and the link to the February's Wisconsin Counties Association edition on this subject.

⁶ This sixth resolution, which was to the PSC, was also submitted after the expiration of the project's defined public comment period. *See* Scheduling Order, Document # 45170, dated November 4, 2022. Various staff and supervisors did raise this as an issue.

- 6) February 7, 2023: Planning and Zoning Committee. *See* the approved Minutes, pages 3, 4, 9-11.
- 7) March 7, 2023. Planning and Zoning Committee as described herein; those Draft Minutes not yet approved.

Individual communications with supervisors are not included above. The above also does not consider current or future actions.

E. Cost to County Residents

The failure to utilize and recognize staff expertise has already cost County taxpayers. If this continues, County taxpayers will continue to bear the financial burden.

i. Resulting Costs

Since last fall, sizeable costs have already accrued directly related to this matter.

Numerous staff hours have been spent on the issue of solar energy and the actions described herein. Note:

- a. Seven resolutions have been drafted on this; six without consultation or heed to it. Several resolutions have not complied with the Open Meetings law requirements on public notice; multiple have disregarded the plain language of Wisconsin law as to content and process; and some have failed to meet the Columbia County Board of Supervisors Standing Rules regarding process, form, content, fiscal consideration, and timely sharing with other supervisors. This has also created an unusual situation where County staff has frequently received the resolutions very late in the process - at times only after select members of the public have already received and reviewed them.
- b. At least nine (9) County meetings have considered solar energy in some form - each with multiple staff members present.
- c. Outside counsel Attorney Curtis was requested to review and assist with handling this issue in October 2022. He has attended multiple meetings, presented to the full board in November, engaged in multiple communications, and drafted legal guidance on the

matter. As private counsel hired by and for the County, his time and efforts have also resulted in additional costs to the County.

- d. Various contradictory actions have been taken to date - all somehow requiring staff time. For example, in February, the Planning and Zoning Committee voted to have public meetings with solar energy developers and to consider a joint development agreement, with the informational meeting moved for by Supervisor Kohlberg and seconded by Supervisor Brusveen. *See* February 6, 2023, Planning and Zoning Committee minutes, pages 3 - 4. Despite the motion omitting any direction on how that would be accomplished, Corporation Counsel staff worked to schedule the informational meeting with three different organizations and at least fifteen separate calendars. Then the same moving supervisor from the February Planning and Zoning committee successfully moved to hold a public hearing on a solar energy moratorium at the full County Board meeting, thereby, negating his own and his committee's previous motions in February.

This type of action was also seen in March. At the Planning and Zoning Committee, regarding agenda item 11 (Request State to Revise Solar Energy Law), the resolution requested that portions of Wis. Stat. § 66.0401(1m) to be removed without any replacement language. Atty. Curtis raised that, without additional guiding language included and if adopted by the legislature, this omission could result in the elimination of the already limited county ability to regulate this issue. Nonetheless, that Committee made no amendment and approved the resolution. This same issue was raised by Supervisor Carr at the County Board and yet the resolution was passed.

In January, the Planning and Zoning Committee developed a list of twenty-seven issues to be considered for solar project developments. In February, a decision was made to consider a joint development agreement using this list. However, since then, that has been suspended due to the public hearing on a moratorium.

As stated, outside counsel was hired to provide additional review and expertise on this matter for the benefit of Columbia County at large. Despite being a direct factor

in the acquisition of his services, the same solar energy opponents on the County Board have since questioned the outside counsel costs, which include his fees. They then voted against paying those costs in March 2023. The approval to pay those costs did ultimately pass.

Those solar energy opponents on the County Board have consistently raised concerns about diminishing land and water quality resulting from solar energy facilities. However, solar energy opponents on the County Board voted in February to not approve but to table until later in the year a regular job replacement request a Land and Water Resource Management Specialist with a nutrient planning emphasis. This position is a budgeted position, and the request was made after the previous employee had taken a job elsewhere. This position is primarily responsible for the implementation and supervision of manure management plans, the supervision of all fertilizer applications, evaluating soil and water run-off and quality, and implementing the Farmland Preservation Program. This position is unfilled; those job responsibilities now are not being met. Of importance, the same supervising staff member who made this request is the director of both the Planning and Zoning and the Land & Water Conservation Departments. *See* the Agricultural, Extension, Land & Water Conservation Committee Minutes, February 6, 2023, page 2, item # 8.

- e. As indicated above, County staff and outside counsel have provided technical and legal information on many occasions.

Any additional work performed on this issue will have a cost to it, including drafting legal memoranda like this or attending future meetings.

ii. Future Legal Costs:

If the County continues to act without or against staff advice, counsel, and input, it will invite litigation in some form, thereby, making the accrual of significant additional costs a likelihood.

First, this contemplated moratorium on solar energy is prohibited by State law. Should any additional direct or related action be taken because of it, the County should expect that there will be those who will seek to enforce State law. In those enforcement actions, the County will accrue its own legal expenses as well as possibly those of the plaintiff. For example, if done through a

mandamus action, Wis. Stat. § 783.04 provides that the plaintiff may recover both damages and costs. If commenced through a declaratory judgment action, Wis. Stat. § 806.01(10) allows for the court to award costs as are just and equitable.

Second, additional legal costs are probable in the County's consideration of small scale solar energy projects. As previously discussed, small scale solar energy projects are subject to County review through the conditional use process subject to Wis. Stats. §§ 66.0401(1m) and 59.69(5e). Both the statutory framework and evidential burdens will dictate the ability to regulate generally, the scope of that regulation, and then the evidentiary weight that must be met when decision making. The result of these leave only very limited County regulatory authority over a properly completed CUP application.

The Planning and Zoning Committee has decision-making authority over CUPs in the County. This Committee is comprised of five members. To date, two of the five have publicly taken positions against solar energy. A brief review of County records demonstrates that one Planning and Zoning Committee member moved for this solar energy moratorium and the Committee's chair has drafted three resolutions on solar energy to date, including one to shut down a currently pending solar project in the County. These actions make it very uncertain whether a reasonable and fair analysis will be performed by this Committee on a small-scale solar project application for a CUP before it. While the three remaining members may be able to perform this duty, that unfairly requires them to never be sick, have a doctor's appointment, go on a vacation, etc.

Denials of CUPs are appealable to the Board of Adjustment (BOA). Corporation Counsel cannot provide both legal advice to the Planning and Zoning Department and to the BOA at this stage, as that would be providing advice to both a party and the overseeing committee with decision-making authority. To prevent that conflict of interest, two attorneys from two different offices would be required then to represent each entity. Potentially, this could be rectified later, if the BOA is appealed and dependent on the decision made by the BOA. However, appeals of the BOA decisions are also subject to circuit court review (and potentially appellate review), which would result in the accrual of more legal fees.

Other legal costs may also accumulate.

If the County Board proceeds with an action that there is no legal basis for and such was advised by Corporation Counsel and the County is then sued, the County's insurance policy will not cover those legal expenses. They will then need to be paid by the County directly.

Corporation Counsel's client is Columbia County itself. There is no duty to represent supervisors in actions where they have been advised against taking but they nonetheless proceed and are then individually sued. Should those arise, those supervisors will be responsible for hiring their own legal counsel. Additionally, if the County chooses to take a legal position without legal merit and against the advice of counsel, Corporation Counsel attorneys will be unable to provide or pursue a meritless defense or action. This is not because County staff do not wish to defend or pursue a reasonable claim or action; this is specifically because **all** attorneys are prohibited from pursuing meritless claims and defenses. *See Wisconsin Supreme Court Rule 20:3.1.*

iii. Staff Costs

Despite their neutrality, the County staff's attempts to provide guidance on content, process and law has been met with blatant hostility by some involved; where disagreement on content, process, and law has been incorrectly interpreted as disagreement on subject matter. Any construed disagreement has then made that staff person a target. Throughout the course of this, those County staff have then publicly and privately faced harassment, bullying, false accusations of corruption and incompetence, and indirect and direct threats to their employment because of performing their duties.

As a result of this conduct, loss of long-term staff is a very foreseeable consequence. Likewise, junior staff are aware of the treatment received, providing little incentive to want to promote internally or to otherwise stay with the County. A simple Google search by future candidates may, too, yield direct or indirect references to this matter; thereby, preventing those candidates from applying for applicable open positions within the County.

Many of these staff have positions where statutory duties comprise their normal work. As those duties are dictated by law, the failure to perform them as provided may become a legal issue. At this time, those staff members have spent considerable time on solar energy related matters to date, already drawing them away from their regular, legally defined, and expected job duties. This alone is problematic. Should these positions later go unfilled, are not timely filed, or as referenced, continue to go unfilled, those duties will not be met, and additional legal issues may very well arise.

Because of the treatment they have received, those staff most involved may also pursue their own legal actions, such as filing grievances internally or externally through other employment law actions, against those perpetuating or furthering such a work environment.

Accrual of additional recruitment, training, and defense costs are all possible in the future.

IV. Conclusion

Within Columbia County government, solar energy has been a substantial topic of discussion since at least September 2022. Wisconsin law on this issue, other legal topics such as preemption, and the County's ability to regulate solar projects have been thoroughly and repeatedly discussed. Yet, motions like having a moratorium on solar energy, battery storage, and Planning and Zoning permits continue to occur. These types of actions demonstrate two things: (1) a profound lack of understanding of the law generally and specifically, including the authority Wisconsin counties possess and their role within State government, and (2) a direct and purposeful unwillingness to utilize County resources to the benefit of County residents. If this practice remains unchanged into the future, County residents will bear the consequences - both those who support solar and those who are against it - either by the repeated and ineffective actions taken or by the continued accrual of those related and unnecessarily caused costs and expenses.