

State Preemption of Local Authority: The Revolution Continues

2020 Upper Midwest APA Conference
Law Session



Presenters

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Overview

- “Preemption” defined
- Historical context in planning and land use
- Recent trends in state limits on local authority
- Case study: renewable energy facility siting

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“Preemption” defined

- A higher authority of law will displace the law of a lower authority of law when the two authorities come into conflict.
 - Local governments are generally considered to be “creatures of the State” and hence are a lower authority than the State.
 - Home rule exception

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Historical Context: Land Use

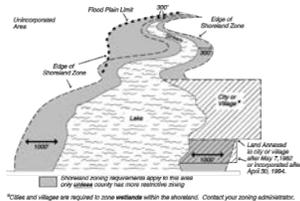
- *The Quiet Revolution in Land Use Control.*
 - Fred Bosselman and David Callies (1971).
 - Attempted to explain a number of legislative developments related to planning and land use during the 1960s.
 - States delegated land use authority to local governments but certain land use issues (environmental, affordable housing) transcend local boundaries and States should take back the power to regulate these issues (“The Revolution”).



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Historical Context: Land Use

- Upper Midwest examples cited as emblematic of “the Quiet Revolution”:
 - Wisconsin’s shoreland zoning mandate.
 - Minnesota’s Metropolitan Council.



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Characterizing the Issue Today



- When developing policy who decides what is in the public interest?
 - Revolution?
 - Preemption?

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1960s - 1990s Revolution

- State programs required/encouraged action by local governments
- State programs established a minimum standard to be followed by local governments
- Often local governments could exceed the minimum standards

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Some Wisconsin Examples

- 1995 Wis. Act 227 – Nonmetallic Mining Reclamation Law requiring local governments adopt nonmetallic mining reclamation ordinances based on DNR rules.
- 1993 Wis. Act 305 – Impact Fee enabling law.

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Some Iowa Examples

- 1968 the home rule amendment was passed by the citizens of Iowa and constitutionalized local control for cities in Iowa. Transitioning Iowa from a Dillon's Rule state to a Home Rule state.
- 1978 the county home rule amendment was passed
- 1979 – Iowa requires cities with a population of greater than 15,000 to adopt a housing ordinance and perform rental inspections.

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Some Iowa Examples

- A county shall not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.
 - Iowa Code 331.301
- Iowa Code sets minimum standards for a rental regulations by large cities.

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Recent Trend in the Revolution

- 2015 Wis. Act 55 – County shoreland zoning ordinances cannot be more restrictive than DNR rules.
 - Limits local authority to innovate and be more protective of water resources
- Significant changes to one of the landmark state programs that originally defined the “Quiet Revolution.”
 - Does it reflect a different type of revolution?

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The Last 20 Years: A Different Revolution?

- State level uniform regulation preempting local
- Prohibition of local authority without state rules
- State level involvement in specific local land use controversies

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Other Wisconsin Examples

- 2003 Wis. Act 235 - Large-scale Livestock Facility Siting Law
- 2013 Wis. Act 20 - Mobile Telecommunications Service Facility Siting Law

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Des Moines Register

Politics

Iowa part of national trend placing limits on local control

Scott Stewart, Associated Press
Published 2:13 p.m. CT, Jun. 24, 2018 | Updated 6:19 p.m. CT, Jun. 25, 2018

DES MOINES, Ia. — Since winning control of both legislative chambers two years ago, Iowa Republicans have moved aggressively to block city and county government actions, leaving local officials frustrated but matching a trend seen in other states with single-party control.

Legislators in Iowa last year overturned already-enacted minimum wage increases in three counties, and this year they passed a sweeping immigration enforcement law threatening local governments with the loss of funding if they refuse to comply with the new requirements.

RELATED: Here's how hard it is for minimum wage workers to afford rent in Des Moines and Iowa

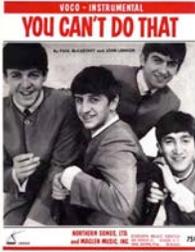
Traffic cameras, plastic shopping bags, minimum paid time off regulations and county election maps are among other areas targeted by efforts that resulted in a loss of local control since Republicans took over state government.

More Stories

- Longtime Indiana councilmember says mayor's claims are 'laughable.' **NEWS**
- Iowa Poll: Donald Trump, Joe Biden are tied in Iowa in presidential race **NEWS**
- Fact check: Amy Coney Barrett quote is missing context in viral meme...

State Prohibition of Local Authority

- Total ban on local control
 - With or without state-level regulations in place
- Limits on the exercise of local authority



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Iowa Agricultural Exemption to County Zoning

Iowa State code preempts the ability of counties to regulate agriculture explicitly in multiple code sections:

- 335.2 – Exempts farms and farm buildings from zoning ordinances
- 331.304(2)(a) – Exempts farms and farm buildings from building codes
- 331.304A – Forbids any county regulations at all on animal operations unless expressly allowed by state law

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Iowa Agricultural Exemption to County Zoning

335.2 Farms exempt.

[...] no ordinance adopted under this chapter applies to land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used [...].

- Land located in the flood plain is not exempt
- Part of the original compromise in allowing county zoning authority in Iowa

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Iowa Agricultural Exemption to County Zoning



- § 331.304A forbids any county regulations at all on animal operations unless expressly allowed by state law.
- Passed in the late 90s in response to a number of court victories by counties regulating confined animal feeding operation.

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Iowa Agricultural Exemption to County Zoning

- Lack of clarity in State Code and case law about where to draw the line
- Inconsistency of application from county to county
- Vulnerability to political pressure

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Iowa Agricultural Exemption to County Zoning



- Increasing ag-adjacent activities:
 - Increasingly industrial processes
 - On-site processing
 - Event venues & agritourism
 - Ag related commercial operations
 - Homes with small hobby farms

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Iowa Agricultural Exemption to County Zoning

Many counties facing development pressure had relied upon an application to help administrators determine whether borderline cases were “primarily adapted for... agricultural purposes.”

2020 - HF 2512 – Prohibited the use of an application process in determining if the agricultural exemption applies.

2020 - HF 2477 creates a new category of activity “agricultural experiences” and limits regulation.

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Wisconsin Examples: Tenant Rights

- 2011 Wis. Act 108 – local ordinances cannot prohibit landlords from obtaining certain information about prospective tenants or place requirements on residential landlords related to security deposits and inspections.
- 2011 Wis. Act 143 - prohibits local governments from enacting moratoria on evictions.



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Wisconsin Examples: Tenant Rights

- 2013 Wis. Act 76 prohibits local ordinances that limit a residential landlord's right to recover for damages to a property from a tenant and prohibits a local government from enacting an ordinance that requires landlords to communicate certain information to tenants.
- 2015 Wis. Act 176 - prohibits local ordinances that require rental inspections (with some exceptions), impose certain fees, require registration or licensing of rental properties (other than name of owner and contact info.)

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Wisconsin Examples: Nonconformities

- 2011 Wis. Act 170 – prohibits use of the 50% rule for nonconforming structures and prohibits amortization ordinances.
- 2015 Wis. Act 223 – local ordinances cannot prohibit the replacement of a nonconforming structure if the structure will be replaced at the size, location, and use that it had immediately before the damage or destruction occurred.

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Wis. Examples: Nonconforming Lots

- *Murr v. Wisconsin*, 582 U.S. ___ (2017).
- SCOTUS upheld use of St. Croix County lot merger provision in regulatory takings test.
- Response: 2017 Wis. Act 67 – ordinances cannot prohibit conveyance of substandard lots or using substandard lots as a building site and cannot require merger of substandard lots under common ownership.



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Wisconsin Examples: Property Rights

- 2015 Wis. Act 391 - Prohibits counties from enacting development moratoria.
- 2017 Wis. Act 59 - prohibits local governments from enacting an ordinance prohibiting the rental of a residential dwelling for 7 consecutive days or longer.
- 2017 Wis. Act 243 – prohibits inclusionary zoning.

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Wisconsin. Examples: Transportation

2017 Wis. Act 59 - prohibits use of eminent domain to acquire property for recreational trails; bicycle ways; bicycle lanes; or pedestrian ways.



2017 Wis. Act 59 - prohibits tax increment districts in the City of Milwaukee from funding operation of the City's new trolley system.



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Wis. Examples: Building Permits

- 2017 Wis. Act 243 – prohibits local governments from enforcing ordinance more restrictive than Uniform Dwelling Code.

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Iowa Examples – Rental Regulations

- **HF 134** – 2017 – Removed a city's ability to enforce occupancy limits in residential rental properties based on family or non-family relationships between tenants.
- Had been widely used to limit the number of unrelated students in single family homes in university towns.



(Jim Slosiarek/The Gazette)

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Iowa Examples – Rental Regulations



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- **SF 447** – 2019 – Prohibits a city from adopting or enforcing residential property rental permit caps on single family homes or duplexes.

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Iowa Examples

- **HF2286** – 2018 – Prevents cities from restricting the transfer of title to real property based on the failure to comply with a city ordinance. (Time of sale requirements)
- **HF 701** – 2019 – Allows the replacement of a mobile or prefabricated home which is a nonconforming use with a similarly sized structure and with no more than the original number of dwelling units without violating nonconforming use law, with some conditions.



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Iowa Examples



- **HF 2641 – 2020** – Limits the ability of local governments to regulate short-term rentals beyond regulations that would apply to a single family residence. Prohibits the collection of license or permit fees for establishing or operating a short-term rental.

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Iowa Examples

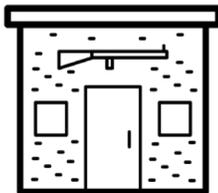
- **HF 2238 – 2020** – Prohibits licensure and fees by both state and local authorities over a food stand, which is operated by a minor on a temporary basis so long as they are not selling food that requires time or temperature control for food safety purposes, or is an alcoholic beverage.



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Iowa Examples

- **HF 2502 – 2020** – Regulation of a shooting range by a city shall be done exclusively through zoning and not require conditions that are more stringent than state law. Preempts local governments from regulating the storage of ammunition. Etc.



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Some Wisconsin Examples

- 2013 Wis. Act 35 – allows shooting ranges to continue as a nonconforming use.
- 2013 Wis. Act 347 – allows manufactured home communities to continue as a legal nonconforming use notwithstanding the 50% rule.
- 2015 Wis. Act 391 – Requires 2/3 vote to approve a downzoning.

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HF 487 Wireless Siting

Amends 8C, March 25, 2019

- A local permitting authority may not reject an application for a tower if the proposed tower is:
 - In an unincorporated part of the county
 - County has <15,000 population
 - Not on land used for single family housing
 - Not within a designated area of historical significance
 - Tower will be part of the nationwide public safety radio network
- This subsection is repealed after two years

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HF 487 Wireless Siting

Amends 8C, March 25, 2019



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HF 487 Wireless Siting

Amends 8C, March 25, 2019

- NEIT applied for a CUP for a cell tower within Allamakee County's Bluffland Protection Overlay District.
- Allamakee Co ordinances allow only "governmental public projects, public utilities, and fencing" in the district.
- NEIT claimed participation in the FirstNet communication system should qualify it as a "governmental public project"
- In August of 2018, the Board of Adjustment Voted 3-2 to deny the permit.
- **SF 2196** | *Extends the Iowa Cell Siting Act*
Extends the repeal of the Iowa Cell Siting Act from its original date of July 1, 2022, to July 1, 2025

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Local Opposition to Wind and Solar Facilities



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Typology of State Regulatory Approaches

- Local siting with local autonomy
- Local siting with defined scope
- Dual authorities with independent decisions
- Dual authority with state pre-emption
- State siting incorporating local requirements
- State siting

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Land Use is Local



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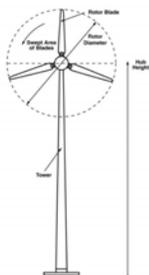
Wisconsin's Approach

- 2009 Wis. Act 40 - Wind Facilities Siting Law
 - State directly regulates large wind energy systems (>100 MW)
 - Local government may regulate small wind energy systems (<100 MW) with defined scope
 - Local government may regulate wind facilities <1 MW with no state involvement

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Wisconsin Standards for Wind Systems Between 1 and 100 MW

- May deny if in area planned for future residential or commercial development
- Setbacks
 - Property lines, roads, overhead transmission lines (1.1 times facility height)
 - Dwelling (3.1 times facility height)
- Noise limits
 - 50 dBA daytime
 - 45 dBA night
- Flicker (no more than 30 hours/year)
- Waiver
- Compensation

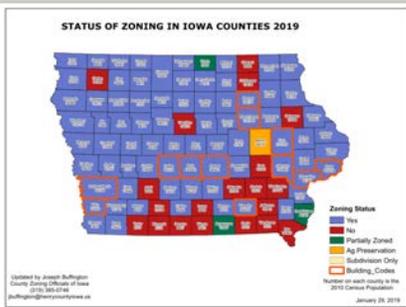


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Emerging Issues in Wisconsin

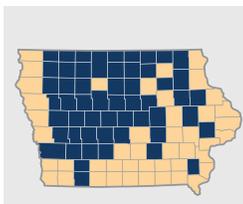
- Large scale solar (>100 MW)
 - Local control largely preempted
 - Wisconsin Public Service Commission regulates
 - No State law comparable to the Wind Facilities Siting Law
- Small scale (<100 MW)
 - Local regulations must protect public health/safety and cannot significantly increase cost/decrease efficiency
 - Local control largely preempted

Renewable Energy Siting Regulation in Iowa



Iowa's Approach

- By the end of 2017, Iowa had utility-scale wind energy production in approximately half of Iowa's 99 counties.
- Counties have adopted a wide range of ordinances under home rule.
- State approval system in development will be in addition to local permitting systems.



Iowa's Approach



- Counties local regulations range widely:
 - Entirely hands off approach
 - Permitted use
 - Setbacks ranging from 500 to 1250
 - Conditional Use
 - Setbacks ranging from 500 to 1250
 - Public infrastructure protection
 - Moratoria or effective bans
- Increasing frustration from wind companies

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Iowa's Approach



- Most counties regulate wind turbine siting within the zoning ordinance.
 - Often the Board of Adjustment has the final say over individual projects
- Some counties regulate wind production in a separate ordinance which allows greater flexibility in process.

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Emerging Issues in Iowa

- Solar Energy Farms
 - Similar local control
 - Counties largely borrowing from other states with mixed results
 - Iowa Utilities Board (IUB) to approve projects that are 25 megawatts or larger in size.
- State level permit in addition to local regulations.

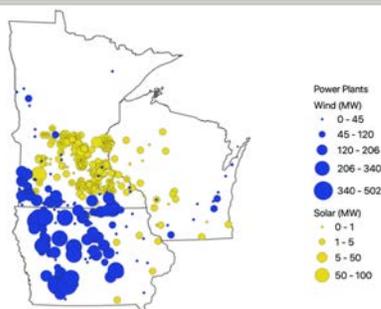
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Other States

- Variability among states
- Comprehensiveness varies
- Minimums versus maximums
- Which approach is best?
- What is the “effect on the ground?”

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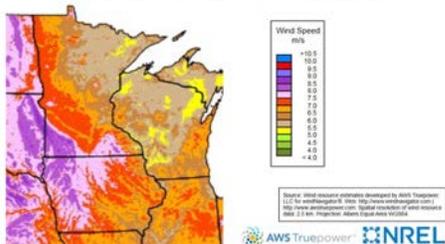
Renewable Energy Siting



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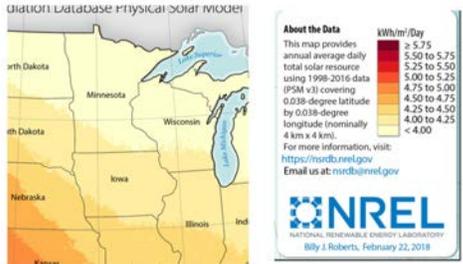
Renewable Energy Siting

Annual Average Wind Speed at 80 m



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Renewable Energy Siting



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What's next?

- Continuing trend nationally restricting local control
- Which is "best," revolution or preemption for particular issues?
- National level – reluctance to take on issues
 - climate change
 - racial/economic justice

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