BoardmanClark

# Municipal Law Newsletter

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## In this issue



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## Remembering Mike May

Mike May passed away peacefully in the early morning of October 3, 2022. We at Boardman Clark will always remember Mike for his quick wit, sharp mind, unfailing dedication to his ethical responsibilities, and his love of the law.

Mike started with Boardman, Suhr, Curry & Field (Boardman Clark's predecessor) in 1979 as an Associate and became a Partner and then Chair of the Executive Committee, serving many municipal and non-governmental clients, including Municipal Electric Utilities of Wisconsin, for whom he was General Counsel for many years. In 2004, he left Boardman to take a 15-year position with the City of Madison as City Attorney – the second-longest serving City Attorney in Madison history. He returned to Boardman Clark in 2020 as Senior Counsel to practice primarily in the areas of public sector litigation and municipal law.

An avid UW Badger football fan, gardener, reader and writer, Mike will be missed by his colleagues, clients, and our wider community. Our deepest sympathies are with his family, including his wife, Briony, his three children and two grandchildren.

A special issue of the Municipal Law Newsletter will be dedicated to our dear friend and colleague in the near future.

**Michael P. May** | 1954-2022

# *Public Records Retention: When to Say Goodbye*

While attention on the public records law frequently focuses on receiving and responding to public records requests, that is but one of the several duties of custodians of public records. Equally important is the retention—and occasional destruction—of public records.

Yes, I said destruction. We live in a world of data—this phrase is often used, but well worth repeating. And municipalities, their governing bodies, and municipal utilities must grapple with the issue of how best to maintain, organize and, when it is appropriate, dispose of their data. Ensuring that your municipality has legally permissible and clear policies and procedures on records retention *and* destruction is essential.

**What is a "Record"?**

Before you begin dumping your files into the shredder or recycle bin, let's recall the definition of a "public record." Not every scrap of paper or electronic file produced in your office must be stored. There are three primary definitions of what qualifies as a record, contained in Wis. Stat. §§ 16.61(2)(b), 19.21(1), and 19.32(2). Each definition is slightly different, but generally "records" are (1) created by the municipality or its contractors in the course of business; (2) received by the municipality for action; or (3) mandated to be retained by statute or regulation. In short, records typically relate to "official public business." What matters, then, is the content of the record, not its medium, format, or location.

Of course, records are not just physical documents. They may be produced on personal devices or accounts when relating to an official duty of the official or employee. Purely personal messages on personal property, such as a smart phone, are not records, but purely personal messages sent over a municipality's computer system could be—especially if these messages are relevant to disciplinary proceedings or an investigation of possible misuse of public resources.

Lest you worry about that growing spam or electronic trash folder, not every document produced is a "record" subject to retention laws. Generally, public records do not include reference materials or stock copies; duplicate copies; drafts of working papers created by an individual and not shared with others; general announcements and unsolicited emails; or notes prepared for the creator's personal use for the sole purpose of refreshing recollection at a later time.

**What Records Must Be Retained?**

Not all records are eternal, but how do you know which to keep? There is no easy answer and different records may be subject to one or more state or federal retention laws.

In general, Wisconsin records retention laws are principally set out in Wis. Stat. § 19.21. According to unofficial Wisconsin guidance, with limited exceptions, records of local units of government must be kept for a minimum of seven years, and may have to be kept longer.[1] The exceptions include: (1) where a shorter retention period is fixed by the Wisconsin Public Records Board (PRB); (2) municipal utility water stubs, receipts of current billings, and customer's ledgers, which must only be kept for at least two years; and (3) any taped recording of a meeting by any governmental body may be destroyed no sooner than 90 days after the minutes have been approved and published, if the purpose of the recording was to make minutes of the meeting. However, the exact wording of the statute requires that cities, village, and towns adopt ordinances setting forth their records retention schedules and that, unless approval is sought from the PRB, the minimum retention times set by the ordinance must be as stated above.[2]

Does this mean that your municipality may automatically destroy any record that is over seven years old? No. Without a waiver from the Wisconsin Historical Society (WHS), all local units of government must provide at least 60 days' written notice to WHS before destroying any record.[3] The WHS may require that records be transferred to the WHS rather than being destroyed. In addition, the PRB has statutory authorization to set longer retention schedules for certain municipal records.

In addition, federal law may establish its own retention schedules. For example, the Internal Revenue Service requires retention of certain tax-related documents; the Occupational Safety and Health Administration requires retention of work-related injury logs; and the Environmental Protection Agency requires retention of records for storage of certain chemicals, to name a few. Often these federally mandated retention periods are less than the default seven years provided by Wisconsin law.

So, what happens when there is a conflict between retention periods? The longest retention period controls.

### Adopting a Retention Schedule

While a city, village or town may wish to evaluate, categorize, and adopt its own records retention schedules unique to the community, this is not always practical. Rather than design such a schedule, which requires PRB approval, cities, villages and towns may adopt standard schedules created and published by the PRB. The principal retention schedule is the *General Records Schedule, Wisconsin Municipal and Related Records* (August 27, 2018), a/k/a, the *Wisconsin Municipal Records Schedule* (WMRS).

As named, it is a general records schedule for municipalities and, as it is designed both to be tailored to municipalities and broad in its categorization of records, it may not have a specific schedule for every possible record in your possession. Consequently, the PRB also publishes additional statewide schedules geared towards such categories including but not limited to administrative records, budget records, facilities records, and human resources records.[4]

Adoption of any of these records schedules is optional. But adopting such a schedule will waive the requirement that the city, village or town notify the WHS for destruction of many of the more mundane records. To adopt a schedule, a city, village or town must complete and file Form PROB-002, *Notification of General Records Schedule Adoption.*[5]

### Municipal Authority To Adopt Retention Schedules

An observant reader will have noticed that I often use the phrase "cities, villages and towns" when referring to the adoption of records retention schedules. Although subunits of local government, such as a committee, department, or utility commission, may be the custodian of their own records under the Wisconsin Public Records Law, the authority to adopt record retention schedules remains with the city, village or town.

This means that certain subunits of government, such as municipal utilities, must work with the governing body of the municipality to ensure that the adopted records retention schedule includes the unique records and regulations of that subunit. For example, the Public Service Commission of Wisconsin (PSCW) is authorized to establish record retention schedules for regulated utilities. These schedules are found in the various PSCW administrative code chapters and are summarized in the (now outdated) *Amended Final Decision* in PSCW Docket 5-US-114 (March 19, 2009). Notably, following PSCW retention periods alone does not obviate the requirement to notify WHS prior to destruction.

### Exceptions

Even when a retention schedule allows destruction of a record, other laws—or simply caution—will delay action. A municipality may not destroy or delete an obsolete record subject to a public records request until the request is granted, or until at least 60 workdays after the request is denied. A municipality cannot delete a record related to litigation until the litigation is fully complete. Finally, a municipality should not delete any record related to an ongoing financial or performance audit.

### Digital Records

Many new records will be created and stored digitally, and many municipalities may be hoping to turn their archived paper copies into digital files. The good news is that Wisconsin law permits the retention and even reproduction of paper records as original electronic files. However, both retention of electronic files and reproduction of paper records must meet specific standards established by the PRB and by Department of Administration rule under Chapter ADM 12, Wis. Admin. Code. Reviewing these requirements would be an article in and of itself, but the PRB has published helpful guidance available at https://publicrecordsboard.wi.gov/Pages/Resources/Policies.aspx. The bottom line is that creating an electronic original out of a paper copy is <u>not</u> as simple as scanning and disposing and retaining electronic files must be handle thoughtfully.

### Conclusion

Adopting a records retention schedule and policy promotes municipal efficiency, protects the municipality in litigation, and is essential for compliance with federal and state laws and regulations. However, schedules and policies are only as good as their implementation. For a records retention schedule to work, your officials and employees have to understand the policies and procedures, as well as their roles and responsibilities in adhering to them, in order to ensure that your municipal records are properly organized and maintained, and when appropriate or necessary, destroyed.

*— Jared Walker Smith*

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[1] https://publicrecordsboard.wi.gov/Pages/Resources/LocalUnit.aspx

[2] Wis. Stat. § 19.21(4)(b).

[3] See https://www.wisconsinhistory.org/Records/Article/CS15489

[4] See https://publicrecordsboard.wi.gov/Pages/GRS/Statewide.aspx

[5] See https://publicrecordsboard.wi.gov/Documents/PRB-002%20FINAL%2011-2017.pdf

# *Municipal Regulation of Solar Energy Systems*

Over the past decade, Wisconsin has seen a huge increase in the development of solar energy systems,[1] with Wisconsin's solar capacity increasing from 21.1 megawatts (MW) in 2012 to 837 MW in 2021. With the continued growth of solar, municipalities should understand their role in the regulation of solar development.

Wisconsin has enacted statutes that protect solar development and limit municipal oversight. Wisconsin Statute § 66.0401 explicitly limits the authority of municipalities to regulate solar energy systems. Under Wis. Stat. § 66.0401(1m), municipalities may not place any restriction on the installation or use of solar energy systems unless the restriction satisfies one of the following conditions:

- Serves to preserve or protect the public health or safety;
- Does not significantly increase system cost or decrease efficiency; or
- Allows for an alternative system of comparable costs and efficiency.

This statute is not superseded by municipal zoning or conditional use powers. The three conditions listed above constitute the only standards that municipalities may consider when regulating solar projects. In the absence of enforceable municipal restrictions, a developer may construct a solar energy system even without prior municipal approval.[2] Moreover, the courts have upheld these statutes, barring municipalities from making restrictions contrary to the state's expressed policy.[3]

In addition, municipalities are not permitted to make general policies applicable to all solar energy systems. Rather, permissible restrictions may only be made on a case-by-case basis, similar to a conditional use permit process. Municipalities must hear the specifics of the particular solar project and then decide whether a restriction is warranted. A municipality may not promulgate an ordinance in order to establish an arbitrary, one-size-fits-all scheme of requirements applicable to all solar projects.

Wisconsin Statute § 66.0403 does allow municipalities to grant solar access permits to the owners of solar energy systems. While a solar access permit is not required to install a solar energy system,[4] such a permit allows an owner to prevent the blockage of solar energy generation by an interfering structure or vegetation. A solar access permit may only be granted if:

- The permit will not unreasonably interfere with the orderly land use and development plans of the municipality;
- No one has demonstrated that they have already made substantial progress toward planning or constructing a structure that would create a blockage;[5] and
- The benefits to the applicant will exceed the burdens.

Once a permit is granted, notice of it must be recorded against each property restricted by the permit. A solar access permit only prevents blockages erected or planted after the notice was recorded. Any person who erects or plants a blockage after notice is recorded may be liable to the permit holder for damages for any loss due to the blockage, court costs and reasonable attorney's fees. A permit holder is also entitled to an injunction to require the trimming of any vegetation that would cause a blockage.

Municipal review is further curtailed for large solar projects of 100 MW or more. Under Wis. Stat. § 196.491, such solar projects are required to obtain a certificate of public convenience and necessity (CPCN) from the Public Service Commission of Wisconsin (PSCW). Solar projects granted a CPCN can proceed with installation and utilization even if they would otherwise be precluded or inhibited by local ordinance. Effectively, municipalities cannot impose ordinances to limit or control the development of solar energy projects of 100 MW or greater. However, municipalities can intervene in PSCW proceedings in order ensure that they have some measure of input and control over project development, maintenance and decommissioning. Municipalities can also appeal PSCW decisions to grant a CPCN.

While the granting of a CPCN effectively preempts the applicability of local ordinances, through intervention and otherwise, municipalities often enter into project development agreements with solar project developers. Negotiations with the developer should take place as early in the project development process as possible, preferably before PSCW hearings begin. Joint development agreements typically address:

1 "Solar energy system" means "equipment which directly converts and then transfers or stores solar energy into usable forms of thermal or electrical energy." Wis. Stat. § 13.48(2)(h)1.g.

2 *See State ex rel. Numrich v. City of Mequon Board of Zoning Appeals*, 2001 WI App 88, 242 Wis. 2d 677, 626 N.W. 2d 366, 00-1643.

3 *See Ecker Brothers v. Calumet County*, 2009 WI App 112, 321 Wis. 2d 51, 772 N.W.2d 240.

4 *See* Wis. Stat. § 66.0403(12)(a).

5 *See* Wis. Stat. § 66.0403(5)(a).

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## *PSCW Takes Up Third Party Ownership Question*

For the past several years, stakeholders have sought clarity on whether or not solar developers can own all or substantial portions of solar generation facilities installed on customer owned property in utility territory without being regulated as public utilities. Earlier this year, the Public Service Commission of Wisconsin (PSCW), considered the question in a widely followed proceeding involving the City of Milwaukee and Eagle Point Solar, but failed to reach a decision in the absence of a definitive majority. Now, however, the question has been set for hearing in a pair of proceedings initiated by solar developers.

The two proceedings have attracted the attention of numerous intervenors, including the Wisconsin Utilities Association, the Municipal Electric Utilities of Wisconsin and the Wisconsin Electric Cooperative Association, all of whom oppose the petitions on the grounds that permitting solar developers to own solar generation facilities and sell energy or lease solar energy generating equipment to utility customers such as school districts or municipalities without PSCW oversight would potentially undermine system reliability, create untenable customer subsidies and weaken consumer protections. For MREA, Vote Solar, and those who support their petitions, such as the League of Wisconsin Municipalities, third party ownership without regulatory oversight is critical to ensuring that tax credits and direct payments can be deployed to lower the cost of financing for tax-exempt organizations or low income residential customers interested in installing on-site solar generation to meet carbon reduction goals or lower utility costs.

Although third party ownership has been the subject of previous PSCW proceedings, such proceedings have focused on the facts and circumstances of specific instances where generation has been developed by entities other than the incumbent utilities to serve utility customers. This is the first time the Commission has expressly decided to take up the question as the subject of possible declaratory relief, rather than look to the state legislature, where recent efforts to pass enabling legislation have failed to generate momentum.

Neighboring states provide little guidance, as third party ownership of solar generation in utility territory is legal in some states (e.g. Iowa and Illinois), but not in others (Minnesota).

In the current proceedings, the petitioners have designated a set of distinguishing features that allegedly define which third-party owned facilities should be deemed *not* to be subject to public utility regulation under Chapter 196 of the Wisconsin Statutes. The petitioners claim that the absence of clarity on this question has impeded the development of other solar projects. The utilities who oppose the petitions have presented testimony purporting to explain how Wisconsin's regulatory framework has protected utility customers without prohibiting the development of solar generation resources to meet customer needs.

Evidentiary hearings are scheduled to take place at the end of October, with a final decision from the Commission expected on December 1.

*— Richard A. Heinemann*

### Municipal Regulation of Solar Energy Systems

*Continued from page 4*

- Road use, maintenance and repair obligation, including proposed equipment haul routes.
- Drainage repair obligations.
- Allocation of utility shared revenue proceeds between local governments.
- Restoration and decommissioning obligations.

For projects 50 MW and larger, the private land leased to a solar developer becomes exempt from local property taxes. Although this land will no longer be subject to property taxes, the owners of such solar projects pay annually into a utility aid fund which is shared with the local governments where the solar project is located. Under the revenue sharing formula currently in place under the Statutes, a qualifying solar project will contribute $4,000 per MW per year. If the solar facility is located in a village or city, the village or city receives $2,333 and the county $1,667; if it is located in a town, the town receives $1,667 and the county $2,333. Generally, the net gain to municipalities from utility revenue sharing is estimated to be at least 10 times higher than the lost property taxes. Notably, school districts are not included in this revenue sharing scheme nor compensated for the lost property tax revenue.

While the legislature has significantly curtailed municipal regulation of solar energy systems, municipalities can still play a meaningful role in ensuring that the development of solar projects can be a net positive for the community.

*— Eric B. Hagen*

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# *Municipal Law Newsletter*

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If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the attorneys listed below who are contributing to this newsletter.

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