Takings Claims and Uniform Wind Farm Siting Regulations: Establishing a Limited Property Interest to Minimize Conflict

INTRODUCTION

The Seventh Circuit's decision in *Muscarello v. Ogle County Board of Commissioners* addressed the relatively novel question of whether a property owner has any protectable property interest in the zoning restrictions applied to an abutting property, which in this case were removed to allow construction of a wind farm.[1] As the court plainly stated, "[t]he core of Muscarello's claims is an allegation that Ogle County violated the Fourteenth Amendment . . . through a violation of the Fifth Amendment's Takings Clause."[2]

The conflict in *Muscarello* represents opposition to wind farm development generally. "Nonparticipating" property-owners see wind farms as nuisances. They face off against zoning boards who allow them to lease the land to wind farm developers and the "participating" property-owners who lease their agricultural land to wind farm developers.[3] To mitigate the harm suffered by non-participants and to simultaneously decrease litigation, states should consider creating a limited version of the property right that *Muscarello* denies. Such a limited property right would build a market, which would encourage parties to settle privately, thereby decreasing litigation, and increasing community satisfaction. The statewide uniform wind farm siting rules recently adopted in Wisconsin, although almost immediately suspended,[4] attempted to do so in a reasonable manner.

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1. Muscarello v. Ogle Cnty. Bd. of Comm'rs, 610 F.3d 416, 423, 418 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1045 (2011).

2. *Id.* at 421; *see also id.* at 419 (explaining that "[a]t the core of [Muscarello's] substantive allegations is an assertion that the county has condoned an impermissible taking of her property").

3. *See, e.g.*, Mike Wiser, *Lawsuits Prolong Delay for Supporters of Wind Farms*, ROCKFORD REG. STAR (Feb. 18, 2010, 9:46 PM), http://www.rrstar.com/carousel/x692835267/Lawsuits-prolong-delay-for-supporters-of-wind-farms.

4. WIS. ADMIN. CODE PSC §§ 128.01–.61 (2011), *suspended by* J. COMM. REVIEW OF ADMIN. RULES, REPORT TO THE LEGISLATURE: ADMINISTRATIVE CODE PSC 128, 2011 LRB–1438/1, 2011 SB–50 (Wis. 2011), *available at* http://legis.wisconsin.gov/2011/data/fe/SB-50ar.pdf (handing governance of wind farm siting back to local authorities temporarily, and noting pendent bills LRB 1483/1 and LRB 1756/1, which would permanently remove the rules and require the Public Service Commission to submit a new clearinghouse rule within six months after passage).

I. *MUSCARELLO*

In 2003, the Board of Commissioners of Ogle County, Illinois enacted a change in the county zoning ordinances creating "special use" permits[5] for wind energy systems.[6] These permits essentially provided a way out of zoning restrictions for wind farms.[7] Baileyville Wind Farms, LLC, a subsidiary of Navitas Energy,[8] successfully applied for a special use permit.[9] The Board simultaneously adopted a "Home Sellers Property Value Protection Plan" (Protection Plan) to compensate residential property owners if, at the time of sale, their property value suffered because of nearby turbines.[10] Patricia Muscarello's property was agricultural,[11] so she was ineligible for compensation under the Protection Plan.[12]

Muscarello filed suit against Baileyville alleging fifteen separate harms resulting from the issuance of the special use permit.[13] She asked the court to enjoin Baileyville from constructing the windmills and to revoke its special use permit,[14] basing her argument primarily on a takings theory.[15] The Seventh Circuit dismissed Muscarello's suit. The court first held, relying on *Loretto v. Teleprompter Manhattan CATV Corp.*, that there was no per se taking because there was no physical invasion.[16] It then dismissed Muscarello's regulatory takings claim, relying on the per se rule established in *Lucas v. South Carolina Coastal Council*, because the special use permit did not deprive her of "all economically beneficial or productive use of land".[17] As with per se takings,

5. *See* 55 ILL. COMP. STAT. 5 / 5-12009.5 (2008) (authorizing counties to issue special use permits).

6. *Muscarello*, 610 F.3d at 418.

7. *See* 55 ILL. COMP. STAT. 5 / 5-12009.5 (2008) (authorizing counties to issue permits for "public and quasi-public uses affecting the public interest; uses that have a unique, special, or unusual impact upon the use or enjoyment of neighboring property; and uses that affect planned development").

8. *Muscarello*, 610 F.3d at 420.

9. *Id.* at 418–19.

10. *Id.* at 419.

11. Response Brief of Plaintiff at 6, 9, *Muscarello*, 610 F.3d 416 (7th Cir. June 24, 2010) (No. 3:06-CV-50017), 2008 WL 751672.

12. *Muscarello*, 610 F.3d at 419–20.

13. *Id.* at 419.

14. *Id.* at 420.

15. *Id.* at 421.

16. *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982)). The court skeptically dismissed Muscarello's nuisance and takings claims, holding that it was "difficult to see" how these claims could be supported where "[o]bviously the permit did not march onto Muscarello's land, nor, as far as this record shows, did any of the defendants." *Id.* at 425. The Court in *Loretto* established that a "permanent physical occupation" of private property was a per se taking under the Fifth Amendment, and also that this was not the only way to establish a taking. *Loretto*, 458 U.S. at 426. A hypothetical argument could be made that there was a taking anyway—either temporary, or non-physical—but because there was no evidence that even that much has occurred yet, the *Muscarello* Court did not address it. *Muscarello*, 610 F.3d at 421–22.

17. *Muscarello*, 610 F.3d at 421 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)). In *Lucas*, the Supreme Court addressed whether the state of South Carolina's new statute restricting coastal property uses to prevent erosion constituted a taking where it completely prevented the plaintiff from

there are ways to establish regulatory takings outside the *Lucas* framework, but the court did not address these.[18]

The court decided that accepting Muscarello's novel regulatory taking claim would "turn land-use law on its head."[19] First, the zoning restriction did not apply to plaintiff's property but instead that of her neighbors.[20] Second, the zoning restriction concerned a decrease in the restrictions on use.[21] In contrast, takings cases normally involve an increase in the restrictions on the plaintiff's own property.[22]

II. ANALYSIS

The Seventh Circuit's decision reflects sound and relatively uncontroversial property law doctrine. Had the court recognized Muscarello's taking claim, it would have needed to recognize a property interest in an abutting property.[23] As the Supreme Court long ago recognized, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[24] Without changes to zoning districts, the natural evolution of a city would lead to increasing disparity between the most efficient use of a given property and the conforming use.[25]

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developing his beachfront lot. *Lucas*, 505 U.S. at 1007. The Court held that deprivation of "all economically beneficial or productive use of land" is always a taking. *Id.* at 1015–16.

18. The court somewhat oversimplified the takings analysis by assessing only the per se rules established by *Loretto*, holding that any physical invasion is a taking, and *Lucas*, holding that any complete denial of economic or productive use is a taking. *Muscarello*, 610 F.3d at 421. The *Lucas* Court did not rule out other types of takings, which the *Muscarello* court could have addressed. *See Lucas*, 505 U.S. at 1015–16 (explaining that Supreme Court precedent recognizes "*at least* two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint," (emphasis added) and further that, outside of categorical takings situations, regulatory takings are found by "essentially ad hoc, factual inquiries"); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136–37 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 328–60 (2007).

19. *Muscarello*, 610 F.3d at 421.

20. *Id.* at 421–22.

21. *Id.* The Seventh Circuit had to reach to Second Circuit precedent to find a case even addressing the issue. *Id.* (citing Gagliardi v. Vill. of Pawling, 18 F.3d 188, 191–93 (2d Cir. 1994)). The court found numerous additional grounds on which to deny Muscarello's claims, but this rationale was central. *Id.* at 420–23.

22. *See* Meltz, *supra* note 18, at 321 (explaining that "a government action increasing or decreasing the allowed uses on A's parcel, causing harm to neighbor B, usually gives B no taking claim").

23. *Muscarello*, 610 F.3d at 421–22.

24. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)). This sentiment in *Mahon* also featured prominently in *Lucas*, appearing both in the opinion, 505 U.S. at 1018, and in Justice Stevens's dissent. 505 U.S. at 1066–68 (Stevens, J., dissenting).

25. *See* JESSE DUKEMINIER ET AL., PROPERTY 943 (7th ed. 2010).

Legal claims notwithstanding, Muscarello's interest in her own property will likely suffer some degree of actual harm from the eventual erection of wind turbines on adjacent land.[26] Most of the harms, like noise in particular,[27] affect residential property-owners much more than agricultural property-owners, but the harms remain relevant to Muscarello's property interest at least as much as the turbines might diminish its eventual resale or development value.[28] By establishing the Protection Plan, Ogle County has itself already acknowledged the likelihood that the wind farm would harm the value of nearby property.[29]

Sympathy for harms suffered by non-participants like Muscarello may have generated backlash against wind farms and their developers in Ogle County, which played out most obviously through a "setback requirement" in siting rules.[30] The most straightforward solution to conflict between participants and non-participants, a "setback" is the amount a wind turbine must be set back from neighboring properties.[31] After *Muscarello*, wind farm opponents in Ogle County were able to enact an ordinance with strict setback requirements that essentially would exclude wind farms from the county.[32]

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26. *See generally*, N.Y. STATE ENERGY RESEARCH & DEV. AUTH., PUBLIC HEALTH AND SAFETY (Oct. 2005), *available at* http://www.powernaturally.org/Programs/Wind/toolkit/18_publichealthandsafety.pdf (discussing threats of blade throw, fire, tower collapse and ice shedding, as well as mitigation through setbacks and other safety measures); HENRY SEIFERT ET AL., DEWI GMBH, RISK ANALYSIS OF ICE THROW FROM WIND TURBINES (Apr. 6–11, 2003), *available at* http://web1.msue.msu.edu/cdnr/icethrowseifertb.pdf (detailing the risk of "ice throw"); DAVID WAHL & PHILIPPE GIGUERE, GE ENERGY, ICE SHEDDING AND ICE THROW—RISK AND MITIGATION (2006), *available at* http://www.gepower.com/prod_serv/products/tech_docs/en/downloads/ger4262.pdf; Alex Bandza, *Gone with the Wind? Understanding the Problems of Wind Energy Policy in the United States through the Successes of Denmark and Germany*, 37 ENVTL. L. REP. 10,197, 10,202–03 (2007), *available at* http://www.elr.info/articles/vol37/37.10197.pdf (discussing frequent NIMBY-based opposition to wind farms based on aesthetics and perceived reduction in property value).

27. *See, e.g.*, DANIEL J. ALBERTS, LAWRENCE TECHNOLOGICAL UNIV., PRIMER FOR ADDRESSING WIND TURBINE NOISE (rev. Oct. 2006), *available at* http://www.maine.gov/doc/mfs/windpower/pubs/pdf/AddressingWindTurbineNoise.pdf. For a compelling account of residents' ordeal with noise from a nearby wind farm, see generally OUR LIFE WITH DEKALB WIND TURBINES, http://lifewithdekalbturbines.blogspot.com/ (last visited Apr. 17, 2011).

28. *See* Plaintiff's Second Amended Complaint at 51, *Muscarello*, 610 F.3d 416 (Oct. 24, 2007) (No. 3:06-CV-50017), 2007 WL 5021068 (seeking compensation in excess of $200,000 based on a 30 percent reduction in value); *see also id.* at 44 (alleging that plaintiff's property was fully surrounded by properties that have been granted special use permits).

29. *See Muscarello*, 610 F.3d at 419.

30. *See, e.g.*, Sam Smith, *County to Propose Tougher Restrictions for Wind Farms*, OGLE COUNTY NEWSPAPER (Aug. 5, 2010, 3:57 PM), http://www.oglecountynews.com/articles/2010/08/05/61824918/index.xml.

31. BLACK'S LAW DICTIONARY 1496 (9th ed. 2009).

32. *See, e.g.*, Smith, *supra* note 30. Indeed, Ogle County recently went so far as to grant and extend a moratorium on new wind farms. Vinde Wells, *County Board Extends Wind Farm Moratorium*, OGLE COUNTY NEWSPAPER (Oct. 20, 2010, 10:30 AM), http://www.oglecountynews.com/articles/2010/10/20/07404305/index.xml.

III. THE WISCONSIN SOLUTION

States facing significant wind farm development should consider adopting uniform statewide wind farm siting rules based on those Wisconsin adopted,[33] including a limited expansion of property rights.[34] Wisconsin helped pave the way for modern utility regulation in the beginning of the twentieth century,[35] and its siting rules would have helped lead the way in regulating alternative energy in the twenty-first.[36] Shortly after *Muscarello* was decided, the Wisconsin Public Services Commission proposed statewide uniform wind farm siting rules,[37] which went into effect March 1, 2011, but were suspended very shortly thereafter.[38] The rules granted non-participants limited property rights in the zoning rules applied to neighboring property.[39] The Commission thus balanced the conflict between non-participants' rights to be free from wind farms and participants' rights "to use their property as they see fit."[40]

On the participants' side, setbacks were a concern—before promulgation of the statewide rules, Wisconsin counties were enacting setbacks like Ogle County's, essentially banning wind farms.[41] The rules were designed to prevent

33. WIS. ADMIN. CODE PSC § 128 (2011), *suspended by* J. COMM. REVIEW OF ADMIN. RULES, REPORT TO THE LEGISLATURE: ADMINISTRATIVE CODE PSC 128, 2011 LRB–1438/1, 2011 SB–50 (Wis. 2011), *available at* http://legis.wisconsin.gov/2011/data/fe/SB-50ar.pdf.

34. As the director of the Center for Renewable Energy at Illinois State University recently said, "Proper siting and zoning of wind farms is THE issue for Illinois in 2011." *Counties Prepare for Wind Farms at Siting, Zoning and Taxing Conference Feb. 9*, ILLINOIS WIND (Jan. 27, 2011, 9:44 AM), http://www.illinoiswind.org/news/index.asp. In New York, Columbia University Law School recently attempted to draft standardized wind farm setback rules for the state. Ken Paulman, *Another Effort to Standardize Wind Farm Setbacks*, MIDWEST ENERGY NEWS (Feb. 17, 2011), http://www.midwestenergynews.com/2011/02/17/another-effort-to-standardize-wind-farm-setbacks/. Not even California, the original leader in wind energy, has a uniform wind farm siting rule. *See* U.S. FISH & WILDLIFE SERV., WIND POWER SITING REGULATIONS AND WILDLIFE GUIDELINES IN THE UNITED STATES (April 2007), *available at* http://www.fws.gov/midwest/wind/guidance/AFWASitingSummaries.pdf.

35. Wisconsin and New York were the first U.S. jurisdictions to begin regulating utilities as natural monopolies. *See* RICHARD F. HIRSH, POWER LOSS 19–23 (1999).

36. *See, e.g.*, Kari Lydersen, *Can Uniform Setbacks Prevent Local Wind Farm Fights?*, MIDWEST ENERGY NEWS (Jan. 6, 2011), http://www.midwestenergynews.com/2011/01/06/wisconsin-wind-turbine-setback-rules-midwest/.

37. The rules were proposed August 31, 2010. *See* WIS. PUB. SERV. COMM'N, RE CLEARINGHOUSE RULE 10-057 (Aug. 31, 2010), 2010 WL 3485321 at *1. The rules may even have been adopted partly in response to *Muscarello* because the Public Services Commission specifically cited *Muscarello* for the rule that "not all decisions that diminish an owner's potential uses, or compel a less valuable use, are takings." *Id.* at *39 (responses to public comments).

38. 662 Wis. Admin. Reg. 25 (Mar. 1, 2011), *available at* http://legis.wisconsin.gov/rsb/code/register/reg662b.pdf, *suspended by* J. COMM. REVIEW OF ADMIN. RULES, REPORT TO THE LEGISLATURE: ADMINISTRATIVE CODE PSC 128, 2011 LRB–1438/1, 2011 SB–50 (Wis. 2011), *available at* http://legis.wisconsin.gov/2011/data/fe/SB-50ar.pdf.

39. *See generally* WIS. ADMIN. CODE PSC §§ 128.01–.61 (2011), *suspended by* J. COMM. REVIEW OF ADMIN. RULES, REPORT TO THE LEGISLATURE: ADMINISTRATIVE CODE PSC 128, 2011 LRB–1438/1, 2011 SB–50 (Wis. 2011), *available at* http://legis.wisconsin.gov/2011/data/fe/SB-50ar.pdf .

40. WIS. PUB. SERV. COMM'N, *supra* note 37, at *39 (responses to public comments).

41. *See, e.g.*, Paul Snyder, *Opposition Chills Wind Farm Bill in Wisconsin Legislature*, THE DAILY REP. (Milwaukee), (Mar. 7, 2008) http://findarticles.com/p/articles/mi_qn5302/is_20080307/ai_n24410261/.

these local de facto wind farm bans, although at the expense of some local autonomy. For example, "political subdivisions" would be allowed to enact wind farm siting ordinances that copy requirements set out in the rules[42] or are less restrictive,[43] but they could not be more restrictive, except for certain areas discussed below.[44] Nor could political subdivisions permanently ban wind farms,[45] nor effectively ban them under the guise of other safety ordinances.[46]

Despite the clear effort to preserve the possibility of wind farm development, the rules would have also protected non-participant owners of adjacent property from most of the harms Muscarello claimed. The rules would have guarded against noise, shadow flicker, interference with commercial or personal communications, and stray voltage.[47] They also included setback requirements, with distances to be determined by concern for safety.[48] Political subdivisions would enforce the actual ordinances that they ultimately enacted,[49] while the Commission would enforce the rules.[50]

In addition to the areas of firm control, the rules were flexible on two levels. At the local level, political subdivisions would have discretion to add requirements to minimize nuisance impact[51] or increase safety.[52] They could even require developers to pay monetary compensation to owners of residences within half a mile of their wind farm.[53] Allowing local communities this discretion would help reduce conflict at the local level.

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42. WIS. ADMIN. CODE PSC § 128.10(1).

43. *Id.* § 128.10(2).

44. *Id.* § 128.10(1).

45. *Id.* §§ 128.13(2)(a), 128.10(4)(b).

46. *E.g.*, *id.* § 128.13(2)(b)–(d) (prohibiting localities from enacting overly restrictive air travel safety standards).

47. *Id.* § 128.13–.17. Protected personal communications include "wireless telecommunications, personal communications service, radio, television, wireless internet service, and other systems used for personal use purposes." *Id.* § 128.01(15). Protected commercial communications include "communications used by government and military entities for emergency purposes, licensed amateur radio service, and non-emergency communications used by agricultural, business, government, and military entities including aviation radar, commercial mobile radio service, fixed wireless service, global positioning, line-of-sight, microwave, personal communications service, weather radar, and wireless internet service." *Id.* § 128.01(1).

48. WIS. PUB. SERV. COMM'N, RE CLEARINGHOUSE RULE 10-057 (Aug. 31, 2010), 2010 WL 3485321 at *40 (responding to public comment on setback requirements); *see also* WIS. ADMIN. CODE PSC § 128.13(1)(d). The Wisconsin rule establishes different setback requirements depending on whether there is a residence or occupied building on the property or not, measuring from the base of the building and from the property line where there is no residence. *Id.* § 128.13(a), (b), (d).

49. WIS. ADMIN. CODE PSC § 128.04(1).

50. *Id.* § 128.04(2).

51. *See, e.g.*, *id.* § 128.18(1)(c) (stating that locality may require wind farm to shield Federal Aviation Administration-required lighting to minimize visibility).

52. *See, e.g.*, *id.* § 128.18(4)(e) (stating that locality may require wind farm to provide additional emergency training to first responders).

53. *Id.* § 128.33(3). Notably, even this compensation scheme is limited to residences and would therefore exclude Muscarello's agricultural property, further repudiating her equal protection and due process claims.

At the level of the individual, the rules would allow non-participating property owners to waive certain siting requirements including setbacks,[54] noise,[55] and shadow flicker,[56] in exchange for monetary compensation, thereby becoming participating property owners.[57] The rules usually made such waivers covenants running with the land.[58] In keeping with the purpose of setbacks to ensure safety, owners of non-participating residences or community buildings could only waive part of the required setback from their structures,[59] while owners of nonparticipating property could waive setbacks entirely.[60]

The rules would therefore do exactly what *Muscarello* said the Fifth Amendment does not require: establish and protect a limited property interest in the zoning restrictions applied to neighboring property.[61] Further, by establishing a property interest comprised of firm protections extending beyond a non-participant's property boundaries, but giving the non-participant discretion to waive, the rules would establish a market for the subject rights.[62] Non-participants' ability to exercise *or* sell the rights would help keep cases like *Muscarello* out of court because more non-participants would be satisfied with private bargains with wind farm developers. That the waivers would run with the land[63] would further limit litigation and overall transaction costs. While developers would supply the funds to compensate owners and purchase

54. The Rules establish a firm minimum setback of "1.1 times the maximum blade tip height" for residences and other occupied buildings, but allow owners of those properties to waive any additional setback greater than that distance, and allow owners of non-participating property (without occupied buildings) to waive setbacks up to the property line. *Id.* § 128.13(1)(d).

55. *Id.* § 128.14(5).

56. *Id.* § 128.15(4).

57. Receipt of payment in exchange for waiver of rights is included in the definition of a "participating property." *Id.* § 128.01(13)(b)(2). Ogle County itself adopted a similar waiver regime in August 2010. *Wind Farm Subcommittee Set to Present at Public Meeting*, OGLE COUNTY LIFE (Aug. 13, 2010), http://www.oglecountylife.com/V2_news_articles.php?heading=0&page=72&story_id=2123. But that is no guarantee that Winnebago County, for instance, will do the same.

58. WIS. ADMIN. CODE PSC § 128.14(5) (noise); *id.* § 128.15(4) (shadow flicker). It is not clear that setback waivers become covenants running with the land. *See id.* § 128.13(1)(d).

59. *Id.* § 128.13(1)(d).

60. *Id.*

61. The rules established a limited property interest more than a clear "right," because enforcement was left first to local or state agencies, rather than a private cause of action. *Id.* § 128.04(1), (2). Nonetheless, exhaustion of administrative remedies would presumably lead to standing to sue. Furthermore, the property interest was firm enough that it would have to be waived by contract, *id.* §§ 128.13(1)(d), 128.14(5), 128.15(4), which is a right-like attribute, and which means the interest could be exercised prospectively before a wind farm is built.

62. To borrow the terminology of Calabresi and Melamed's famous article, non-participant property owners are being granted some "inalienable" rights, such as the minimum setback from a residence or occupied building (with waivable rights to a setback some distance beyond that minimum), and some "property rule" rights, such as noise, shadow flicker and the negotiable portion of setbacks. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (establishing three categories of entitlements, those protected by "property rules," which can be bought and sold, those protected by "liability rules," which can be infringed under penalty of damages, and "inalienable" entitlements).

63. *See, e.g.*, WIS. ADMIN. CODE PSC § 128.15(4) (waiver).

the rights, which might slow or prevent development, uniform statewide rules create a more stable and predictable regulatory environment. All else equal,[64] predictable regulation would be a draw when two states compete for economic development.[65] Indeed, the recent suspension of the rules caused two wind farm developers to abandon projects almost immediately.[66]

CONCLUSION

Illinois and other states facing significant wind farm development should examine the uniform statewide siting rules recently adopted and suspended in Wisconsin, which were intelligently geared towards allowing development of wind energy while reasonably protecting the legitimate concerns of nearby property owners. The rules would grant new limited property rights to non-participants, prevent localities from permanently banning wind farms, standardize siting requirements to address almost all of the injuries Muscarello alleged, and reduce conflict between wind farm developers and the wind farm's neighbors. The full effects the rules could not be determined because of the short time they were in force, but Wisconsin's attempted solution deserves serious consideration—perhaps by Wisconsin most of all.

Nick Jimenez

64. If all else is not equal, however, wind developers may flee what they consider overly-restrictive requirements. *See, e.g.*, Laura Smith, *Walker Proposes New Wind Farm Regulations*, FOX 11 WULK-TV (Jan. 12, 2011), http://www.fox11online.com/dpp/news/wisconsin/wisconsin-governor-scott-walker-proposes-new-wind-farm-regulations; Ken Paulman, *Illinois vs. Wisconsin: Who's 'Open for Business'?*, MIDWEST ENERGY NEWS (Jan. 24, 2011), http://www.midwestenergynews.com/2011/01/24/illinois-vs-wisconsin-whos-open-for-business/. The negative effects would therefore be compounded because a detrimental standard would apply to the entire state rather than a smaller political unit. The rules, however, would set setback distances in proportion to turbine size, WIS. ADMIN. CODE PSC § 128.13(1)(a), and not the flat 1800 feet Governor Walker proposed. *See* Smith, *supra*.

65. *See, e.g.*, Hillary Gavan, *'Open for Business'*, BELOIT DAILY NEWS (Jan. 19, 2011, 11:13 AM), http://www.beloitdailynews.com/articles/2011/01/19/news/local_news/news1906.txt; *see also* Paulman, *supra* note 64.

66. The first was a 100-turbine farm planned by Invenergy, Matt Smith, *Company Drops Plans for Brown County Wind Turbine Farm*, ABC 2, WBAY-TV (Mar. 21, 2011), *available at* http://betterplan.squarespace.com/todays-special/2011/3/21/32211-big-wind-vs-bucky-safe-and-restful-sleep-for-brown-cou.html, and the second was a 75-turbine wind farm planned by Midwest Wind Energy. Keith Reopelle, *Clean Wisconsin: Midwest Wind Energy Suspends Calumet County Wind Project* (Mar. 30, 2011), http://www.wisbusiness.com/index.iml?Article=231784. Invenergy carefully explained that it was pulling out due to uncertainty in the "current legislative and regulatory climate" after suspension of the rules. Nino Marchetti, *Large Wisconsin Wind Farm Killed by Politics*, EARTH TECHLING (Mar. 24, 2011), http://www.earthtechling.com/2011/03/large-wisconsin-wind-farm-killed-by-politics/.

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.