

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1407

Cir. Ct. No. 2012CV1203

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**WISCONSIN REALTORS ASSOCIATION, WISCONSIN BUILDERS
ASSOCIATION, WISCONSIN TOWNS ASSOCIATION, JOHN E.
MOREHOUSE, SR. AND ERVIN E. SELK,**

PLAINTIFFS-APPELLANTS,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 STARK, J. This case involves a challenge to WIS. ADMIN. CODE ch. PSC 128, Wind Energy Systems (hereinafter, PSC 128).¹ The Wisconsin Realtors Association, Wisconsin Builders Association, Wisconsin Towns Association, John E. Morehouse, Sr., and Ervin E. Selk (collectively, WRA) argue PSC 128 is invalid because it was promulgated without a housing impact report, in violation of WIS. STAT. § 227.115(2) (2009-10).² The circuit court concluded § 227.115(2) did not require a housing impact report, and it therefore granted the Public Service Commission of Wisconsin (the Commission) summary judgment. We agree and affirm.

BACKGROUND

¶2 In 2009, the legislature enacted WIS. STAT. § 196.378(4g)(b), which directed the Commission, with advice from a wind siting council, to “promulgate rules that specify the restrictions a political subdivision may impose on the installation or use of a wind energy system[.]” *See* 2009 Wis. Act 40, § 12. The statute further provided:

The subject matter of these rules shall include setback requirements that provide reasonable protection from any health effects, including health effects from noise and shadow flicker,^[3] associated with wind energy systems. The subject matter of these rules shall also include

¹ WISCONSIN ADMIN. CODE ch. PSC 128 has not changed since it went into effect. All references to ch. PSC 128 are therefore to the current, February 2012 version.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

³ The term “shadow flicker” refers to “alternating changes in light intensity caused by [a] wind turbine blade as it passes through the sun’s line of sight, causing a passing shadow.” *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 197 P.3d 1153, 1160 n.4 (Wash. 2008) (quoted source omitted).

decommissioning and may include visual appearance, lighting, electrical connections to the power grid, setback distances, maximum audible sound levels, shadow flicker, proper means of measuring noise, interference with radio, telephone, or television signals, or other matters. A political subdivision may not place a restriction on the installation or use of a wind energy system that is more restrictive than these rules.

WIS. STAT. § 196.378(4g)(b).

¶3 In accordance with the legislature’s directive, a wind siting council was formed to advise the Commission. The wind siting council met twenty times between March 29 and August 4, 2010. It spent all or significant portions of three meetings considering the impact of wind energy systems on property values. At a June 9, 2010 meeting, appraiser Kurt Kielisch presented a report entitled “Wind Turbine Impact Study.” Kielisch’s report included three components: (1) a survey of realtors in two Wisconsin counties where wind energy systems had been built; (2) an analysis of property sales near those wind energy systems; and (3) a “literature review.” The report concluded:

[I]t can be said with a high rate of confidence that the impact of wind turbines on residential land sales is negative and creates a loss greater than -12%, averaging -30%. It is logical to conclude that the factors that created the negative influence on vacant land are the same factors that will impact the improved property values. Therefore, it is not a leap of logic to conclude that the impact of wind turbines on improved property value would also be negative, most likely following the same pattern as the vacant land sales, that being greater than -12% averaging -30%.

¶4 Eric Corroy, the zoning administrator for the Town of Red River, Wisconsin, also gave a presentation at the June 9, 2010 meeting. Corroy reported wind turbines had been operating in Red River for eleven years. He stated the turbines had not had a discernible effect on property values, and construction of new homes had continued in the turbines’ vicinity.

¶5 The wind siting council also reviewed a December 2009 study conducted by the Ernest Orlando Lawrence Berkeley National Laboratory. The study considered approximately 7,500 sales of single-family homes near wind energy systems between 1996 and 2007. The study determined there was no conclusive evidence that wind energy systems had a widespread effect on property values.

¶6 In its final report to the Commission, the wind siting council concluded there was no causal relationship between the siting of wind turbines and a measurable change in property value. In addition to the wind siting council's report, the Commission also considered:

- Other states' siting regulations for wind energy systems;
- Local ordinances and community agreements from throughout Wisconsin;
- Various white papers and best practices;
- Papers from a conference on siting wind energy systems;
- The Commission's previous decisions involving wind energy systems;
- Environmental impact statements for wind energy projects in Wisconsin;
- Technical and scientific research;
- Expert testimony;
- Research by non-profit organizations;
- Research by educational institutions;
- Other state commissions' investigations and precedent;
- Consultations with public health professionals;
- Court decisions;

- Joint development agreements between wind developers and political subdivisions;
- Lease agreements for wind energy systems;
- Complaint resolution documentation from past complaints about wind energy projects;
- The Commission's noise measurement protocols;
- The Commission's stray voltage protocols;
- The Commission's application filing requirements;
- Federal regulations involving emergency and safety standards in gas pipeline safety regulations; and
- Federal Aviation Administration processes, standards, and provisions.

The Commission also held multiple hearings around the state and considered a large number of public comments. The Commission ultimately concluded there was insufficient data to show a negative effect on the value of properties located within one-half mile of wind turbines. The Commission further concluded the evidence did not suggest wind turbines affect the value of properties more than one-half mile away.

¶7 On August 31, 2010, the Commission submitted proposed rules to the legislature governing the installation and use of wind energy systems. Following the legislative review process, a modified version of the proposed rules went into effect on March 16, 2012 as PSC 128.

¶8 WRA filed the instant lawsuit on June 6, 2012, asking the circuit court to declare PSC 128 invalid because it was not promulgated in compliance with statutory rule-making procedures. *See* WIS. STAT. § 227.40(4)(a). WRA alleged the Commission failed to obtain a housing impact report, as required by

WIS. STAT. § 227.115(2), before submitting PSC 128 for legislative review.⁴ Section 227.115(2) states, “If a proposed rule directly or substantially affects the development, construction, cost, or availability of housing in this state, the department [of commerce] shall prepare a report on the proposed rule before it is submitted to the legislative council staff[.]”⁵ The report “shall contain information about the effect of the proposed rule on housing in this state[.]” WIS. STAT. § 227.115(3)(a).

¶19 The parties subsequently filed cross-motions for summary judgment. The Commission conceded no housing impact report regarding PSC 128 was prepared or submitted to the legislature. However, the Commission argued WIS. STAT. § 227.115(2) did not require a housing impact report because PSC 128 does not directly or substantially affect the development, construction, cost, or availability of housing in Wisconsin. WRA, in turn, argued PSC 128 “necessarily affects housing” because it: (1) requires that wind energy systems be set back certain distances from residential properties; and (2) limits the noise and shadow flicker wind energy systems may produce, as measured at surrounding residences. *See* WIS. ADMIN. CODE §§ PSC 128.13-15. The circuit court ruled in favor of the Commission, concluding no housing impact report was required under § 227.115(2). WRA now appeals.

⁴ In a second cause of action, WRA alleged PSC 128 was invalid because the wind siting council charged with advising the Commission did not include a University of Wisconsin System faculty member with expertise regarding the health impacts of wind energy systems, as required by WIS. STAT. § 15.797(1)(b)8. The circuit court dismissed WRA’s second cause of action, and WRA does not challenge that ruling on appeal.

⁵ Effective July 1, 2011, the legislature eliminated the Department of Commerce and transferred its functions to various other state agencies. *See* 2011 Wis. Act 32, §§ 3285-3462m. The responsibility for preparing housing impact reports was assigned to the Department of Administration. *See* WIS. STAT. § 227.115(1)(a) (2011-12).

DISCUSSION

¶10 We review a grant of summary judgment independently, using the same standard applied by the circuit court. *Stubbe v. Guidant Mut. Ins. Co.*, 2002 WI App 203, ¶6, 257 Wis. 2d 401, 651 N.W.2d 318. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶11 WRA argues the circuit court erred by granting the Commission summary judgment because PSC 128 is invalid. WISCONSIN STAT. § 227.40(4)(a) sets forth three grounds on which a court may invalidate an administrative rule: (1) the rule violates the constitution; (2) the rule exceeds the statutory authority of the agency that promulgated it; or (3) the rule was not promulgated in compliance with statutory rule-making procedures. WRA’s challenge to PSC 128 falls under the third category—WRA argues PSC 128 was not promulgated in compliance with WIS. STAT. § 227.115(2) because it was submitted to the legislature without a housing impact report.

¶12 We disagree. WISCONSIN STAT. § 227.115(2) requires a housing impact report only when a proposed rule “directly or substantially affects the development, construction, cost, or availability of housing in this state[.]” The statute does not specify the entity responsible for making the initial determination whether a housing impact report is required, but the only reasonable interpretation is that the Commission must make that determination. Here, the Commission considered voluminous evidence before submitting the proposed rules to the legislature without a housing impact report. In particular, the Commission relied on the recommendation of the wind siting council, which spent three meetings considering wind energy systems’ impact on property values. Although neither

the Commission nor the wind siting council explicitly addressed § 227.115(2), both entities clearly found that wind energy systems do not substantially affect property values. Based on that finding, the Commission could reasonably conclude its proposed rules governing setbacks, noise, and shadow flicker would not directly or substantially affect the development, construction, cost, or availability of housing in Wisconsin.⁶

¶13 Moreover, under WIS. STAT. § 227.20(3)(a) and (c), the filing of a certified copy of a rule with the Legislative Reference Bureau creates a presumption that the rule was “duly promulgated” and that “all of the rule-making procedures required by [WIS. STAT. ch. 227] were complied with.” A certified copy of PSC 128 was filed with the Legislative Reference Bureau on December 27, 2010. We must therefore presume that PSC 128 was duly promulgated and that the Commission complied with WIS. STAT. § 227.115(2). In other words, we must presume no housing impact report was required under § 227.115(2) because PSC 128 does not directly or substantially affect the development, construction, cost, or availability of housing in Wisconsin.

¶14 WRA has not presented any evidence to rebut this presumption. Instead, WRA argues PSC 128 necessarily affects the development, construction, cost, or availability of housing because the subject matter of the rules relates to

⁶ WRA argues that, to comply with WIS. STAT. § 227.115(2), the Commission had to make an explicit determination as to whether a housing impact report was required. However, there is no case law interpreting § 227.115(2), and WRA does not cite by analogy any legal authority for the proposition that the Commission was required to address § 227.115(2) explicitly. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address arguments that are undeveloped or unsupported by legal authority). By submitting PSC 128 to the legislature without a housing impact report, the Commission implicitly determined no report was required.

housing. However, WRA interprets WIS. STAT. § 227.115(2) too broadly. Statutory interpretation presents a question of law that we review independently. *State v. Arends*, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513. If a statute is unambiguous on its face, we simply apply the statutory language as written. See *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110. Section 227.115(2) unambiguously states a housing impact report is required only when a proposed rule “*directly or substantially* affects the *development, construction, cost, or availability* of housing in this state[.]” (Emphasis added.) Thus, a housing impact report is not required simply because the subject matter of a proposed rule relates to housing, or because the rule tangentially affects housing in some way.

¶15 The legislative history of WIS. STAT. § 227.115(2) supports our interpretation. As originally proposed, § 227.115(2) would have required a housing impact report when a proposed rule “directly or indirectly” affected the development, construction, cost, or availability of housing. See 1995 A.B. 384. During the drafting process, the words “directly or indirectly” were replaced with “directly or substantially.” See Assembly Substitute Amendment 1 to 1995 A.B. 384. This change suggests the legislature did not intend a housing impact report to be required every time a proposed rule has some indirect effect on housing. We therefore reject WRA’s argument that a housing impact report is required whenever the subject matter of a proposed rule relates to housing.

¶16 WRA argues WIS. STAT. § 196.378(4g)(b), which directed the Commission to promulgate PSC 128, shows the Legislature “sought to protect housing and its occupants from the adverse effects of wind turbines by making sure that a sufficient setback was established[.]” Be that as it may, the issue before us is not whether wind energy systems in general have adverse effects. The

issue is whether PSC 128 directly or substantially affects the development, construction, cost, or availability of housing in Wisconsin. The legislature's purported awareness of wind energy systems' negative effects is not relevant to this issue.⁷

¶17 WRA next argues PSC 128 directly or substantially affects housing because it “seeks to limit, but does not totally protect housing from the effects of wind energy systems.” (Capitalization omitted.) WRA observes that PSC 128 requires a wind turbine to be set back 1,250 feet from any nonparticipating residence.⁸ *See* WIS. ADMIN. CODE § PSC 128.13(1)(a). However, another section of PSC 128 allows local governments to require owners of wind energy systems to offer to pay nonparticipating property owners within one-half mile of a wind turbine up to \$1,000 per year, depending on the number of turbines located near their property. *See* WIS. ADMIN. CODE § PSC 128.33(3). WRA argues these payments would not be necessary if the setback prescribed in WIS. ADMIN. CODE § PSC 128.13(1)(a) were adequate to eliminate wind turbines' negative effects. WRA also notes that, while PSC 128 regulates the amount of noise and shadow flicker wind energy systems may produce, it does not completely eliminate the noise and shadow flicker discernible at nearby residences. *See* WIS. ADMIN. CODE §§ PSC 128.14(3), 128.15(2).

⁷ WRA similarly argues that WIS. STAT. § 66.0401(4)(f)2. “demonstrate[s] [the legislature's] concern for the adverse consequences of locating wind energy systems in close proximity to residential areas.” Again, the legislature's purported concern about the effects of wind energy systems in general does not show that PSC 128 directly or substantially affects housing.

⁸ A nonparticipating residence is a residence located on a property that is: (1) not a turbine host property; and (2) not the subject of an agreement for compensation from the owner of a wind energy system. *See* WIS. ADMIN. CODE § PSC 128.01(8)-(9), (13).

¶18 That PSC 128 does not completely eliminate wind energy systems’ effects on nearby residences is not dispositive of the issue before us. To demonstrate that a housing impact report was required, WRA must show that the setback, noise, and shadow flicker restrictions imposed by PSC 128 are so inadequate that the rules will directly or substantially affect the development, construction, cost, or availability of housing in Wisconsin.⁹ WRA has not even attempted to make this showing. WRA specifically concedes it is “not asserting that the noise and shadow flicker setbacks established in [PSC 128] are insufficient.” Without presenting evidence that the restrictions imposed by PSC 128 are insufficient, WRA cannot rebut the presumption that no housing impact report was required.¹⁰

⁹ One could argue that the setbacks established by WIS. ADMIN. CODE § 128.13 will necessarily affect the *development* of housing in Wisconsin, regardless of whether they adequately protect property values and public health. However, WRA has not raised any argument on appeal that PSC 128 directly or substantially affects the development of housing. We will not abandon our neutrality to develop the argument for WRA. See *Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

¹⁰ WRA argues it is not required to present evidence of PSC 128’s inadequacy because it is making a “facial” challenge to the rules, not an “as applied” challenge. A facial challenge is “[a] claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally.” BLACK’S LAW DICTIONARY 244 (8th ed. 2004). An as applied challenge is “[a] claim that a law or governmental policy, though constitutional on its face, is unconstitutional as applied, usu[ally] because of a discriminatory effect.” *Id.* WRA is not challenging PSC 128 on constitutional grounds. WRA does not cite any authority supporting its assertion that the distinction between facial and as applied challenges extends beyond the realm of constitutional law. We need not address arguments that are undeveloped or unsupported by legal authority. See *Pettit*, 171 Wis. 2d at 646-47.

(continued)

¶19 Despite asserting it is not attempting to show that the restrictions imposed by PSC 128 are insufficient, WRA cites three pieces of evidence that allegedly show the Commission was aware when drafting PSC 128 that the rules would negatively affect housing in Wisconsin. However, the evidence WRA cites does not support that proposition.

¶20 First, WRA cites an affidavit submitted in support of the Commission’s summary judgment motion, in which Commission employee Deborah Erwin averred:

Based on a review of various sources of information, the Commission concluded that existing studies regarding impacts to property values contain insufficient data to show that wind energy systems negatively impact property value for properties one-half mile and closer to wind turbines, and that the evidence does not suggest any impacts would occur at distances greater than one-half mile from a wind turbine.

WRA argues this statement shows the Commission “was aware and had concluded that evidence suggests negative impacts out to a half mile from wind turbines, which is double the maximum [1,250-foot] setback required under [WIS. ADMIN. CODE §] PSC 128.13.” WRA is mistaken. Erwin clearly averred there was “insufficient data” to show a decrease in value for properties located within one-half mile of wind turbines.

WRA also argues it should not be required to produce evidence that PSC 128 has a direct or substantial effect on housing because “[a]t the point in time [when] WIS. STAT. § 227.115 was violated by [the Commission,] such evidence could not exist. There could not be a wind turbine sited in compliance with [PSC 128] at that point in time, because [PSC 128] had not yet gone into effect.” We disagree. As the Commission points out, “An expert, if properly qualified, could have opined as to [PSC 128’s] likely impact upon housing before a single turbine had been built.” Moreover, if WRA were correct that it was impossible to judge PSC 128’s effects before the rules went into effect, it would also have been impossible to prepare a housing impact report, which is precisely what WRA alleges should have been done.

¶21 Second, WRA cites an August 13, 2010 memorandum authored by several Commission employees. WRA asserts the memorandum acknowledges that wind turbines “create noise and shadow flicker that impacts housing[,]” and that “these impacts increase as the distance between turbines and residences decreases.” It is undisputed that wind turbines create noise and shadow flicker, and that these effects are greater on properties near the turbines. The disputed issue is whether the setback, noise, and shadow flicker restrictions imposed by PSC 128 are insufficient, so that the rules directly or substantially affect the development, construction, cost, or availability of housing in Wisconsin. The August 13, 2010 memorandum does not speak to that issue.

¶22 Third, WRA cites the report appraiser Kurt Kielisch presented to the wind siting council, which concluded the presence of wind turbines negatively affected residential property values by twelve to thirty percent. However, while the Kielisch report concluded wind turbines generally have a negative effect on property values, it did not address the operative issue in this case—whether PSC 128 directly or substantially affects the development, construction, cost, or availability of housing in Wisconsin. As the Commission points out, Kielisch did not opine “that the combination of protections [PSC 128] provide[s] would not be enough to mitigate or prevent the impact his report describes.”

¶23 In summary, we reject WRA’s argument that PSC 128 is invalid because it was promulgated without a housing impact report. WISCONSIN STAT. § 227.115(2) does not require preparation of a housing impact report whenever the subject matter of a proposed rule relates to housing. Instead, a housing impact report is required only when the proposed rule directly or substantially affects the development, construction, cost, or availability of housing in Wisconsin. The Commission must make the initial determination, either explicit or implicit,

whether a housing impact report is required. Here, the Commission submitted PSC 128 to the legislature without a housing impact report after considering voluminous evidence about wind energy systems' effects on housing and reasonably concluding wind energy systems do not negatively affect residential property values. We must presume PSC 128 was duly promulgated, and the Commission has not cited any evidence to rebut that presumption. Accordingly, the circuit court properly granted the Commission summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

