Chapter 404: Wind Energy Gets an Overhaul

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Code Sections Affected
AB 45 (Blakeslee); 2009 STAT. Ch. 404.

I. INTRODUCTION

In 1996, George Horvath approached the Los Angeles Department of Building and Safety about installing a windmill in his backyard. The City responded: “We don’t know anything about windmills.” So, George built his own windmill with four large fan blades and a twelve-volt battery pack and attached it to a thirty-foot tower in his backyard. Neighbors were generally fine with the idea until one of the blades came loose, got caught in a power line, and almost crashed through a neighbor’s window. The neighbor complained, and the City, which had no ordinances for windmills, made Horvath take his windmill down because he lacked a valid permit.

Diana Hofman attempted to erect a wind turbine in neighboring Riverside County, where there are an estimated 170,000 acres of land with “prime small wind development potential.” Despite working with the City of Murieta for almost two years and investing $10,000 in a commercially approved wind turbine, the City delayed her final inspection because the “stainless steel turbine was too shiny.”

These stories represent two common problems encountered when attempting to install a small wind system. Some counties have no wind energy ordinances and are completely in the dark about what should be required for a safe and

2. Id.
3. Id.
4. Id.
5. Id.
beneficial system.\textsuperscript{10} Other counties, like Los Angeles County, have instituted regulations that make it costly and cumbersome to obtain a permit with no assurances that the permit will be issued.\textsuperscript{11} According to John Supp of Southwest Windpower, “Los Angeles County is the worst place in the entire country to try to put in a small wind system.”\textsuperscript{12} Even after the California Legislature passed a law in 2001 to encourage windmills, Los Angeles County enacted an ordinance that requires applicants to pay $4,000 or more for a permit.\textsuperscript{13}

Chapter 404 attempts to “encourage local agencies to support the state’s ambitious renewable energy procurement requirements” and standardize the installation permit process while still allowing local governments to tailor ordinances for their unique circumstances.\textsuperscript{14}

II. LEGAL BACKGROUND

A. Wind Energy Regulations Prior to 2001

Prior to 2001, small wind energy systems were loosely regulated in California.\textsuperscript{15} There were no statewide regulations, and there were only a few local ordinances governing the process.\textsuperscript{16} Many localities attempted to manage this by applying a combination of laws that were originally designed to regulate general building setbacks, height limits, and open space requirements.\textsuperscript{17} Since the laws did not directly relate to small wind energy systems, they had to be manipulated to fit the distinctive characteristics of such systems.\textsuperscript{18} In many counties, this meant requesting a zoning variance, which was difficult to obtain and could cost as much as $8,000.\textsuperscript{19} The complex and expensive process, coupled with the fact

\textsuperscript{10} Wind Turbine Handbook, supra note 7, at 23 (“Many planning and permitting departments are unfamiliar with the policy rationale behind the new law.”).

\textsuperscript{11} Id. at 24-25 (explaining that there is a fee for a minor use permit with no guarantee the wind energy system will be approved).


\textsuperscript{13} Id.

\textsuperscript{14} Cal. Gov’t Code § 65893(a)(5) (enacted by Chapter 404).

\textsuperscript{15} Cal. Wind Energy Collaborative, supra note 9, at 1.

\textsuperscript{16} Id.; Beverly J. Shane, Note, Solving California’s Energy Crisis: The Answer May Be Blowing in the Wind, 33 McGeorge L. Rev. 403, 407 (2002) (stating that prior to AB 1207 “small wind-energy systems were regulated by . . . local land-use controls”).

\textsuperscript{17} See Shane, supra note 16, at 407 (explaining that land-use controls did not address small wind energy systems).

\textsuperscript{18} See id. (explaining that counties had the discretion to manipulate land use regulations to accommodate community goals).

\textsuperscript{19} See id. at 407-08 (“[D]iscretionary entitlements, such as use permits or variances, were commonly required . . . with application fees ranging from two thousand to eight thousand dollars . . . .”).
that the processes varied from locality to locality, deterred many small wind energy system installers.20

B. Assembly Bill 1207

In 2001, California faced an energy crisis, causing energy prices to soar and subjecting many residents to rolling blackouts.21 The Legislature enacted AB 1207 in an attempt to clean up the difficult permitting process and to encourage residents to install small wind energy systems.22 The bill required counties to adopt ordinances for small wind energy systems that complied with, or were less restrictive than, AB 1207.23 If a county did not adopt an ordinance, it would have to “approve applications for a small wind energy systems ‘by right’” provided that the application met the bill’s requirements.24

The legislation also provided guidelines for height requirements of a system.25 In addition, notice of an application to install a small wind turbine needed to be provided to any “property owners within 300 feet of the . . . property.”26 To deal with noise concerns, the law specified that the system could not generate noise beyond “60 decibels (dBA) . . . as measured at the closest neighboring inhabited dwelling.”27 Furthermore, the California Energy Commission needed to certify the applicant’s small wind turbine, and the applicant needed to “include standard drawings and an engineering analysis of the tower, showing compliance with the Uniform Building Code or the California Building Standards Code.”28

C. Post-AB 1207

AB 1207 expired on January 1, 2006.29 In the absence of statewide regulation, some counties have adopted regulations similar to those of AB 1207, while others have implemented regulations that are more restrictive.30 A handful of counties have abandoned small wind energy system ordinances altogether.31

20. CAL. WIND ENERGY COLLABORATIVE, supra note 9, at 4.
21. WIND TURBINE HANDBOOK, supra note 7, at 21.
22. Id.
23. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1207, at 3 (Sept. 7, 2001).
24. Id. at 5.
25. Id. Under AB 1207, “[t]he allowable height for a small wind turbine tower on a site of one to five acres must be at least 65 feet; on parcels of five acres or more, the allowable height must be at least 80 feet.” WIND TURBINE HANDBOOK, supra note 7, at 22.
26. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1207, at 3 (Sept. 7, 2001).
27. Id.
28. Id. at 4.
29. CAL. WIND ENERGY COLLABORATIVE, supra note 9, at 1.
30. Id.
31. Id.
As a result, many of the problems that plagued the permit process before AB 1207 are cropping up again.\textsuperscript{32} Since AB 1207 expired, the expensive and overly difficult application processes have discouraged many system installers and caused them to move away from installing the systems.\textsuperscript{33}

III. CHAPTER 404

By imposing a statewide standard that counties must adhere to, Chapter 404 aims to eliminate barriers that discourage system installations.\textsuperscript{34} However, there is one important exception: any ordinance that is adopted before January 1, 2011, is exempt from Chapter 404.\textsuperscript{35} If a county does not enact an ordinance before the January 1st deadline, it can either follow the standards of Chapter 404 or adopt an ordinance at a later date provided that the ordinance is not more restrictive than the provisions within Chapter 404.\textsuperscript{36} The legislation will continue to operate until January 1, 2017, unless the Legislature modifies the sunset provision.\textsuperscript{37}

Chapter 404 requires a county to “review an application for a small wind energy system pursuant to the timelines established in the Permit Streamlining Act.”\textsuperscript{38} Once a county considers an application complete, it has sixty days to approve or deny the application.\textsuperscript{39} In addition, fees must be determined under the standards of the Mitigation Fee Act.\textsuperscript{40} Under this Act, permit fees cannot “exceed the estimated reasonable cost of providing the service for which the fee is charged.”\textsuperscript{41} The application must also include an engineering analysis that complies with the California Building Standards Code, must contain a line drawing of electrical components showing that the system conforms to the National Electric Code, and must comply with all Federal Aviation Administration (FAA) requirements.\textsuperscript{42} Chapter 404 also requires the wind turbine to be “approved by the [California] Energy Commission as qualifying under its

\begin{itemize}
\item \textsuperscript{32} See \textit{id.} at 4 (“Inconsistency in the regulations, high fees, and time to process are the biggest problems.”).
\item \textsuperscript{33} \textit{id.}
\item \textsuperscript{34} See \text{CAL. GOV’T CODE} § 65893(a)(6) (enacted by Chapter 404) (“It is the intent of the Legislature to facilitate the implementation of consistent statewide standards to achieve the timely and cost-effective installation of small wind energy systems.”).
\item \textsuperscript{35} \text{CAL. GOV’T CODE} § 65895(a) (enacted by Chapter 404).
\item \textsuperscript{36} \text{SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF AB 45, at 2 (June 11, 2009)} (noting a July 1, 2010, deadline, which was changed to January 1, 2011, in the final bill).
\item \textsuperscript{37} \text{CAL. GOV’T CODE} § 65899 (enacted by Chapter 404).
\item \textsuperscript{38} \textit{id.} § 65895(b)(1) (enacted by Chapter 404).
\item \textsuperscript{39} See \textit{id.} § 65950(a) (West 2009) (providing timelines for compliance with the California Environmental Quality Act).
\item \textsuperscript{40} \textit{id.} § 65895(b)(2) (enacted by Chapter 404) (stating that application fees for small wind energy systems must be determined in accordance with sections 66014 and 66016 of the Government Code, which are sections of the Mitigation Fee Act).
\item \textsuperscript{41} \textit{id.} § 66014(a) (West 2009).
\item \textsuperscript{42} \textit{id.} § 65896(b) (enacted by Chapter 404).
\end{itemize}
Emerging Renewables Program . . . or [to be] certified by a national program recognized and approved by the commission.

Chapter 404 is limited to “small wind energy systems” that are located outside of an “urbanized area.” Moreover, Chapter 404 limits installations to parcels of land that are at least one acre in size. If a parcel is between one and five acres in size, the ordinance governing the small wind energy system installation must allow tower heights of up to eighty feet. For parcels that are larger than five acres, the ordinance must allow tower heights of up to one hundred feet. The legislation also limits tower height to the “applicable limits established by the [FAA].” Additionally, the noise measured at the nearest property line must be below sixty decibels and cannot exceed the maximum noise level of the general plan for the applicable zoning classification. Finally, a system is not allowed when the proposed site conflicts with other legislation.

IV. ANALYSIS

A. State v. Local Concerns

Chapter 404, like its predecessor, AB 1207, attempts to strike a balance between furthering California’s goal of procuring renewable energy resources and allowing local agencies to regulate installations. Some have expressed concern about preempting local land use ordinances because it stops communities...

43. CAL. GOV’T CODE § 65896(b)(7) (enacted by Chapter 404).
44. Id. § 65896(a) (enacted by Chapter 404).

A small wind energy system is defined as a “small, electricity-producing, wind-driven generating system with a rated output of 50 kilowatts or less.” ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 45, at 4 (May 13, 2009).

“Urbanized areas” are defined as “any urban location that meets the definition used by the United States Department of Commerce’s Bureau of Census for ‘urban’ and includes locations with core census block groups containing at least 1,000 people per square mile and surrounding census block groups containing at least 500 people per square mile.” CAL. GOV’T CODE § 65944(d)(2).

45. CAL. GOV’T CODE § 65896(b)(1) (enacted by Chapter 404).
46. Id. § 65896(b)(2) (enacted by Chapter 404).
47. Id.
48. Id.

49. SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF AB 45, at 3 (June 11, 2009).
50. CAL. GOV’T CODE § 65896(b)(17) (enacted by Chapter 404). These include the following: the California Coastal Act; the Tahoe Regional Planning Compact; the San Francisco Bay Conservation and Development Commission; any regulations adopted by an airport land use commission; The Alquist-Priolo Earthquake Fault Zoning Act; Article 2.5 of the Streets and Highways Code; the Open-Space Easement Act of 1974; the California Farmland Conservancy Program Act; the Williamson Act; the National Register of Historic Places or the California Register of Historical Resources. Id.

51. See id. §§ 65893, 65895 (enacted by Chapter 404) (noting that Chapter 404 encourages the local agencies to advocate ordinances consistent with statewide regulations to promote local small wind energy system installations); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1207, at 5-6 (Sept. 7, 2001) (noting that AB 1207 prohibits local agencies to deny small wind energy system installation based on local ordinances).
from addressing their unique conditions. However, Chapter 404 is not the first piece of legislation that limits local authority. At least seven laws have been enacted since 1994 that limit local authority, including ordinances for solar energy systems and wireless telecommunications collocation facilities. In addition, California is not the only state to enact a small wind energy law that preempts local authority. Oregon, Wisconsin, Nevada, Michigan, Vermont, and New Hampshire have all enacted similar state laws. The laws appear to be having a positive effect, as the American Wind Energy Association (AWEA) reports that these states have generated more in-state energy than states that have not enacted legislation. While Chapter 404 limits the scope of local governments, it does not completely preclude counties from adopting local ordinances as long as the local ordinances are not more restrictive than the provisions of Chapter 404.

B. Breaking Down Barriers?

Each year ten thousand small wind energy turbines are sold in the United States, and the demand is rising. Zoning restrictions that are overly cumbersome can discourage installations of these systems in California, because the necessary time and expense is not worth the return on the initial investment. In a recent survey conducted by the California Wind Energy Collaborative (CWEC), only one of the companies that routinely install small wind energy systems reported that it was satisfied with local permitting processes. The CWEC also observes that “[t]he current permitting challenges would not encourage anyone to go into this business.”

In 2008, the AWEA put out a best practices guide for the installation of small wind energy systems. In the areas of setback distances, allowable system height, soil analysis, and lot size, Chapter 404 is consistent with the best practices guide. In addition, Chapter 404 does not regulate what the AWEA regards as

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52. See Shane, supra note 16, at 411-12 (explaining that state legislatures preempts local authorities undermines local land use ordinances).
53. SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF AB 45, at 6 (June 11, 2009).
54. See id. (listing legislation that has restricted or preempted local land use ordinances).
56. Id.
57. Id.
58. CAL. GOV’T CODE §§ 65895, 65896 (enacted by Chapter 404).
59. AM. WIND ENERGY ASS’N, supra note 55, at 3.
60. See id. (explaining the responsibilities of small wind turbine owners).
61. CAL. WIND ENERGY COLLABORATIVE, supra note 9, at 4.
62. Id.
63. See generally AMERICAN WIND ENERGY ASS’N, supra note 55.
64. Id. at 8-11.
non-issues. For example, a common misconception about small wind energy systems is that they are dangerous for local bird and bat populations. However, it is estimated that wind turbines “account for less than 0.003% of all human-caused bird deaths;” in fact, “[a] sliding glass door is more dangerous to birds than a small wind turbine is.” By providing a standardized framework for permits that counties can refer to when creating ordinances, the Legislature hopes to remedy the inconsistencies and lack of education that have been barriers for potential applicants.

Although AB 1207 was very similar to Chapter 404, it failed to remedy many of these issues. Some counties did not understand that AB 1207 took precedence over the local laws and a few did not even know that the law existed. On the other hand, in those counties that did understand the rationale of AB 1207, the law did seem to have an effect. For example, when Steve Anderson attempted to install a wind turbine in Riverside County, the county required him to notify every landowner within a half-mile radius. After AB 1207 went into effect, Anderson was only required to notify neighbors within 300 feet, decreasing the amount of letters he had to send from 50 to 6.

Since any small wind ordinance adopted before January 1, 2011, is exempt from Chapter 404, it is unclear whether the legislation will have any effect in counties with the most cumbersome permit processes. As mentioned previously, Los Angeles County has some of the most discouraging wind energy laws in the country. Under Chapter 404, the impetus to change the existing ordinance is solely up to the county. Unless there is another energy crisis or some other compelling reason to force these counties to change their laws, the current barriers may continue to exist.

65. Id. at 17-21.
66. Id. at 19.
67. Id.
69. CAL. GOV’T CODE § 65893 (enacted by Chapter 404); WIND TURBINE HANDBOOK, supra note 7, at 21.
70. WIND TURBINE HANDBOOK, supra note 7, at 23.
71. Id.
72. Id. at 25.
73. Id.
74. Id.
75. See CAL. GOV’T CODE § 65895(a) (enacted by Chapter 404) (stating that prior laws are exempt, so there is no incentive for counties to change them).
76. Brooks, supra note 12.
77. See CAL. GOV’T CODE § 65895(a) (enacted by Chapter 404) (exempting all local ordinances that have been adopted prior to January 1, 2011, from following the provisions of Chapter 404).
78. Id.
C. Fees

In the time since AB 1207 lapsed, installers of small wind energy systems have listed high fees as one of the main barriers to installation.\(^{79}\) Within the fifty-eight counties of California, the range of fixed fees for permits varies from none to $10,000 with an average fee of $2,666.\(^{80}\) A 1.5 kilowatt high-end system costs about $7,500, which means that the average fee of $2,666 represents thirty-five percent of the total cost of a new system.\(^{81}\) “In some counties the permit may cost more than the wind turbine [itself].”\(^{82}\) In comparison, the average solar permit fee averages $214, which is only 1.2% of the total cost.\(^{83}\) Based on their findings, the CWEC recommends that there should be a $1,000 ceiling on total permitting costs.\(^{84}\)

Instead of putting a ceiling on permit costs, Chapter 404 requires that “[f]ees charged by a county . . . be determined in accordance with Sections 66014 and 66016” of the Government Code.\(^{85}\) Under these sections, permit fees cannot exceed the “estimated reasonable cost of providing the service for which the fee is charged.”\(^{86}\) While this provision improves upon AB 1207, it does not put a $1,000 limit on fees as the CWEC suggests.\(^{87}\) Thus, it is conceivable that fees in some counties will continue to exceed $1,000.\(^{88}\) If this is the case, installers of small wind energy systems may not see the type of relief the bill intends.\(^{89}\)

V. CONCLUSION

Chapter 404 removes some of the unnecessary barriers that have crept into county wind energy ordinances since AB 1207 expired in 2006.\(^{90}\) In contrast to the last three years, counties will no longer have complete discretion to impose whatever wind energy ordinances they deem appropriate.\(^{91}\) In addition, counties

\(^{79}\) CAL. WIND ENERGY COLLABORATIVE, supra note 9, at 4.


\(^{81}\) Id. at 7.

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) Id. at 8.

\(^{85}\) CAL. GOV’T CODE § 65895(b)(2) (enacted by Chapter 404).

\(^{86}\) Id. § 66014(a) (West 2009).

\(^{87}\) PERMITTING FEES, supra note 80, at 8; see also SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1207, at 5 (Sept. 7, 2001) (listing the requirements that a small wind energy system has to meet to be approved, which does not include any limit on fees).

\(^{88}\) See WIND TURBINE HANDBOOK, supra note 7, at 21-26 (explaining that many counties already have fees in excess of $1,000).

\(^{89}\) See PERMITTING FEES, supra note 80, at 7 (noting that the current average permitting fee across counties is $2,666, which is well above CWEC’s suggestion of $1,000).

\(^{90}\) CAL. WIND ENERGY COLLABORATIVE, supra note 9, at 1.

\(^{91}\) See CAL. GOV’T CODE §§ 65893-65897 (enacted by Chapter 404) (requiring local agencies to adopt
that have no wind energy ordinances can use Chapter 404 as a model to enact ordinances that follow many of the best practices of the AWEA.\textsuperscript{92}

However, Chapter 404, like AB 1207, allows local governments to enact their own ordinances as long as they do not conflict with Chapter 404.\textsuperscript{93} This provision caused problems under AB 1207, because local governments that were unsure about allowing installations found loopholes in the law and effectively discouraged installations in those counties.\textsuperscript{94} Thus, counties that found loopholes in AB 1207 may find similar loopholes in Chapter 404.

Additionally, Chapter 404 could be more specific with respect to fees.\textsuperscript{95} Requiring counties to adhere to the Fee Mitigation Act provides loose boundaries, but is unlikely to bring permit costs below the CWEC suggested $1,000 point.\textsuperscript{96} Even after AB 1207 was in effect, the permit fees in Los Angeles County exceeded $4,000, and there is no indication that Chapter 404 will decrease costs.\textsuperscript{97}

Finally, Chapter 404’s sunset clause, together with the exemption for local ordinances that go into effect before January 1, 2011, may limit the overall effectiveness of the legislation.\textsuperscript{98} While it is possible that Chapter 404 will increase the efficiency of the permitting process, it is just as possible that the law will have little or no effect where it is most needed.\textsuperscript{99} After Chapter 404 expires in 2017, counties will again be free to abandon small wind energy system ordinances, potentially leaving California’s small wind energy market in the same situation that it is in today.\textsuperscript{100}

\begin{thebibliography}{99}
\bibitem{92}American Wind Energy Ass’n, supra note 55, at 8-21.
\bibitem{93}Cal. Gov’t Code § 65896 (enacted by Chapter 404).
\bibitem{94}See Brooks, supra note 12 (discussing how Los Angeles County’s attempts to compromise between renewable energy and protecting neighborhoods actually discouraged system installations).
\bibitem{95}See Permitting Fees, supra note 80, at 8 (explaining that permit fees for small wind energy systems should not exceed $1,000).
\bibitem{96}Cal. Gov’t Code § 65895 (enacted by Chapter 404); see also Cal. Wind Energy Collaborative, supra note 9, at 4-5 (explaining that high fees are one of the main deterrents in considering whether to install a system).
\bibitem{97}Brooks, supra note 12, at 3; see also Cal. Gov’t Code § 65895 (enacted by Chapter 404) (noting nothing about the cost of small wind energy system installation).
\bibitem{98}See Wind Turbine Handbook, supra note 7, at 24-26 (discussing Los Angeles County’s complicated ordinances).
\bibitem{99}Id.
\bibitem{100}See Cal. Wind Energy Collaborative, supra note 9, at 1 (noting that counties abandoned small wind laws after AB 1207 expired, which makes it possible that the same thing might happen after Chapter 404 expires).
\end{thebibliography}