

Regulating Industrial Sand Mining in Wisconsin: Local Regulation

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I. INTRODUCTION – WHY THE INTEREST IN LOCAL REGULATION

A. The Limits of State and Federal Regulation.

1. Federal regulations – primarily worker safety through the Mine Safety and Health Administration (MSHA).
2. State regulations are limited to only certain specific impacts:
 - a. Surface water runoff through nonmetallic mine general permit.
 - b. Some air pollution regulations for fugitive dust and stack emissions from dry plants.
3. County regulations typically only address non-metallic mine reclamation – not operation. There are some exceptions.

B. Key Issues of Local Concern.

1. Hours of operation – on site and off-site (trucking).
2. Road impact issues.

3. Buffer and screening.
4. Lighting.
5. Dust control and air monitors.
6. Noise control.
7. Groundwater impact issues.
8. Surface water impacts issues.

II. CURRENT REGULATORY TOOLS FOR TOWNS

A. Zoning.

1. Towns in Counties *with* General Zoning.

- a. Develop Town Zoning. Adoption of town zoning requires the following actions.
 - Adoption of village powers approved by the town electors. The town electors have to grant such town board village powers at a formal town meeting of the electors. Wis. Stat. § 60.10(2)(c).
 - The electors grant the town board zoning authority by either an elector meeting or a referendum. Wis. Stat. § 60.10(2)(h) and § 60.62(2).
 - Towns must still have the county board approve any town zoning ordinance or any amendments. Wis. Stat. § 60.62(3). **OR**
- b. Adopt County Zoning. In lieu of developing its own zoning, towns may also adopt county zoning by resolution. Wis. Stat. § 59.69(5)(c).

2. Towns in Counties *without* General Zoning. Adoption of town zoning requires one of the following actions:

- a. The town board petitions the county board to initiate, at any regular or special meeting, action to enact a county zoning

ordinance under Wis. Stat. § 59.69, and the County refuses to act.

- b. The town board, in exercising village powers adopts town zoning under Wis. Stat. § 60.61(2).
3. **Scope of Zoning Ordinances. Basic Structure of Zoning.**
 - a. The establishment of zones – for example, agricultural, commercial, industrial and residential.
 - b. Specification of permitted uses, conditional uses and prohibited uses.
 4. **Existing Operations and the Law of Diminishing Assets.**

“When a single owner has contiguous parcels on which an excavation operates ... all land which constitutes an integral part of the operation is deemed “in use” notwithstanding the fact that a particular portion may not yet be under actual excavation.” *Sturgis v. Winnebago Co. Board*, 141 Wis. 2d 149, 413 N.W.2d 6432 (Ct. App. 1987). *See also, Smart v. Dane County Bd of Adjustments*, 177 Wis. 2d 445, 501 N.W.2d 782 (1993).

5. **Practical Limitations of Town Zoning.**

B. Licensing Ordinances.

1. **Concept.** Towns with village powers can enact, administer and enforce licensing ordinances under its general police power. Licenses are often used to regulate certain kinds of business that can be problematic, regardless of zoning. Examples include dog kennels, massage parlors, secondhand goods, sales on public streets, etc. Such concepts can be applied to nonmetallic mining operations.
2. **Licensing vs. Zoning.** This kind of local ordinance is not a zoning ordinance. It does not establish where a nonmetallic mining operation may be sited. It will not have specific zoning districts with specific permitted and conditional uses. It may, however, establish specific license standards for the site and for related commercial or industrial operations off-site.
3. *Zwiefelhofer, et al. v. Town of Cooks Valley*, 2012 WI 7. The Supreme Court held that a nonmetallic mining ordinance was not a

zoning ordinance and therefore did not need approval from the county board.

C. Other Police Power Ordinances.

1. Nonmetallic Mining Reclamation Ordinances.

- a. In Wisconsin, every county must be administering a nonmetallic mining reclamation ordinance. Wis. Stat. § 295.13. Towns can choose to enact their own ordinance.
- b. All these ordinances must comply with the DNR rules in ch. NR § 135 requirements. A town can be more restrictive but may not conflict with state law.
- c. These ordinances are for mining reclamation not mining operation. Typically, they will not address the many other operations at the site, including items related to traffic, setbacks, blasting, dewatering, hours and days of operation, noise, dust etc.

2. Building Permit Ordinances. Towns can regulate nonmetallic mining operations, in part, under their specific statutory ordinance authority to issue building permits. Towns with village powers have specific building permit authority under Wis. Stat. § 60.61, § 62.17, and § 62.23(9). Towns without village powers will need to rely on Wis. Stat. § 60.627.

3. Subdivision/Land Division Ordinances.

- a. Towns have authority by ordinance to approve and regulate any proposed subdivision and land division, under Wis. Stat. § 236.45 Wis. Stats. If a nonmetallic mining operation includes a request to divide certain lands this provision may be applicable. Most operations however acquire land in large blocks so the effectiveness of this tool is probably limited.
- b. The subdivision and land division ordinance may also address whether the land proposed to be divided is to be then “suitable” for the proposed operation, and may approve, condition, or deny approval on that basis.

4. **Blasting Ordinances.** State code allows local governments to enact additional regulations.

D. Development Agreements.

1. **Context.** Development agreements are most common with respect to development in incorporated municipalities where a developer is seeking to have some assurances of the conditions under which it will operate such as in a TIF district. The concept however can be applied more broadly.
2. **Authority.** A municipality may not delegate away its police powers, so any developers agreement must be authorized and not compromise basic compliance with local ordinances. Practice Point: There should be a specific authorization in an ordinance allowing development agreements and there should be procedures providing opportunities for public notice and comment.
3. **Differences with Permits.** A development agreement is more flexible for the developer and municipality. For example, property value guarantees which normally are not within the municipality's ability to control by ordinance can be included in a development agreement.

E. Moratoriums.

1. **Concept.** Moratoriums have been used to freeze certain land use development while comprehensive plans or other regulations are being developed.
2. **Application of the Concept.**
 - a. This is most commonly used in zoning where Wis. Stat. § 62.23(7)(da) authorizes a freeze while a comprehensive zoning is being developed.
 - b. The courts have upheld a freeze on land divisions under Wis. Stat. § 236.45 while a comprehensive town plan was being developed. *Wisconsin Realtors Ass'n v. Town of West Point*, 309 Wis. 2d 199, 747 N. W.2d 681 (Ct. App. 2008).
3. **Moratorium Legislation – 2011 Act 144.**

- a. The Act creates Wis. Stat. § 66.1002 which limits the ability to enact a moratorium that would affect the following specific land use requests: a request for rezoning, a plat or certified survey map, or a subdivision plat or other land division.
- b. The Act allows a municipality to enact a development moratorium ordinance if it has a comprehensive plan (or is preparing or amending a comp plan) and adopts a resolution that a moratorium is needed to prevent a shortage of public facilities or is needed to address a significant threat to the public health safety.
- c. An ordinance, must meet certain criteria and many not exceed 12 months with a onetime renewal for 6 months.

III. KEY ELEMENTS FOR LICENSING OR DEVELOPERS AGREEMENTS

A. Basic Provisions for an Ordinance.

1. Applicability and Definitions.

- a. What activities are exempt or subject to less rigorous requirements – for example, how do you treat existing operations or small sand and gravel operations.
- b. Mining and processing.
- c. Adjacent landowner.

2. License Term and Renewal.

3. License Application Process.

- a. Review body (town planning commission or town board).
- b. Retained experts and cost.
- c. Public hearing and decision process.

4. Application Materials.

5. Minimum Standards.

- a. **General Standards.**
- b. **Off-Site Impacts.**
 - Erosion control -- relationship to state permit.
 - Buffer and screening.
 - Hours of Operation -- trucking and road impacts.
 - Lighting.
 - Dust and air monitors -- number of monitors and parameters (TSP vs. PM10).
 - Noise control -- noise standards and exceptions.
 - Waste disposal and waste from other sites.
- c. **Groundwater and Surface Water.**
 - Monitoring wells -- location, number, sampling frequency, and parameters.
 - Mining in relationship to depth to groundwater.
 - Measuring impacts to surface water.

6. **Annual Report and License Renewal.**

7. **Inspection, Enforcement and Penalties.**

8. **Financial Assurance.**

9. **Provision for Developers Agreement.**

B. Key Legal Issues Associated With Local Regulation.

1. **Existing areas of state preemption.**

a. **High Capacity Wells.**

b. **Air regulations and local programs.**

2. **Equal Protection and Substantive Due Process Concerns.**

- a. Regulations cannot treat persons differently unless there is a rational basis for the classification.
- b. Key issue here is how are frac sand mines different than large sand and gravel operations.
- c. Regulations must have a rational relationship to the goal of the regulation.

3. **Takings Issues.**

- a. Takings can arise when a regulatory action "goes too far" in restricting the use of land. *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 373, 548 N.W.2d 528 (1996). Regulatory takings actions include "categorical regulatory takings" and "traditional regulatory takings."
- b. A regulation which deprives the property owner of all or substantially all the value of the property is considered a categorical taking requiring just compensation. In such cases the question is not whether there is *an* impact, but rather whether the regulation denies the owner of *all or substantially all* of the use or value of the property.
- c. Regulatory activities that are not viewed as categorical takings are analyzed under a more *ad hoc* analysis which has been characterized as the "traditional takings inquiry":

"We are left, then, with the ad hoc factual, traditional takings inquiry of *Penn Central* and *Zealy*. This involves an analysis of the nature and character of the governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property." *R.W. Docks & Slips v. State*, 2001 WI 73, ¶17, 244 Wis. 2d 497, 628 N.W.2d 781.

- d. Thus ordinances which expressly or impliedly prohibit any use of land property for frac sand purposes could be subject to takings claims.

4. Rail Issues.

- a. The ability of state and local governments to regulate loading operations at rail facilities is a complex subject. There is a federal statute that vests the Surface Transportation Board with jurisdiction over transportation by rail carriers. Termination Act 49 U.S.C. §1050. This can include loading operations and *Green Mountain. Green Mountain Railroad Corporation v. State of Vermont*, 404 F.3d 638 (2nd Cir. 2005).
- b. On the other hand, not all state and local regulations are preempted. State and local bodies retain police powers which protect public health and safety. Several cases discuss this in more detail such as *Hi Tech Tans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004). *See also, Green Mountain* at 404 F.3d at 643 (“States and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.”).
- c. State and local laws that impose reasonable requirements on controlling dust and other pollution from frac sand loading operations might be permissible under these standards but each case should be evaluated on an individual basis.

5. Political Issues.

B. Review Of Preemption Legislation.

1. **SB 349 – Absolute Preemption of Licensing Ordinances for Nonmetallic Mining.**
2. **SB 362 – Expansion of Existing Limitations.**
 - a. Codifies the diminishing asset rule for zoning ordinances and applies the rule to licensing ordinances. A licensing ordinance may not affect an existing nonmetallic mining facility or an existing off-site processing or transportation facility.

- b. Extends the nonmetallic registration process in Wis. Stat. § 295.20 to licensing ordinances. If a nonmetallic mining deposit is registered, an ordinance may not *prevent* the extraction of that deposit unless the ordinance is necessary to implement a master plan, comprehensive plan or land use plan adopted one year before the enactment of the ordinance.
- c. Prohibition of a zoning or licensing ordinance that applies to a borrow site or a material disposal site.