

TOWN REGULATION OF FRAC SAND AND NONMETALLIC MINING OPERATIONS IN WISCONSIN

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I. The Most Common Local Impacts of Mining Operations, Including Frac Sand and Nonmetallic Mining Operations are as Follows:

- Unsafe and destructive truck traffic on town, county, and other roads;
- Air and water pollution from mining, trucking, rail transportation, and processing activities;
- Dust from mining and trucking operations;
- Waste and mine reclamation issues;
- Groundwater pollution and withdrawal issues
- Noise and vibrations from blasting, mining, processing, and trucking;
- Devaluation of affected properties near mining operations and adjacent to haul routes; and
- Liability and financial issues.

II. Wisconsin's Town Governments Can Take a Number of Actions to Protect Their Town Residents and Property Owners from the Most Common Local Impacts of Mining Operations.

A. Zoning.

Town governments can use their zoning power under the Wisconsin Statutes and pursuant to county and/or town zoning ordinances, to regulate and in some areas, prohibit frac sand and other metallic and nonmetallic mining operations. The laws governing town and county zoning in Wisconsin are complex, however. Therefore, zoning may not be the best or most efficient approach for towns to use in regulating frac sand and nonmetallic mining.

B. Licensing & Police Power Ordinances.

In addition to (or instead of) zoning, towns that have adopted Village Powers can adopt nonmetallic mining ordinances to regulate and license frac sand and other nonmetallic mining

operations. (Such an ordinance could also be written and adopted to regulate all types of mining, metallic and nonmetallic.) Likewise, counties can adopt similar licensing ordinances.

Through such ordinances (commonly called “licensing” or “police power” ordinances), towns can approve, conditionally approve or prohibit frac sand mining operations, on a case-by-case basis, to protect the public health, safety and general welfare of town residents and property owners. Such licensing ordinances have been adopted by a number of Wisconsin towns, including the Town of Cooks Valley, in Chippewa County.

The Town of Cooks Valley Nonmetallic Mining Ordinance was challenged in court by frac sand mining interests and was decisively upheld by the Wisconsin Supreme Court on February 8, 2012, in the case of *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7. The Town of Cooks Valley Nonmetallic Mining Ordinance is not a zoning ordinance, did not require county board approval, and does not regulate other types of land use the way a zoning ordinance does.

C. Mining Agreements.

Towns that have adopted licensing ordinances can address and regulate the negative impacts of frac sand and other types of nonmetallic mining by applying their ordinances or by entering into mining agreements with mining companies, such as the mining agreement entered into between a mining company (EOG) and the Town of Howard, in Chippewa County. However, in my opinion a town should have a nonmetallic mining ordinance in effect before it considers entering into such an agreement, because the ordinance gives the town the authority necessary to license a frac sand mining operation by agreement with a mining company. (Note: Towns and counties can enter into “local agreements” with *metallic* mining companies, even if they do not have a separate mining ordinance, under Wis. Stat. § 293.41. This statute expressly delegates to towns and counties the power to enter into local agreements with mining companies. *See Nicolet Minerals Company v. Town of Nashville*, 2002 WI App 50, 250 Wis. 2d 831, 641 N.W.2d 497. There is no such express delegation under the Wisconsin Statutes for towns to enter into local agreements with mining companies engaging in *nonmetallic* mining, however.)

D. Town Road Agreements.

Towns can also regulate use of their town roads by mining companies and mining operations, and they can require mining companies to enter into special town road agreements to govern truck routes, establish hours of operation, set other limits on trucking and hauling sand and materials (such as requiring tarping loads), and to require the mining companies to pay for road maintenance, repair, reconstruction, etc. *See Wis. Stats. §§ 349.16 & 349.17.*

E. Moratoria.

Towns may also adopt short-term moratoria on frac sand and other nonmetallic mining, to give them time to develop more permanent and comprehensive nonmetallic mining restrictions through adoption of a licensing ordinance or zoning.

F. Town Board Action or Direct Legislation Required.

Whatever is done to regulate frac sand and nonmetallic mining by a town must be done either through action taken by the elected town board members. However, if the town board members refuse to act, it may be possible to enact a town licensing ordinance through a petition for direct legislation by town residents (electors), pursuant to Wis. Stat. § 9.20. *See Mount Horeb Community Alert v. Village Board of Mount Horeb*, 2003 WI 100, 263 Wis. 2d 544, 665 N.W.2d 229.

III. Wisconsin's Town Governments Have the Legal Authority to Adopt Nonmetallic Mining Licensing Ordinances that Would Allow Them to Prohibit Proposed Mining Operations on a Case-By-Case Basis.

A. It is Perfectly Legal for Towns to Prohibit Frac Sand & Nonmetallic Mining Proposals on a Case-By-Case Under a Nonmetallic Mining Licensing Ordinance in Wisconsin.

Towns that have a licensing ordinance similar to the Town of Cooks Valley Nonmetallic Mining Ordinance can decide to prohibit development or expansion of proposed frac sand mines on a case-by-case basis, based on the location of the proposed mine or mines, the proposed mining operations, health concerns associated with frac sand mining or for other reasons to protect of public health, safety, and general welfare.

To do so towns should generally adopt and apply such ordinances in a reasonable manner on a case-by-case basis, to all parties applying for mining permits. Similarly situated mining proposals should be treated fairly and equally relative to each other by any given town. However, different mining proposals, located in different locations in the same town, from different mining companies, with different types of operations, may not be considered similarly situated and may, thus, be treated differently from one another under such ordinances. Also, if a town has such an ordinance and there is an existing mine in the town, the town can potentially stop any expansion of the mine or regulate the expansion with specific conditional restrictions.

This regulatory approach, with the possible prohibition of mining proposals or expansions on a case-by-case basis, is clearly provided for in the language of the Town of Cooks Valley Nonmetallic Mining Ordinance, which I drafted. Moreover, it has also been expressly recognized and upheld by the Wisconsin Supreme Court in its February 8, 2012 decision upholding the Town of Cooks Valley Nonmetallic Mining Ordinance: *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7.

In the *Zwiefelhofer* decision, at paragraph 55, the Wisconsin Supreme Court stated as follows with respect to the Town of Cooks Valley Nonmetallic Mining Ordinance:

¶55 The Ordinance does affect the location where mines may operate. It may be that there are certain locations in the Town where a nonmetallic mine would not be allowed, even with conditions attached, but the Ordinance's impact on the location of nonmetallic mines is an incidental consequence of the Ordinance's

general goal of ensuring that nonmetallic mines are "in the best interests of the citizens of the Town, and will be consistent with the protection of public health, safety and the general welfare," no matter where they are located.

In addition, the court stated, at paragraph 66 of the same decision, as follows:

¶66 Fifth, unlike traditional zoning ordinances that feature fixed, self-administering rules and do not allow for case-by-case, ad hoc assessments of individual uses in particular locations, the Ordinance features no permitted uses. The Ordinance operates exclusively on a case-by-case basis, where each would-be land user must apply for a permit to engage in nonmetallic mining. Although there has been an increase in "conditional uses" in zoning ordinances, zoning ordinances still generally include certain categories of uses that are permitted as of right and do not require case-by-case assessment.

Further, at paragraph #73 of the *Zwiefelhofer* decision, the court stated:

¶73 Nevertheless, the Ordinance has similarities to a zoning ordinance. Conditional allowance of a land use and exemption of preexisting land uses are features associated with zoning ordinances. The Ordinance clearly regulates the use of land in a potentially dramatic way. It regulates nonmetallic mining in many respects and in great detail. A landowner might be barred from engaging in nonmetallic mining in a certain location or in the entire Town because of the terms of the Ordinance. The extent to which an ordinance affects the use of land is a relevant consideration in determining whether the regulation is a zoning ordinance, but this consideration is not dispositive. Many non-zoning ordinances affect the use of land.

Thus towns which have nonmetallic mining licensing ordinances like the one adopted by the Town of Cooks Valley can prohibit new frac sand mines from being developed on a case-by-case basis, provided their ordinances are applied in a reasonable manner based on public health, safety, and general welfare considerations. Such towns can also prohibit the expansion of existing nonmetallic mines on the same basis.

Finally, there are many resources available for interested persons and town officials on this issue. The Wisconsin Towns Association has much information on its website, and there are many well-informed citizens and public officials who can provide additional information on this issue. I have represented the Town of Cooks Valley on this issue for several years, and I have also represented and assisted other towns, citizens groups, and individuals regarding this issue. Please feel free to contact me at the address for more information.