

Wisconsin Supreme Court Approves Non-zoning Town Ordinance Regulating Frac Sand Mining

A lawsuit challenging whether a town without a zoning ordinance could license and regulate non-metallic mining was decided by the Wisconsin Supreme Court on February 8, 2012. The Town of Crooks Valley claimed its ordinance was enacted under its police powers as an exercise of town village powers. Zweifelhofer and other land owners in the town filed a lawsuit alleging that under Wisconsin law this was a zoning ordinance, and the town had not followed the required legal steps to enact a valid zoning ordinance. The Supreme Court disagreed, saying it was not a zoning ordinance, but a valid exercise of police powers allowed as part of town village powers.

Professor Brian Ohm of the UW Madison and the UW Extension prepared the following summary and analysis of the case.

Wisconsin Supreme Court Upholds Town's Nonmetallic Mining Ordinance

On February 8, 2012, the Wisconsin Supreme Court filed its opinion in the case *Zweifelhofer v. Town of Crooks Valley*, 2012 WI 7, upholding the town's nonmetallic mining ordinance against a challenge that it was an improperly adopted zoning ordinance.

Background on the Town and the Police Power Authority to Adopt the Ordinance

The Town of Crooks Valley is an unzoned town located in Chippewa County. Chippewa County has a county zoning ordinance but the Town has not approved the application of the County's zoning ordinance in the Town, nor has the Town adopted its own ordinance. In 2008, the Town adopted a nonmetallic mining ordinance to regulate nonmetallic mining operations within the Town. The Town had adopted village powers in 2001 and the Town used the general police power authority given to villages (and Towns that adopt village powers) as the authority to adopt the ordinance. This basic police power authority is *lithé* power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public." Wis. Stat. § 61.35(1).

The Town's Nonmetallic Mining Ordinance

The Town's nonmetallic mining ordinance requires a permit for the operation of nonmetallic mines and sets forth the application process. The appendix to the Ordinance contains the application form, which

the applicant must submit to the Town Clerk along with an application fee. The application is first considered by the Town Plan Commission and copies are distributed to all residents who own land adjoining the proposed site. The Town Plan Commission then makes a recommendation to the Town Board. The Town Board considers the recommendation at a public meeting and takes comments from the public. The Town Board determines whether the "mine is in the best interests of the citizens of the Town, and will be consistent with the protection of public health, safety and general welfare;" and whether the applicant has received any required federal, state, and county permits. If these criteria are satisfied, the Town Board "shall grant the permit, either with or without conditions."

The Ordinance elaborates on the type of conditions that the Town may impose on nonmetallic mining "to protect public health and safety and promote the general welfare of the Town" as follows:

Such conditions may include, but are not limited to, restrictive provisions and proof of financial security for reclamation, restrictive provisions and proof of financial security for town road maintenance and repair, restrictions on hours of operation, restrictions on truck routes on town roads, restrictions on truck and traffic volume into and out of the mine site, restrictions to protect groundwater quantity and quality, restrictions to safeguard public and private drinking and agricultural wells, restrictions to control air emissions and dust from the mine and its operations, and any other restrictions deemed necessary and appropriate

Finally, the Ordinance exempts preexisting mines from the application and permit requirements. The Ordinance applies, however, to expansion of preexisting mines.

The Lawsuit

The plaintiffs own land in the Town and have engaged in nonmetallic mining operations. They brought the lawsuit contending that the nonmetallic mining ordinance is a zoning ordinance and is invalid because the County Board did not approve it. (If unzoned towns in counties with a county zoning ordinance wish to have their own zoning ordinance, the county board must approve the town zoning ordinance and amendments to the town zoning ordinance.) The Wisconsin Supreme Court's decision focuses on whether or not the nonmetallic mining ordinance is a zoning ordinance.

The unanimous Wisconsin Supreme Court decision, written by Justice Shirley Abrahamson (Justice Prosser did not participate), evaluates the Town's ordinance against some of the common characteristics of a traditional zoning ordinance and concludes that the Town's ordinance is not a

zoning ordinance. The Court notes that many traditional characteristics of zoning ordinances are absent from the Ordinance. The Ordinance does not create multiple districts; it applies with equal force to any location in the Town. The Ordinance does not confine nonmetallic mining to any particular area in the Town; no parts of the Town are foreclosed to nonmetallic mining. The Ordinance does not directly affect where an activity may take place; it governs how an activity must be conducted and incidentally limits where it may be conducted. The Ordinance does not automatically permit or prohibit any land use; it operates entirely on a case-by-case basis. The Ordinance does not comprehensively address a wide range of potential classes of land use; it speaks only to a single, specific land use.

However, the Court did find that the Town's ordinance has several similarities to a zoning ordinance. The Town's ordinance mentions conditional uses and excludes existing mining operations. Conditional allowance of a land use and exemption of preexisting land uses are features associated with zoning ordinances. The Town's 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.

While the Supreme Court recognizes that the extent to which an ordinance affects the use of land is a relevant consideration in determining whether the regulation is a zoning ordinance, that consideration is not dispositive. As noted by the Court: "Many non-zoning ordinances affect the use of land."

The Court's decision confirms an important non-zoning tool available to local government to regulate activities such as nonmetallic mining to protect public health, safety, and welfare. Finally, since the ordinance is not a zoning ordinance it is not required by law to be consistent with a local comprehensive plan.

*Summary prepared by **Brian W. Ohm**, UWEX Planning Law Specialist. February 8, 2012*