Wisconsin Counties Association

Nonferrous Metallic Mining Regulation Handbook

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TABLE OF CONTENTS

PAGE

SECTION VII: ZONING ORDINANCES

1. Legal Standards for Zoning Ordinances
2. Determining Policy
3. Drafting Considerations
4. Approval Process
5. Comprehensive Planning and County Development Plans
6. Timing and Vested Rights
7. Spot Zoning
8. Contract Zoning
9. Permitted Uses and Equal Protection
10. Conditional Use Permits

SECTION VIII: LICENSING ORDINANCES

1. Licensing Ordinances Must Be Distinguished From Zoning Ordinances
2. County Authority to Adopt Licensing Ordinances
3. Legal Risks in Adopting Licensing Ordinances vs. Zoning Ordinances for Regulation of Nonferrous Metallic Mining: A Licensing Ordinance May Be Deemed a Zoning Ordinance.
4. Another Legal Risk in Adopting Licensing Ordinances vs. Zoning Ordinances for Regulation of Nonferrous Metallic Mining: Potential Loss of WisDNR's "Local Approval" Requirement.
5. And Another Legal Risk in Adopting Licensing Ordinances vs. Zoning Ordinances for Regulation of Nonferrous Metallic Mining: Potential Loss of Ability to Use A Local Agreement.
6. Best Practices for Adopting a Licensing Ordinance to Regulate Nonferrous Metallic Mining.

SECTION IX: LOCAL IMPACT COMMITTEES

1. Statutory Authority for Local Impact Committees
2. Local Impact Committee Powers
3. Operator's Representation on a Local Impact Committee
4. Joint Impact Committees
5. Funding For Local Impact Committees

SECTION X: LOCAL AGREEMENTS

1. Statutory Authority for Local Agreements
2. Components and Requirements of Local Agreements
3. Waiver of Zoning Requirements in Local Agreements
4. Separate Ordinance Requiring a Local Agreement
5. Additional Benefits of Local Agreements
6. Limitations of Local Agreements
7. Additional Best Practices for Local Agreements

SECTION XI: DEVELOPMENT MORATORIA

1. Counties Lack Statutory Authority to Impose a Development Moratorium on Nonferrous Metallic Mining
2. Moving Ahead with a Development Moratorium on Nonferrous Metallic Mining
3. Evidentiary Precautions
4. Best Practice for Implementing Development Moratoria

SECTION I: DISCLAIMER

The practices contained in this *Nonferrous Metallic Mining Regulation Handbook* (referred to herein as the "Handbook") are for informational purposes. There are complexities in every situation that must be addressed on a case-by-case basis. Nothing in this Handbook should be construed as legal advice or suggesting any problem with any existing ordinance or agreement. Instead, it is the Wisconsin Counties Association's ("WCA") hope that counties will take the opportunity to review existing regulations and agreements, and address any problem areas that they believe may exist. Moving forward, it is WCA's recommendation that all counties use the materials in this Handbook as a guide for future regulations and agreements. Moreover, it is critical that counties seek advice from corporation counsel and, if deemed advisable, other counsel and consultants, when engaging in the regulatory process to ensure compliance with all state laws, federal laws, standards, and precedent.

SECTION II: EXECUTIVE SUMMARY

The WCA is providing this guidance in response to 2017 Wisconsin Act 134 ("Act 134"), which was enacted December 11, 2017. Act 134, in effect, ends what has been referred to as Wisconsin's "moratorium" on nonferrous metallic mining (also known as sulfide mining). For ease of reference, this Handbook refers to the body of law prior to Act 134 as the "State Moratorium." With Act 134's passage, nonferrous metallic mining operations will likely increase in Wisconsin given the changes to the current standards and processes applied by the State of Wisconsin Department of Natural Resources ("WisDNR"). Act 134 changes how WisDNR regulates bulk sampling, prospecting, and mining of nonferrous metals, while also setting forth strict timelines for review and directives on what administrative code provisions WisDNR may promulgate to implement the changes resulting from Act 134. All of these changes may impact how counties elect to regulate nonferrous metallic mining.

This Handbook is intended to serve as a guide to aid in the development of ordinances and agreements that protect the interests of county governments and the residents they serve. It has been designed to provide a basic framework for deliberation of regulatory options among county leaders. It will be in counties' best interests to draft consistent, well-reasoned regulations prior to the first application for nonferrous metallic mining permits. By taking proactive measures, county officials will be well-prepared to address local concerns and needs when operators pursue nonferrous metallic mining in their counties.

Deviation from consistent, well-reasoned local regulations of a particular industry can and has resulted in state preemption of local governments' regulatory authority. In just the last 15 years, the State of Wisconsin Legislature ("State Legislature") has removed local regulation of significant land uses and industries, such as high capacity wells, concentrated animal feeding operations (CAFOs), wind mill siting, and cellular and radio tower siting. In each instance, the State Legislature reacted to significant variations in the level of local regulation to create uniform standards. The WCA believes in responsible local control of nonferrous metallic mining in harmony with the new statutory requirements set forth in Act 134.

While the WCA understands that local conditions must be considered and addressed throughout the development of any regulation, WCA recommends that counties adhere to the guidance included in the Handbook to the greatest extent possible. The information contained throughout the Handbook provides instructions to guide counties in moving forward with whatever regulations are deemed appropriate policy for each county, and to ensure the process for adopting the regulations is open, transparent, and provides an opportunity for input from the public and other stakeholders.

The Handbook is organized into the following Sections:

1. **Section III - General Reference Information.** It is important for county representatives to understand what has changed, and what has not changed, after Act 134. County officials should know which steps to take, and which steps to avoid, in codifying local policy on nonferrous metallic mining.

2. Section IV - Procedural Limitations and Considerations. Throughout the course of developing a regulatory framework, counties should actively engage in a process that is transparent, provides for active input, is fair, includes reasonable timelines, engages the public, adheres to ethical considerations, and utilizes data-driven decision-making.

3. Section V - Environmental Regulatory Considerations. Nonferrous metallic mining is heavily regulated at both the state and federal levels. It is important for county representatives to understand these regulations and to understand whether a county may adopt more stringent environmental regulations than those set forth in state and federal regulations. The environmental regulatory considerations apply to zoning ordinances, licensing ordinances, and local agreements.

4. Section VI - Considerations for Both Zoning Ordinances and Licensing Ordinances. Both zoning ordinances and licensing ordinances are exercises of a county's police power, yet also have differences. County officials should be well-versed in these general considerations.

5. Section VII - Zoning Ordinances. Zoning ordinances present an opportunity for thorough regulation of nonferrous metallic mining. While the procedure for enacting a zoning ordinance is statutorily defined, there are practical and legal issues that must be considered when adopting and administering any zoning ordinance. In addition, Chapter 293 presents unique opportunities for a county to waive certain zoning and permitting requirements. Waiving certain requirements may create leverage for counties when negotiating a local agreement with a mine operator.

6. Section VIII – Licensing Ordinances. Licensing ordinances are an option for regulating nonferrous metallic mining without implementing a zoning ordinance. However, licensing ordinances present risks that counties need to consider when regulating nonferrous metallic mining.

7. Section IX - Local Impact Committees. Counties may form a local impact committee, which assists in obtaining information to understand, discuss, and plan for the impacts of a potential nonferrous metallic mining operation.

8. Section X - Local Agreements. Counties may enter into a local agreement with a nonferrous metallic mine operator to address multiple issues. A local agreement is an important tool for counties to address the complexities of regulating nonferrous metallic mining in a flexible and efficient manner. Local agreements may modify the general procedure that would otherwise be followed in securing local zoning approvals.

9. Section XI - Development Moratoria. The WCA does not recommend implementing a development moratorium on nonferrous metallic mining, even when a county requires time to develop an ordinance or enter into a local agreement. This section discusses the statutory basis for the WCA's recommendation.

SECTION III: GENERAL REFERENCE INFORMAITON

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1. General Information – Nonferrous Metallic Mining.

Nonferrous metallic minerals are used in various products throughout the world on a daily basis. For example, nonferrous metallic minerals are often used for technology manufacturing and by producers of green technology products. Examples of nonferrous metallic minerals include copper, zinc, gold, silver, platinum, nickel, aluminum, and lead.

The process used to extract nonferrous metallic minerals from the earth is called nonferrous metallic mining or sulfide mining. During this process, ore is taken from mines, and nonferrous metals are then extracted from the ore leaving sulfides as a byproduct. Sulfides, when exposed to the air and water, can create sulfuric acid, which may present health concerns and environmental risks.

Nonferrous metallic mining may present both benefits and drawbacks to local communities. Economic benefits may include job creation and "multiplying impacts," such as an increase in construction, manufacturing, and other ancillary services. However, counties must also consider any negative impacts created by of nonferrous metallic mining. These impacts may include environmental effects on the land, air, and water, fluctuations in property values, public health risks, traffic, and noise concerns.

2. Federal Nonferrous Metallic Mining Regulation.

Federal law contains multiple areas of nonferrous metallic mining regulation, including the Clean Air Act and the Clean Water Act. Federal environmental laws are typically administered in Wisconsin jointly by the U.S. Environmental Protection Agency ("EPA") and by WisDNR. The EPA and WisDNR will generally have a formal memorandum of understanding to delegate primary oversight and enforcement responsibilities to WisDNR. *See Section V/1 Environmental Regulatory Considerations/Federal Regulation* below for more information regarding federal environmental regulations.

3. Wisconsin's Nonferrous Metallic Mining Legislation.

In 1998, the State Legislature imposed the State Moratorium against nonferrous metallic mining. On December 11, 2017 Wisconsin Act 134 ("Act 134") was created and, in effect, ended the State Moratorium on nonferrous metallic mining. Act 134 is effective July 1, 2018.

Act 134 is expected to allow more nonferrous metallic mining operations in Wisconsin. While mining companies will have an opportunity to engage in nonferrous metallic mining in Wisconsin, operators are still required to work with counties to secure any necessary local approvals.

See Section V/2 Environmental Regulatory Considerations/Wisconsin Regulation below for more information regarding Wisconsin's environmental regulations.

4. What Has Changed Since Act 134? Act 134 brought changes to nonferrous metallic mining regulation in Wisconsin. It is important for county officials to understand what *has* changed pursuant to Act 134:

- *"10-Year Rule" Repealed.* Act 134 repeals the requirement under which applicants for nonferrous metallic mining permits must provide, and WisDNR must verify, information showing that a nonferrous metallic mining operation in the United States or Canada has operated for at least 10 years without polluting surface water or groundwater, and that a nonferrous metallic mining operation in the United States or Canada has been closed for at least 10 years without polluting surface water or groundwater.

- *Applicability of Groundwater Standards.* Prior to Act 134, groundwater standards generally applied to the land surface down through all saturated geological formations. Under Act 134, groundwater contamination enforcement standards do not apply in nonferrous metallic mining below the depth at which the groundwater is not reasonably capable of being used for human consumption and is not hydraulically connected to other sources of groundwater that are suitable for human consumption.

- *Wetlands.* Act 134 eliminates certain administrative code provisions intended to protect wetlands from specifically-identified impacts caused by nonferrous metallic mining. Now, general wetland requirements apply to a nonferrous metallic mining site.

- *Bulk Sampling.* Act 134 creates a separate approval process for "bulk sampling," which is defined as extraction of less than 10,000 tons of total material of nonferrous metallic minerals. The bulk sampling results may be used to support a mining application. A party wishing to engage in bulk sampling must file a bulk sampling plan with WisDNR. The filing triggers a streamlined approval process.

- *Mining Permit Application Timeline.* Act 134 implements changes to the nonferrous metallic mining permit review and approval processes. A summary of the timeline is as follows:

    - WisDNR has 180 days after application submittal to provide comments and request additional information.

    - If no additional information is requested within the initial 180 days, WisDNR has 90 days to prepare a draft Environmental Impact Statement ("EIS"), a draft permit, and any other draft approvals.

    - If WisDNR requests additional information within the initial 180 days, WisDNR then has an additional 90 days after receipt of the additional information to provide comments and request additional information.

    - WisDNR then has 180 days after the submittal of the additional information to prepare a draft EIS, a draft permit, and other draft approvals.

- If additional information is not requested, WisDNR has 90 days to prepare a draft EIS, a draft permit, and any other draft approvals.

Act 134 also requires WisDNR, the applicant, the U.S. Army Corps of Engineers and other relevant federal agencies to enter into a memorandum of understanding, which may set forth alternative timelines for the permitting process.

- *High Capacity Well Approval.* A mining applicant must still obtain a high capacity well approval if the applicant will withdraw groundwater at a rate and capacity of more than 100,000 gallons each day. However, the approval framework has changed. Prior to Act 134, WisDNR was prohibited from granting a permit for a high capacity well if the withdrawal would result in the "unreasonable detriment of the public." Under Act 134, WisDNR may grant a high capacity well permit with conditions to avoid such unreasonable public detriment.

- *Hearing and Review Process.* Act 134 alters the public hearing process and eliminates a "master hearing," which included both a public information hearing and a contested case hearing (with testimony under oath and an opportunity to cross-examine). Now, WisDNR will conduct only the public informational hearing prior to rendering its decision on a permit application. Once WisDNR renders its approval, an aggrieved party may file for a contested case hearing within 60 days. Act 134 also imposes timelines for a contested case.

- *Fees.* Act 134 exempts a nonferrous metallic mining operation from specified solid waste disposal fees.

- *Predictive Modeling.* Act 134 imposes a 250-year limitation of an examination period if WisDNR requires an applicant to conduct hydrological modeling to determine whether a waste site will violate groundwater or surface water quality regulations.

- *Financial Assurance Requirements*. Prior to Act 134, an applicant must have created and maintained, in perpetuity, an irrevocable trust to ensure the availability of funds for preventive and remedial activities. Act 134 eliminates this requirement and creates two (2) new statutory financial assurance requirements.

5. What Has Not Changed Since Act 134? While Act 134 brought many changes to nonferrous metallic mining regulation in Wisconsin, many elements of Wis. Stat. Chapter 293 *have not* changed:

- *Local Authority to Regulate.* Most significantly, Act 134 did not generally change counties' authority to regulate nonferrous metallic mining so long as counties are not preempted by other state or federal regulations. *See Section V/4 – Environmental Regulatory Considerations/Preemption* for more information.

- *Local Impact Committee to Discuss Agreement.* A county that is "likely to be substantially affected by potential or proposed mining" may still establish a local impact committee pursuant to Wis. Stat. § 293.33(1). The purpose of a local impact committee should be to facilitate communications between the county and the mine operator, analyze the implications of mining, review and comment on reclamation plans, develop solutions to mining-induced growth, recommend priorities for local action, and negotiate a local agreement. *See Section IX – Local Impact Committees* for more information.

- *Ability to Waive Zoning Regulations.* If a county and mine operator come to agreement on the terms, conditions and other regulatory points of the operation, a county has the right to waive zoning requirements and other permits. Any waivers must be contained within a written local agreement. *See Section X - Local Agreements* for more information.

- *Requiring Other Forms of Financial Assurance.* Act 134 does not prohibit a county from requiring other forms of financial assurance from a mine operator, such as insurance, financial requirements related to completion of a reclamation plan, and long-term care of a waste facility.

6. Nonferrous Metallic Mining Frequently Asked Questions (FAQs). Counties often face common questions regarding nonferrous metallic mining. Below are responses to the common questions counties may face.

Q: May a county explicitly prohibit nonferrous metallic mining in its zoning code?

A: Perhaps. A county may explicitly prohibit nonferrous metallic mining in its zoning code, or it may effectively prohibit nonferrous metallic mining by not including it as a permitted use or a conditional use. Counties must also be mindful of equal protection issues. *See Section VII/9 - Zoning Ordinances/Permitted Uses and Equal Protection* below for more information.

Q: May a county use a development moratorium of nonferrous metallic mining if it does not have sufficient time to pass a nonferrous metallic mining ordinance prior to the effective date of Act 134 on July 1, 2018?

A: No. The Wisconsin Statutes expressly prohibit counties from using development moratoria. *See Section XI - Development Moratoria* for more information.

Q: May a county require a local agreement with a mine operator?

A: It depends. If a county has a zoning ordinance, yes. If a county has a licensing ordinance, maybe. If a county does not have a zoning ordinance or a licensing ordinance, most likely no. *See Section X - Local Agreements* for more information.

Q: May a county recover its costs from an operator of a proposed nonferrous metallic mine?

A: Yes, so long as the costs are reasonably related to the nonferrous metallic mine application, pursuant to Wis. Stat. § 66.0628. Fee recovery provisions may also be set forth in a local agreement. *See Section X – Local Agreements* for more information.

Q: May a county impose environmental regulations on nonferrous metallic mining?

A: It depends. Environmental regulations may be preempted by state or federal regulations, and it is not recommended that a county duplicate environmental regulations. However, if a county feels more stringent environmental regulations are necessary to protect the public's health, welfare and safety, such regulations must not be preempted, must be narrow, and must explicitly reference the public harm that the regulation is intended to address. *See Section IX/4 - Environmental Regulatory Considerations When Are Counties Preempted From Adopting Local Environmental Regulations?* for more information regarding preemption and other environmental regulation issues.

Q: What if a county receives a complete application for a nonferrous metallic mining operation before it has adopted a zoning code or other regulatory ordinance? Is the county "stuck" with the nonferrous metallic mine?

A: It depends. Whether an applicant obtains a vested right in a particular use depends upon several factors, including the type and completeness of an application, and what the regulations are (if any) at the time the applicant submits a complete application. *See Section VII-6 Zoning Ordinances/Vested Rights* for more information.

Q: May a county permit nonmetallic mining but prohibit nonferrous metallic mining?

A: It depends. A county may permit nonmetallic mining but prohibit nonferrous metallic mining as long as the county does not violate a nonferrous metallic mining operator's right to equal protection. A county must treat applicants in similar circumstances, with no reasonable basis for different treatment, equally. However, if there is a reasonable basis for the different treatment of nonmetallic mining and nonferrous metallic mining, there is likely no denial of equal protection. *See Section VII/9 - Zoning Ordinances/Equal Protection* for more information.

SECTION IV: PROCEDURAL LIMITATIONS AND CONSIDERATIONS

There are options for counties to regulate nonferrous metallic mining such as: (1) adoption or amendment of a county zoning or licensing ordinance; (2) negotiation of local agreements with mine operator(s); and (3) depending upon circumstances, take no action at all. Each of these options present similar procedural limitations and considerations, which are discussed below.

The process for adopting any regulatory framework should be open, transparent, predictable, accountable, and provide ample opportunities for input from the public and other stakeholders. The process must also be in compliance with statutes and other applicable regulations.

Should a county decide to develop a regulatory framework for nonferrous metallic mining, the WCA recommends adherence to the points discussed below:

1. Regulatory Decision Making. In the event a county decides to pursue regulations through ordinances and/or a local agreement, counties should not engage in practices that could be perceived as non-essential and hostile to the mine operator's existing legal interests as a means to simply delay the review and approval process. Counties' actions should be deliberate; however, counties should also recognize that under certain circumstances, there may not be a role for county regulation and should not create one where none exists. For example, environmental impacts of nonferrous metallic mining may be an area in which a county determines it should not regulate due to concerns of duplication of federal and state regulations, or due to concerns of preemption. *See Sections V/1-2 - Environmental Regulatory Considerations/Federal Regulations and State Regulations* and *Section V/4 – Environmental Regulatory Considerations/Preemption* for more information.

2. Notice and Public Meetings. Nonferrous metallic mining public meetings create special considerations because Wis. Stat. § 293.33 and Wis. Stat. § 293.41 have public meeting requirements, beyond the general notice requirements, when a county is engaging a local impact committee or voting on a local agreement.

A county may create a local impact committee to discuss various impacts of a potential or proposed mining operation if the county determines that it is "likely to be substantially affected by the potential or proposed mining."[1] A local impact committee meets the definition of a "governmental body" and local impact committee meeting meets the definition of a "public meeting."[2] Therefore, a local impact committee meeting should be noticed and conducted just like any other public meeting. In addition, a local impact committee may consider a new or amended zoning ordinance as part of its discussion. Adoption of that zoning ordinance must still follow the required statutory process set forth in Wis. Stat. § 59.69(5).

[1] Wis. Stat. § 293.33(1).
[2] *See* Wis. Stat. § 19.82(1) and (2); *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987).

In the event a county elects to enter into a local agreement with a nonferrous metallic mine operator, the county must hold a public hearing on the local agreement before its adoption via a class 2 notice.[3] After the public hearing, the governing body must vote on the local agreement in a public meeting in open session.[4] The local agreement does not become affective until it is adopted in a public meeting by the governing body.[5]

The same general limitations and considerations for any other public meeting apply regardless of whether it is a meeting of the governing body or the local impact committee. The public should be provided adequate notice of all meetings where issues surrounding nonferrous metallic mining are to be considered. Exceeding minimum requirements with respect to both noticing and conducting public meetings is recommended. For instance, although 24-hours notice is required by law for public meetings relating to the development of an ordinance, it is recommended that at least 72-hours notice be provided to ensure that the public and all other stakeholders are afforded the opportunity to provide comment. Similarly, although there is not a public hearing requirement with respect to the development of a licensing ordinance, it is recommended that public comment be formally sought.

3. Process. The public should be afforded an opportunity to provide input as to draft regulations, agreements and the like. Counties should identify and proactively engage all stakeholders, including industry and citizen stakeholders, and provide each with the opportunity to offer meaningful input at every juncture. Counties should consider the development of "public information packets" for dissemination.

The local agreement provisions of the Wisconsin Statutes present a unique aspect of general zoning procedure.[6] In *Nicolet Minerals Co. v. Town of Nashville,* the Wisconsin Supreme Court held that negotiation of a local agreement and the subsequent adoption of the local agreement act as an exception to the general zoning statutes.[7] While a county may not have to follow the general zoning statutes when negotiating a local agreement, a county must still follow the general zoning statutes when adopting an underlying zoning ordinance. *See Section X – Local Agreements* for more information.

4. Timing. It is important that counties be deliberate in their approach. Timelines that reflect a reasoned approach should be established and communicated to the public and other stakeholders. In addition, counties should develop a realistic timeline for advancing any regulation or agreement, and then adhere to the timeline set forth without undue delay. If a timeline needs to be adjusted, the reasons for the timeline adjustment should be communicated to the public and other stakeholders.

5. Expertise. Counties may not have all the answers to issues presented. Counties should develop a process for vetting and enlisting outside assistance in the

[3] *See* Wis. Stat. § 293.41(4).
[4] *See id.*
[5] *Id.*
[6] *See Nicolet Minerals Co. v. Town of Nashville,* 2002 WI App 50, 250 Wis. 2d 831, 641 N.W.2d 497.
[7] *Id.*

consideration of these important issues, determining whether to take action, and what action is appropriate. Costs incurred for the general planning and drafting of a zoning or licensing ordinance may not be recovered from an applicant or other party (unless a county identifies a grant source or other appropriate method of reimbursement.) Any costs a county incurs as a result of reviewing a specific application may be recovered from the applicant so long as the costs are reasonable and necessary for the county to review and evaluate the application.[8]

6. Fact-Based Decision Making. Any actions taken by a county that appear to be punitive or hostile to any applicant or stakeholder group raise both legal and practical concerns. Engaging in regulatory and decision making processes that are driven by scientific and fact-based evidence will not only help insulate the county from legal challenges, including questioning decision-makers' impartiality, but will also aid in educating the public about the proposed project. Counties should make every effort to avoid codifying in ordinance or local agreement provisions that are unreasonably subjective or legally indefensible.

7. Ethics and Conflicts of Interest. Counties should carefully review any possible conflicts of interest that may involve decision makers at any level of the decision making process. Any appearance of impropriety, regardless of whether it truly exists, will have the effect of eroding public confidence and undermining support for the development of regulations.

8. Scope of Regulatory Authority. Act 134 vests primary oversight authority to WisDNR. However, there may be circumstances in which a county will have an opportunity to exercise some regulatory authority over a proposed nonferrous metallic mine through the adoption of a zoning or licensing ordinance, or by creating a local impact committee and setting forth requirements for a local agreement. A county must be careful not to exceed its regulatory authority. A county should not adopt ordnances that conflict with state regulations or duplicate regulatory oversight. *See Section V - Environmental Regulatory Considerations* for more information.

9. Best Practices for Procedural Considerations. In addition to following the procedures set forth in Wis. Stat. § 59.14, Wis. Stat. § 59.69, the Open Meetings Law and any relevant local rule, it is recommended that counties consider the following additional processes for adopting or amending regulations relating to nonferrous metallic mining:

- *Notice.* When possible, provide at least 72-hours advance notice of any meeting where a governmental body will convene for purposes of discussing or acting upon the proposed regulation. Wisconsin's Open Meetings Law, Wis. Stat. § 19.81, *et seq.*, requires at least 24-hours advance notice of a meeting (absent emergency), but providing as much notice as possible will ensure that interested parties are able to monitor developments.

[8] *See* Wis. Stat. § 66.0628.

- *Informational Packets.* Develop informational packets for public dissemination containing materials that the county or committee will consider, or has considered, in drafting the proposed regulation. The informational packets will ensure that the public is apprised of all relevant information prior to action being taken.

- *Timeline.* Establish a timeline of key dates detailing when the county, committees, and departments will consider various aspects of a regulation. Once the county board, committee or department has established a timeline for consideration of a regulation, publish the timeline and, to the extent possible, adhere to the timeline. Any deviation from the timeline should be communicated to the public, along with the reasons for the delay.

- *Public Hearing Process.* Develop a process for conducting public hearings on the proposed regulation. A good practice is to require sign-in for individuals desiring to speak on a particular agenda item, which identifies the individual, the group the individual represents, and whether the individual is "for" or "against" a particular agenda item being considered (if applicable). The hearing process may have time limits and the public should be advised of the time limits.

- *Identify Stakeholders.* Early on in the process, a county should identify the stakeholders that should be involved in the process – experts, industry representatives, community representatives and environmental groups. The stakeholders should receive updates regarding progress and be provided with an opportunity to participate. Organizing a local impact committee pursuant to Wis. Stat. § 293.33 is a logical way to integrate stakeholders, but a county should still communicate with stakeholders that may not be members of the local impact committee.

- *Scientific-Based Decisions.* It is critical that all decisions regarding a proposed regulation be based upon sound evidence. There are many different views regarding the benefits and risks associated with nonferrous metallic mining. Decisions based upon opinion or conjecture only lead to problems with enforcement, defending legal challenges, or continuous revisions to the regulatory mechanism.

- *Clear Public Communication.* Identify the decision makers at each consideration point of a regulation, and communicate the identity of the decision makers to the public. If a matter is left to the discretion of a department or agency, let the public know and leave the matter to the

department or agency's discretion. Likewise, if a particular measure requires committee or county board approval, that fact should be communicated. The public should not have to guess as to who is making a final determination.

- *Local Impact Committee Considerations.* Local impact committees are subject to the same notice and process requirements as any other governmental body. Counties should consider which stakeholders should sit on a local impact committee, including representatives of business, government, the public, school districts and other groups that may be impacted by a proposed nonferrous metallic mining operation.[9] A proposed or potential nonferrous metallic mine operator or its representative must also sit on a local impact committee.[10] *See Section IX - Local Impact Committees* for more information.

- *Local Agreement Considerations.* For local agreements, identify the person(s) within the county responsible for determining the necessary elements in a local agreement and the person(s) executing the agreement(s) on the county's behalf. Ensure that such person(s) signing the agreement(s) have been given the lawful authority to execute the agreement(s). Counties must also ensure that any local agreement is provided a public hearing and then adopted by the governing body in an open meeting.[11] *See Section X - Local Agreements* for more information.

- *Open and Transparent Process.* The process for adopting any regulatory framework should be open, transparent, predictable, accountable, in compliance with statutes and local ordinances, and provide an opportunity for input from all stakeholders.

[9] *See* Wis. Stat. § 293.33(2).
[10] *Id.*
[11] *See* Wis. Stat. § 293.41(4).

SECTION V: ENVIRONMENTAL REGULATORY CONSIDERATIONS

Environmental aspects of nonferrous metallic mining are regulated at multiple levels of government, including federal, state, tribal and local. Each form of regulation is subject to its own scope and limitations. Most environmental considerations are addressed in federal and state regulations; however, simply because an environmental consideration is regulated elsewhere does not necessarily mean that counties may not impose other environmental regulations. Whether a county may impose such an environmental regulation depends on several factors, including the nature of the federal, state and proposed regulation, when the county has been preempted in regulating that environmental factor, and each case's specific facts.

This section summarizes the federal and state regulations of potential environmental impacts of nonferrous metallic mining. It is important for county officials to understand federal and state regulatory oversight to determine whether the county may implement more restrictive regulations than required by federal and state law.

1. Federal Regulation.

Federal regulation of nonferrous metallic mining is based on the Mining Act of 1872, 30 U.S.C. Sections 22-54 and 611-615 as amended, including by the Mining and Minerals Policy Act of 1970, the Federal Land Policy and Management Act, and other laws. Generally, the Mining Act makes available for extraction metallic minerals on federal lands. Certain federal lands have been withdrawn altogether or restricted by law from metallic mining, including National Parks, Bureau of Reclamation projects, National Wildlife Areas, military reservations, and other designated wild and scenic areas. Some of these types of facilities exist in Wisconsin, such as the Apostle Islands National Lakeshore, the St. Croix Wild and Scenic Waterway, the Horicon National Wildlife Refuge, and Fort McCoy.

Mining on lands in Wisconsin is subject to many federal environmental requirements, regardless of whether the mining activity occurs on federally-owned lands. Federal environmental laws applicable to nonferrous metallic mining operations may include the following:

- The National Environmental Policy Act (NEPA), which requires an EIS for any major federal action, including a state action that is federally-funded, that significantly affects the quality of the environment.

- The Clean Air Act, which may require an operator to obtain permits to control emissions of hazardous air pollutants from nonferrous metallic mining operations.

- The Clean Water Act, which may require nonferrous metallic mining operators to comply with effluent limitations and water quality standards for wastewater discharges from mining operations.

- The Resource Conservation and Recovery Act (RCRA), which regulates management of solid and hazardous wastes, including "high-volume/low-hazard" wastes.

- The Toxic Substances Control Act (TSCA), which regulates some chemical substances that may be used in mining operations.

- The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund"), which requires management of hazardous substances and creates a liability scheme relating to "cradle-to-grave" life cycle of hazardous substances.

Federal environmental laws are typically administered in Wisconsin jointly by the EPA and by WisDNR. The EPA and WisDNR will generally have a formal memorandum of understanding, which designates WisDNR with primary oversight and enforcement responsibilities.

Many federal laws, in addition to environmental regulations, may apply to mining activities. Mining operations in Wisconsin need to comply with all applicable federal rules, and not just those of the EPA. For example, the Occupational Safety and Health Administration (OSHA) has general and specific requirements applicable to mining operations in Wisconsin.

2. Wisconsin Regulation.

Wisconsin environmental regulation of nonferrous metallic mining is based primarily on Chapter 293 of the Wisconsin Statutes, which establishes a comprehensive scheme for the regulation of nonferrous metallic mining in Wisconsin. However, Chapter 293 is not the full extent of state regulation of nonferrous metallic mining.

Wisconsin Statute § 293.93 requires compliance with all other applicable laws by stating "if there is a standard under other state or federal statutes or rules which specifically regulates in whole an activity also regulated under this chapter the other state or federal statutes or rules shall be the controlling standard." This provision effectively retains all other relevant environmental laws and regulations that would apply to nonferrous metallic mining operations, such as the need to obtain a wastewater discharge permit. In addition to retaining other relevant environmental laws and regulations, Wis. Stat. § 293.93 also states that those other laws and regulations "shall be the controlling standard," regardless of which regulation is more restrictive.

Wisconsin Statutes Chapter 293 sets out procedures and substantive requirements for nonferrous metallic mining activities, including exploration, prospecting, bulk sampling, mining and reclamation. Chapter 293 charges WisDNR with responsibility for assuring compliance.[12] WisDNR has promulgated regulations to implement Chapter 293, including the following Wisconsin Administrative Code chapters:

- Chapter NR130, Nonferrous Metallic Mineral Exploration.
- Chapter NR131, Nonferrous Metallic Mining Prospecting.

[12] *See* Wis. Stat. § 293.41(5).

- Chapter NR132, Nonferrous Metallic Mineral Mining.
- Chapter NR135, Nonferrous Mining Reclamation.
- Chapter NR182, Nonferrous Metallic Mining Wastes.
- Chapter NR273, Nonferrous Metals Forming and Metal Powders.

In addition, by virtue of Wis. Stat. § 293.93, nonferrous metallic mining is subject to other substantive environmental requirements generally applicable to other regulated entities beyond nonferrous metallic mining, such as:

- Discharges of wastewater.
- Construction and operation of sources emitting air contaminants.
- Discharges of dredged or fill material into wetlands.
- Construction of dams, culverts, bridges or other physical structures in waters of the state.
- Management of solid and hazardous wastes, including operation of treatment facilities.
- High capacity wells.
- Stormwater discharges.
- Erosion control.
- Protection of threatened and endangered species.
- Construction and/or operation of sewage treatment plants.
- Impacts on cultural resources.

Wisconsin Statutes Chapter 293 and the applicable WisDNR regulations establish a process that must be followed in order to operate a nonferrous metallic mine in Wisconsin. As described above in *Section III/4* above, Act 134 amended several points in the review and approval processes for nonferrous metallic mining applications.

3. State Regulation and Local Approvals. Chapter 293 recognizes the role of local units of government in WisDNR's review and approval processes for nonferrous metallic mining permits.

Wisconsin Statute § 293.49(1)(a)6 conditions WisDNR's grant of a mining permit upon its finding that "the proposed mining operation conforms with all applicable zoning ordinances." This requirement is confirmed in WisDNR's publications describing the process for obtaining a mining permit. There is not a similar condition in the statute for local approvals prior to issuance of exploration licenses or bulk sampling licenses. Nor does the statute condition WisDNR grant of a prospecting permit upon receipt of zoning approvals, although Wis. Stat. § 293.43(2m) requires that WisDNR provide notice of an opportunity for and comment to local units of

government, including counties. Thus, county zoning approvals are necessary for a state mining permit, but not for other predecessor mining activities.

Wisconsin Statute Chapter 293 includes two mechanisms to assist local units of government in the review and approval process of nonferrous metallic mining activities. First, Wis. Stat. § 293.33(1) authorizes a county that is "likely to be substantially affected by potential or proposed mining" to form a "local impact committee." The local impact committee may engage in activities such as facilitating communications, analyzing environmental implications of mining, reviewing and commenting on reclamation plans and negotiating a local agreement.[13] This statutory language permits the local impact committee to analyze and address environmental concerns. Second, Wis. Stat. § 293.41(1) permits a county to require a "local agreement" between the county and the mine operator. A local agreement may also modify the review timelines and other points within the approval process. *See Section IX – Local Impact Committees* and *Section X - Local Agreements* for additional information.

4. When Are Counties Preempted From Adopting Environmental Regulations?

The statutes do not explicitly prohibit a local agreement from imposing stricter environmental standards than set forth in federal or state regulations. However, the legal issue of preemption still applies when determining whether a county is prohibited from imposing more stringent environmental regulations than otherwise required under federal or state law.[14] Even with issues such as nonferrous metallic mining, for which the State Legislature has implemented a statewide regulatory scheme, a county may still regulate so long as the ordinances do not conflict with the state legislation under the theory of preemption.[15]

In the *Lake Beulah* case, the Wisconsin Supreme Court established a four-factor test to determine whether a local regulation is preempted by state law:

- Has the state legislation expressly withdrawn the powers of municipalities to act?
- Does the local regulation logically conflict with state legislation?
- Does the local regulation defeat the purpose of the state legislation?
- Does the local regulation violate the spirit of the state legislation?[16]

While there are no specific statutes prohibiting a county from regulating the environmental aspects of a nonferrous mining facility, counties should be mindful of "going too far." For example, Wisconsin courts have struck down local regulation of operations even when the state statute requires "local government approval" if the local regulation is deemed to "go too far."[17]

[13] *See* Wis. Stat. § 293.33(1)(a)-(g).
[14] *See Lake Beulah Mgmt. Dist. v. E. Troy*, 2011 WI 55, 335 Wis. 2d 92, 799 N.W.2d 787.
[15] *See Scenic Pit LLC v. Vill. of Richfield*, 2017 WI App 49, ¶8, 377 Wis. 2d 280, 900 N.W.2d 84.
[16] *See Lake Beulah*, 2011 WI 55 at ¶15.
[17] *See Scenic Pit LLC*, 2017 WI App 49 at ¶18.

Courts have held that even a statutory requirement of "local government approval" does not permit a municipality from stepping beyond the purpose and spirit of the state regulation. So even though the statutes appear to permit local regulation of environmental impacts of nonferrous metallic mining, counties should work to ensure that its regulations do not conflict with the state and federal environmental regulations.

5. Local Agreements and Environmental Regulation. While the *Scenic Pit* case demonstrates that a county may not exceed its regulatory authority simply because a statute requires an applicant to secure all local approvals,[18] what if a county and a nonferrous metallic mine operator *agree* to not apply state standards and impose more restrictive regulations, and therefore waive any preemption claim?

Wisconsin courts have not addressed whether preemption standards apply to local agreements, nor do the statutes address whether counties may require more stringent environmental regulations in local agreements. The statutory language permitting local agreements is broad and requires that the agreement include "a description of any conditions, terms, restrictions or other requirements determined to be necessary" by the county.[19] A local agreement may also include "other provisions deemed reasonable and necessary by the parties to the agreement."[20] This language seems to permit a county to include more stringent environmental regulations than required by state or federal law, if the county determines in good faith that the restrictions are "reasonable and necessary."[21] Of course, the operator must also agree to the more stringent regulations as part of the local agreement.

Given that the Wisconsin courts have not determined whether preemption standards apply to local agreements, and to avoid any claim of preemption, a county wishing to include more stringent environmental regulations than required by state or federal law should still meet the four prongs of the *Lake Beulah* test:

- Did the State Legislature expressly withdraw the powers of a county to act? No – Chapter 293 does not have an express prohibition against a county (or other local unit of government) from imposing environmental restrictions on nonferrous metallic mining operations.
- Does the county regulation conflict with Chapter 293 or other state legislation?
- Does the county regulation defeat the purpose of Chapter 293 or other state legislation?

[18] *See id.*
[19] Wis. Stat. § 293.41(2)(d).
[20] Wis. Stat. § 293.41(2)(h).
[21] *Id.*

- Does the county regulation violate the spirit of Chapter 293 or other state legislation?[22]

6. Best Practices When Considering Environmental Issues.

- *Coordinate with WisDNR.* Once a county receives notice that a nonferrous metallic mine operator may have interest in operating a mine in that county, county officials should immediately reach out to WisDNR. While WisDNR has certain statutory obligations to hold a public information meeting, counties should not wait until that point to voice the county's concerns. Open dialogue regarding the community's concerns, ideas and input assist WisDNR in having a better understanding of the local issues. Having a better understanding of what falls under WisDNR regulation, and what WisDNR will actually be regulating, will assist in drafting a comprehensive local agreement. In addition, WisDNR will likely be the party enforcing the environmental restrictions set forth in a local agreement.[23] A county should make sure that WisDNR will agree to enforce those terms.

- *Utilize Objective Historical and Scientific Data*. A nonferrous metallic mine applicant will oftentimes supply data to support its position as to what environmental regulations are necessary in a local agreement. Parties objecting to a proposal for a nonferrous metallic mine will oftentimes present data supporting their position that nonferrous metallic mining is harmful to the environment. It is up to county officials to sort through this conflicting data and determine what is in the best interest of the county residents' health, welfare and safety. If the analysis is in response to a specific application, a county may recover its reasonable costs incurred in its application review pursuant to Wis. Stat. § 66.0628.

- *Avoid Duplication of Environmental Regulations.* Wisconsin law is clear that WisDNR is the enforcing body for nonferrous metallic mining. Duplication of regulations may cause confusion and make the local regulations more vulnerable to legal challenges.

- *More Stringent Regulations.* If a county determines to impose more stringent environmental restrictions than otherwise required under federal or state law, a county should make sure the ordinance cites the reasonable basis and evidence supporting the need for increased regulation. A county should also address the *Lake Beulah*'s four points and demonstrate in the record why the county is not preempted from imposing more stringent environmental regulations.

[22] *See Lake Beulah*, 2011 WI at ¶15.
[23] *See* Wis. Stat. § 293.41(5).

SECTION VI: CONSIDERATIONS FOR BOTH ZONING ORDINANCES AND LICENSEING ORDINANCES

Zoning ordinances and licensing ordinances have several similarities, but also have key differences. This section discusses those similarities and differences, and also discusses considerations for both zoning ordinances and licensing ordinances.

1. Similarities and Differences Between Zoning Ordinances and Licensing Ordinances. The key similarity between zoning ordinances and licensing ordinances is that both are enacted pursuant to a county's police power. "Police power" is defined as the power to regulate for the advancement and protection of the health, morals, safety or general welfare of the community as a whole.[24] However, not all ordinances enacted under the police power are zoning ordinances.[25] Courts recognize the close overlap between zoning ordinances and licensing ordinances, and the Wisconsin Supreme Court recognized there is no bright-line rule governing what constitutes a zoning ordinance.[26] Counties should also note that courts have found licensing ordinances to be zoning ordinances given the type and extent of regulation, thereby requiring a zoning adoption process to be followed. *See Section VIII/3 – Licensing Ordinances/Legal Risks in Adopting Licensing Ordinances vs. Zoning Ordinances for Regulation of Nonferrous Metallic Mining* for more information.

The most significant difference between a zoning ordinance and a licensing ordinance is the process by which each is adopted. Zoning ordinances are granted a heightened level of scrutiny because of the potential risk of unduly infringing on a person's property right.[27] Below are other differences between zoning ordinances and licensing ordinances:[28]

- *Termination.* A license may usually be terminated pursuant to the terms set forth in the permit. A zoning designation is only "terminated" upon a change of the ordinances. A conditional use permit, issued pursuant to a zoning ordinance, may generally be terminated.[29]

- *Run With the Land.* A license does not run with the land. A zoning designation runs with the land.

- *Basis of Regulation.* A license is based on conduct and regulates activity. A zoning designation is based on location and regulates land use activity on that land.

[24] *See Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, ¶31, 338 Wis. 2d 488, 809 N.W.2d 362.
[25] *See id.* at ¶5.
[26] *See id.* at ¶8.
[27] *See id.* at ¶7.
[28] *See id. generally.*
[29] *See Section VII/10- Zoning Ordinances/Conditional Use Permits* for more information.

- *Approvals*. A license is approved on an *ad hoc*, case-by-case basis. A zoning designation sets forth pre-approved uses that do not require case-by-case analysis (except for zoning designations that permit conditional uses).

- *Transferability.* Licenses are issued to individual users and are generally non-transferable. A zoning designation runs with the land, not a person or applicant, and therefore does not transfer between parties.

- *Nonconforming Uses.* An activity or use pursuant to a license may not be "grandfathered" if an underlying ordinance changes. Existing uses may be "grandfathered" if a zoning ordinance changes.

2. Zoning Ordinances, Licensing Ordinances, and Local Agreements. Although zoning and licensing ordinances can stand alone as the sole regulatory framework for nonferrous metallic mining operations in a county, ordinances may also be developed in conjunction with local agreements pursuant to Wis. Stat. § 293.41. When used together, a local agreement and a zoning ordinance or licensing ordinance provide a county with tools that govern the operator's and the county's roles and responsibilities in the nonferrous metallic mine operations.

Pursuant to Wis. Stat. § 293.41(1), a local agreement may be used if an operator is required "to obtain an approval or permit pursuant to a zoning or land use ordinance." This language clearly permits a local agreement to be used when a zoning ordinance is in place. This language may permit a local agreement to be used when a licensing ordinance is in place so long as the licensing ordinance is deemed a "land use ordinance." Counties should be mindful to not evade the zoning ordinance adoption process by implementing a licensing ordinance that is really a zoning ordinance.[30]

See Section X – Local Agreements for more in-depth information regarding the use of local agreements with zoning ordinances and licensing ordinances.

3. Legal Considerations and Litigation Risks – What May an Operator Claim? Litigation is always a risk when a county regulates land use, especially when the regulations apply to complex operations such as nonferrous metallic mining. Below are examples of actions an operator may bring to challenge a county's zoning ordinance or licensing ordinance, or to challenge a county action.

- *Regulatory "Takings" or Inverse Condemnation Claims*. Wisconsin law allows for regulation of property "to a certain extent," but if regulation goes too far, it will be recognized as a taking.[31] A land owner or mine operator may argue that an ordinance's application or a particular restriction set forth in a permit is so restrictive that it results in a taking of his or her property without just

[30] *See Zwiefelhofer*, 2012 WI 7 at ¶7.
[31] *See Zealy v. City of Waukesha*, 201 Wis. 2d 365, 373, 548 N.W.2d 528, 531 (1996).

compensation. Courts will find that regulatory takings have occurred when a regulation denies a landowner of "all or substantially all practical uses of a property."[32] To result in a regulatory taking, a government regulation must have "rendered the property practically useless for all reasonable purposes."[33] The factors to be considered in determining whether a regulatory taking has occurred include: (1) the nature of the government regulatory scheme; (2) the severity of the economic impact on the landowner; and (3) the degree of interference with the landowner's anticipated and distinct investment opportunities.[34]

- *Improper Exercise of Police Power.* As noted above, a county exercises its police powers when adopting a zoning ordinance or a licensing ordinance. To withstand constitutional scrutiny, the county ordinance must "reasonably related" to the public's health, safety and welfare. A claim of an improper exercise of police power is usually contained within a takings claim, but it may also be an independent claim such as when a county has arguably exceeded its jurisdiction.[35]

- *Procedural challenges.* In attacking a zoning or licensing ordinance, a landowner or operator may seek the following:

  - A declaratory judgment under Wis. Stat. § 806.04, in which a court could declare an ordinance to be invalid if the court determines the ordinance does not comply with state statutes.

  - A writ of mandamus under Wis. Stat. Chapter 783, by which a court could direct a county to act as the court deems appropriate.

  - An injunction prohibiting the county from enforcing its ordinance under Wis. Stat. Chapter 813.

  - A remedy available by certiorari under Wis. Stat. § 59.694(10) if the applicant claims an unconstitutional taking or other violation of the applicant's constitutional rights.

[32] *Id.*
[33] *Id.*
[34] *See Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust,* 508 U.S. 602, 644–46, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *Zealy,* 194 Wis. 2d at 710, 534 N.W.2d 917.
[35] *See AllEnergy Corp. v. Trempealeu Cty. Env't & Land Use Comm*., 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368.

4. Best Practices When Considering Both Zoning Ordinances and Licensing Ordinances. Counties should consider four general points when considering adoption of either a licensing ordinance or a zoning ordinance to regulate nonferrous metallic mining: (1) ensure that the ordinance is a proper use of police power; (2) follow proper adoption procedures; (3) avoid duplication of state or federal environmental regulations; and (4) utilize acceptable penalty provisions. Points of consideration unique to zoning ordinances are discussed in greater detail below in *Section VII – Zoning Ordinances.* Points of consideration unique to licensing ordinances are discussed in greater detail below in *Section VIII – Licensing Ordinances*.

- *Ensure that the Ordinance is a Proper Use of the County's Police Power.* A county implementing nonferrous metallic mining regulations must ensure that the regulations reflect a proper use of the county's police power. Wisconsin courts generally uphold regulations set forth in ordinances as a proper exercise of police power when the regulation promotes "the public health, safety, morals, or general welfare" by prohibiting particular contemplated uses of land.[36] An ordinance must be "reasonably related" to protecting the public's health, safety and welfare in order to withstand constitutional scrutiny.

- *Equal Protection Considerations.* Counties must be careful to treat uses in similar circumstances equally to avoid a claim of unconstitutional violation of a user's right to equal protection.[37] However, so long as there is a "reasonable basis" for the different treatment or class of uses, there is no denial of equal protection.[38] *See Section VII/9 – Zoning Ordinances/Permitted Uses and Equal Protection* for more information.

- *Follow Proper Adoption Procedures.* Oftentimes, litigation will focus on the *process* of ordinance adoption rather than the *substance* of the ordinance. The Wisconsin Statutes set forth specific processes that a county must follow in adopting a zoning ordinance.[39] Careful consideration in following the statutory and local adoption procedures will reduce risk of legal challenges.

- *Avoid Duplication of State Environmental Regulation.* As discussed in *Section V/4 – Environmental Regulatory Considerations/When Are Counties Preempted From Adopting Environmental Regulations?*, a county is prohibited from adopting and enforcing environmental regulations of nonferrous metallic mining that are preempted by federal or state law. While counties may implement regulations that are not preempted, zoning ordinances should not duplicate the regulatory functions of the state in areas such as navigable waterways, high capacity wells or air and water quality because oversight resides with the WisDNR, not the counties. A good rule of thumb is that if a county regulation "complements" a state or federal regulation, it will usually pass legal muster. If a county regulation "conflicts" with a state or federal regulation, then it will not usually pass legal muster.

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[36] *Noranda Expl., Inc. v. Ostrom*, 113 Wis. 2d 612, 628–29, 335 N.W.2d 596, 605 (1983).
[37] *See Brown Itern'l. v. Board of Adjustment,* 60 Wis. 2d 182, 203-204, 208 N.W.2d 121 (1973), *citing Tateoka v. City of Waukesha Board of Adjustment,* 220 Wis. 2d 656, 670, 220 583 N.W.2d 871 (1998).
[38] *Shannon & Riorden v. Board of Zoning App.*, 153 Wis. 2d 713, 728, 451 N.W. 2d 479 (Ct. App. 1989).
[39] *See* Wis. Stat. § 59.69(5).

- *Utilizing Acceptable Penalty Provisions.* Counties may include penalties for violations of zoning and licensing ordinances. The penalties, however, should be reasonable. Ordinances containing penalties for noncompliance may not be punitive in nature and may not impose criminal sanctions (fines or imprisonment) for noncompliance. The primary purpose of an ordinance cannot be the raising of revenue in lieu of taxation, but forfeitures may at least pay the cost of enforcement of ordinances and regulations. A forfeiture may be imposed to effect compliance and deter violations.[40] When drafting penalty provisions for noncompliance, it is recommended that counties limit the amount of any forfeiture to that which can reasonably be considered as reimbursing the county for the costs of monitoring and enforcing compliance, and reasonably ensuring future compliance.

[40] *See Village of Sister Bay v. Hockers*, 106 Wis. 2d 474, 480, 317 N.W.2d 505 (Ct. App. 1982).

SECTION VII: ZONING ORDINANCES

Zoning ordinances represent the most comprehensive regulatory framework available to counties seeking to regulate nonferrous metallic mining. Because the legal and statutory foundation for the development of zoning ordinances requires significant opportunity for public input and delineates a clear process for adoption pursuant to Wis. Stat. § 59.69(5), zoning ordinances are arguably the strongest and most legally defensible regulatory framework available to counties.

1. Legal Standards for Zoning Ordinances. A zoning ordinance is an exercise of a county's police power. Police power is defined as "the power to regulate for the advancement and protection of the health, morals, safety or general welfare of the community as a whole."[41] Zoning ordinances will be upheld when they are deemed a *valid* exercise of a county's police power. As such, zoning ordinances must have a reasonable and rational relationship to the furtherance of a proper legislative purpose.

Protecting the public from potential impacts of nonferrous metallic mining, particularly any environmental or health impacts, likely qualifies as a "proper legislative purpose." Wisconsin Statute § 293.49(1)(a)6 anticipates a local zoning regulatory overlay and requires that a "proposed mining operation conforms with all applicable zoning ordinances." Other sections of Chapter 293 reference local zoning considerations, thus contemplating and anticipating local zoning of nonferrous metallic mining.

A zoning ordinance is unconstitutional when its provisions are clearly arbitrary, unreasonable, and have no substantial relation to the public health, safety, morals or general welfare.[42] Potential impacts of nonferrous metallic mining such as noise, dust, water quality and traffic usually have a substantial relationship to public health and welfare. As such, a comprehensive zoning ordinance that addresses public health concerns such as noise, dust, and water quality is more likely to withstand a constitutional challenge.

2. Determining Policy. This Handbook does not include a "model ordinance" for nonferrous metallic mining. Why? Because each county will face particular issues and have its own policies on nonferrous metallic mining. The fundamentals of passing an ordinance are contained within Wis. Stat. § 59.69(5) and may also be contained within local rules. But prior to following the statutory implementation process, a county must determine what its *policy* will be for nonferrous metallic mining. Once the policy goals are determined, the county may move forward with drafting (or amending) its ordinance.

Public policy is a county's primary guide to action. It may also be defined as a belief set upon which the legislative actions (such as adoption of ordinances) are taken. Many factors can drive public policy, such as public input, needs of the community, natural resource availability, future

[41] *Zwiefelhofer*, 2012 WI 7 at ¶5.
[42] *Thorp*, 235 Wis. 2d at 639-640 (*citing Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

planning, and legal implications. A county must ask itself "what do we want to accomplish and what can we accomplish with respect to nonferrous metallic mining?" The answer to those questions, and a plan of implementation, generally make up a county's public policy on nonferrous metallic mining. A county may engage its planning administrators or other consultants to help formulate its policy on nonferrous metallic mining.

3. Drafting Considerations. In addition to public policy considerations, counties should be mindful of the following drafting considerations:

- *Public Input.* In addition to the required public hearings, counties should afford the public ample opportunity to provide input as to draft ordinances, even before the actual drafting occurs. Wis. Stat. § 59.69(6) allows a county to hold additional public hearings other than the generally required public hearing(s).

- *Legitimate County Interest.* When drafting zoning ordinances, it is imperative that the ordinance relate to the purposes set forth in Wis. Stat. § 59.69(1) and the purpose must meet a legitimate state interest. As noted above, zoning ordinances, as an exercise of a county's policy power, must have a reasonable and rational relationship to the furtherance of a proper legislative purpose.

- *Preemption.* A county should ensure that it has the authority to regulate what it wants to regulate prior to undertaking actual drafting, or whether it has been preempted to regulate by specific state or federal regulations.

- *Timing.* Counties should be mindful of the time it will take to draft a proper ordinance to implement its policy. Timelines that reflect a reasoned approach should be established and communicated to the public and other stakeholders. In addition, counties should develop a realistic timeline for advancing any regulation or agreement, and adhere to the timeline set forth without undue delay.

4. Approval Process. Wisconsin Statutes § 59.69(5) sets forth the specific process for adopting a zoning ordinance. Below is a brief summary of the approval process steps; however, counties are encouraged to refer to Wis. Stat. § 59.69(5) and other available resources to ensure compliance with the correct procedures. Legal challenges often focus on the *process* of an ordinance's adoption rather than the *substance* of an ordinance. *See Section IV – Procedural Limitations and Considerations* for more information.

- *Written Draft.* A county must have a written draft zoning ordinance 'in hand' before commencing the approval process.

- *Notice of Public Hearing.* Notice of the required public hearing must be a class 2 notice pursuant to Wis. Stat. Ch. 985.

- *Hold Public Hearing.* A public hearing must be held on the draft zoning ordinance following proper notice. A county zoning agency may make any

revisions it "considers necessary" following the public hearing, although revisions are not required.

- *Report to County Board and County Board Action.* Once a county zoning agency recommends enactment to the county board, the county zoning agency transmits a report and notice of the public hearing. The county board may then enact the zoning ordinance as submitted, reject it, or return it to the county zoning agency with revision recommendations. If the county board rejects the ordinance, the process may have to commence all over again.

5. Comprehensive Planning and County Development Plans. Wisconsin's comprehensive planning law (Wis. Stat. § 66.1001) requires counties to adopt a development plan addressing the nine planning elements set forth in Wis. Stat. § 66.1001(2). The law further requires that any future ordinance or amendment to an existing ordinance adopted pursuant to Wis. Stat. § 59.69 must "be consistent with" the development plan.[43] However, a development plan itself is not a standalone regulation.[44]

Counties should ensure that any measures taken to regulate nonferrous metallic mining are consistent with the county's development plan. If the proposed regulation is not consistent with the county's development plan, it is recommended that the county consider an amendment to its development plan. The county must follow the statutory steps for amending its development plan as set forth in Wis. Stat. §§ 59.69(2) and (3).

6. Timing and Vested Rights. Complex legal questions surround the retroactive application of a land use ordinance and determining whether a property owner's right to use the land in a specific way has "vested." Each analysis depends upon the specific facts of the case. Generally, however, Wisconsin follows the "Building Permit Rule" to determine whether an owner has a vested right to operate under a particular zoning designation.[45]

The Building Permit Rule holds that a landowner's rights vest upon submission of a building permit that is in "strict and complete compliance with zoning and building code requirements" that exist at the time of the application.[46] However, the nonferrous metallic mining approval process (or any other complex use of land, such as CAFOs) is *far* different from a general building approval process. The difference in complexity may be the basis upon which the Wisconsin Supreme Court extends the vested rights doctrine in heavily-regulated operations, such as CAFOs and nonferrous metallic mining.[47]

[43] *See* Wis. Stat. § 66.1001(3)(j).
[44] *See* Wis. Stat. § 66.1001(2m)(a).
[45] *See McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12*; Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 175, 540 N.W.2d 189 (1995).
[46] *See id*.
[47] *See Golden Sands Dairy*, 375 Wis. 2d 797 (2017). Oral argument occurred on January 11, 2018 and no decision has been issued as of the date of the Handbook's publication.

If the Wisconsin Supreme Court extends the vested rights doctrine beyond the current building permit "trigger point," the question becomes 'at what point does the right of use vest?' In a case of nonferrous metallic mining, does a right vest upon submission of a complete permit application, or upon submission of a complete pre-application notification pursuant to Wis. Stat. § 293.31?[48] These questions are best answered when the *Golden Sands* decision is issued given the differences between a building permit application and an application for a large, complex operation such as a nonferrous mining operation. The individual facts of each case are also key factors in determining any vested rights questions rendering it difficult to apply any bright line rules at this time.[49]

Unless the Wisconsin Supreme Court's decision in *Golden Sands* alters the determination of vested rights, the vested rights doctrine would protect a nonconforming nonferrous metallic mining use if a landowner/operator used the land for nonferrous metallic mining in conformance with the ordinance that was in place when the mining began (or used the land for mining if there was no ordinance in place that prohibited such use when the mining began). Counties considering adoption of a zoning ordinance, or amendment thereto, that regulates nonferrous metallic mining should take note of any prior nonferrous metallic mining use that may be deemed 'nonconforming' and therefore may be allowed to continue as a nonconforming use (also subject to the other legal requirements applicable to nonconforming uses.)

In addition, the current vested rights doctrine may trigger a vested right to a nonferrous metallic mine operator if the operator submitted a complete building permit application prior to any zoning ordinance or licensing ordinance changes. If a county does not have a zoning ordinance or licensing ordinance regulating nonferrous metallic mining at the time a complete building permit application is submitted, a county may not rely on any subsequent zoning or licensing ordinance adopted after the complete application is submitted. Given that a local agreement may be used when an operator is subject to a "zoning or land use ordinance," a question arises of whether a county may use a local agreement if it does not have a zoning or land use ordinance in place at the time a complete application is submitted.[50] Answers to these questions are very fact-specific and should be determined on a case-by-case basis.

7. Spot Zoning. Wisconsin courts define spot zoning as "zoning by which a small area situated in a larger zone is purportedly devoted to a use inconsistent with the use to which the larger area is restricted."[51] Spot zoning grants privileges to a single lot or area that are not granted or extended to other land in the same use district. Spot zoning is not per se illegal in Wisconsin; however, assuming that a refusal to rezone will not result in a taking by depriving an

[48] It is unlikely that a complete pre-application notification would trigger a vested right for an operator. The pre-application notification does not contain the information necessary to issue the actual prospecting permit or mining permit. An operator may have a vested right upon submission of a complete permit application; the answer depends upon the Wisconsin Supreme Court's decision in *Golden Sands* and the particular facts of each case.
[49] Interestingly, the desire for a bright-line test to answer a vested rights question is exactly what the Wisconsin Supreme Court's jurisprudence has striven for, and most recently reiterated in the *McKee* case in 2017.
[50] *See* Wis. Stat. § 293.41(1).
[51] *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 32, 33, 174 N.W.2d 533 (1970).

owner all beneficial use of the property, spot zoning should only be used when it is in the public interest and not solely for the benefit of the property owner who requests the rezoning.[52] In other words, a rezoning will pass muster as permissible if the zoning change is in the public interest and not solely for the benefit of the property owner requesting the rezoning.[53]

8. Contract Zoning. Contract zoning occurs when a zoning authority makes an agreement with a landowner to rezone a particular piece of property.[54] The basis for deeming contract zoning inappropriate in Wisconsin lies in a municipality's inability to surrender its governmental powers via the contract.

However, Wis. Stat. § 293.41 specifically grants a county the power to enter into a local agreement with a nonferrous metallic mine operator. This local agreement is a contract between an operator and a county, and must set forth reasonable conditions for approvals.[55] While Wisconsin courts have not specifically held that a local agreement is not illegal contract zoning, the holding in *Nicolet Minerals Co.* supports the argument that a local agreement is not illegal contract zoning.[56]

9. Permitted Uses and Equal Protection. Generally, zoning ordinances identify specific zones in which designated activities and uses may occur (such as residential, commercial, agricultural and industrial). Each zone typically sets forth permitted uses, prohibited uses and conditional uses.[57] However, an ordinance is not required to set forth prohibited uses but may be permissive in form by stating only the uses that are allowed in that zone.[58] In such instances, Wisconsin courts have recognized that the identification of permitted uses within a zoning ordinance means that all uses *not* referenced as permitted uses are, by definition, prohibited.[59] For example, if a county's zoning code identifies permitted uses in an I-1 industrial zone as light manufacturing and nonmetallic mining, nonferrous metallic mining is deemed prohibited because it is not specifically referenced as a permitted use.[60]

A question arises whether a county may permit nonmetallic mining but prohibit nonferrous metallic mining in its zoning code. This question creates an issue of equal protection. Equal protection within the context of zoning requires that those in similar circumstances and, assuming no reasonable basis for distinction in treatment exists, must

[52] *See Step Now Citizens Group v. Town of Utica*, 2003 WI App 109, 264 Wis. 2d 662, 663 N.W.2d 833.
[53] *See Buhler v. Racine County*, 33 Wis. 2d 137, 146 N.W.2d 403 (1966).
[54] *See State ex rel. Zupancic v. Schimenz,* 46 Wis. 2d 22, 30, 174 N.W.2d 533, 539 (1970).
[55] *See* Wis. Stat. § 293.41(1)(f).
[56] *See Nicolet Minerals Co.*, 2002 WI App at ¶12.
[57] A zoning designation may include only conditional uses. A planned unit development zoning designation is a typical example of a zoning designation that only permits conditional uses.
[58] *See* 8 MCQUILLIN, *Municipal Corporations*, § 25.124 at 492 (3d. ed. 1991).
[59] *See Foresight, Inc. v. Babl*, 211 Wis. 2d 599 (Ct. App. 1997).
[60] *Id.*

be treated equally.[61] There is no denial of equal protection so long as there is a reasonable basis for the different treatment or class of uses.[62]

Nonferrous metallic mining and nonmetallic mining are likely different enough uses so as to justify different treatment under a county zoning code, i.e., one may be permitted and one may be prohibited so long as there is a reasonable basis to justify the different treatment.[63] Nonferrous metallic mining is governed by Chapter 293 of the Wisconsin Statutes; nonmetallic mining is governed by Chapter 295 of the Wisconsin Statutes. WisDNR also has separate regulatory codes for nonmetallic mining and nonferrous metallic mining. Each use may present similar environmental and health concerns that establish a basis for local regulation (so long as the regulation is not preempted), but the types of mining are separate and distinct, as illustrated by the separation in statutory regulations and administrative code regulations.

Using the example above, if a county zoning code includes light manufacturing and nonmetallic mining as permitted uses in its I-1 industrial zone, nonferrous metallic mining is deemed not permitted by reason of it not being included as a permitted use.[64] However, if that county zoning code includes light manufacturing and *mining* as permitted uses in its I-1 industrial zone, the county may not distinguish between nonferrous metallic mining and nonmetallic mining. If one type of mining is specifically permitted and another type of mining is prohibited, there must be a reasonable basis for that different treatment or that differential treatment may be a violation of an applicant's equal protection.[65]

10. Conditional Use Permits. Conditional use permits ("CUPs") may be a useful tool for counties to regulate nonferrous metallic mining. Conditional uses are not "uses of right."[66] Rather, a conditional use is allowed only if approved by the appropriate local government authority. A CUP traditionally allows counties to consider the specific operation, determine whether the application met the ordinance's standards, and apply conditions for how the business/use operates utilizing the discretion of the determining body's members. The applicant may then be granted permission to use its property as authorized when conditions are met.[67]

2017 Wisconsin Act 67 ("Act 67") codified existing standards set forth in case law governing CUPs. Act 67 was a response in part to the Wisconsin Supreme Court's decision in *AllEnergy Corp. v. Trempealeu Cty. Env't & Land Use Comm*., 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368. Act 67 impacts counties' use of CUPs in three primary ways:

[61] *Brown Itern'l.*, 60 Wis. 2d at 203-204, *citing Tateoka,* 220 Wis. 2d at 670.
[62] *Shannon & Riorden v. Board of Zoning App.,* 153 Wis. 2d 713 at 728.
[63] *See id.*
[64] *See Foresight,* 211 Wis. 2d at 520.
[65] *Brown Itern'l.,* 60 Wis. 2d at 203-204
[66] *Town of Rhine v. Bizzell,* 2008 WI 76, ¶¶55-57, 311 Wis. 2d 1, 751 N.W.2d 780.
[67] *State ex rel. Skelly Oil Co. v. Common Council,* 58 Wis. 2d 695, 701 (1973).

- Counties are required to grant a CUP if an applicant meets, or agrees to meet, all of the requirements and conditions specified in the county ordinance. *See* Wis. Stat. § 59.69(5e)(b)(1).

- Conditions or requirements imposed by counties must be capable of being assessed on the basis of "substantial evidence," which the statute defines as "facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion." *See* Wis. Stat. § 59.69(5e)(a)(2).

- Conditions and requirements of a CUP must be "reasonable and, to the extent practicable, measureable." *See* Wis. Stat. § 59.69(5e)(b)(2).

Given Act 67's codification of existing case law and a potential change in how counties may utilize CUPs, counties should consider the following points when utilizing CUPs as a tool for nonferrous metallic mining regulation:

- *Use Reasonable Discretion.* Counties still have the right (and the obligation) to use reasonable discretion in determining whether a CUP application meets the required standards and in developing the conditions imposed on a CUP.

- *Explicit Conditions.* Counties should ensure that each condition set forth in a CUP is explicit. It would be ideal for counties to specifically list all categories of requirements in an ordinance to enable boards to rely on relevant, substantive evidence. In addition, conditions must relate to the purpose of the ordinance and all conditions, even standard conditions such as hours of operation, light control, and noise reduction, and must be supported by substantial evidence presented to the deciding body on a specific application.

- *Applicant's Compliance or Agreement to Comply with Conditions.* A CUP's conditions must be clear to establish that the applicant has complied with those conditions or agrees to comply in the future.

- *Substantial Evidence.* Counties must ensure that substantial evidence supports the conditions imposed and the underlying decision it makes on a CUP application.

- *Requirements Must Be Reasonable and Measurable (if possible).* Counties must ensure their standards and requirements are reasonable and, to the extent practicable, measureable.

- *Termination.* Counties likely still have the power to terminate a CUP assuming the terms of the CUP justify such termination upon noncompliance.

Counties should also ensure that substantial evidence supports the termination of a CUP.

SECTION VIII: LICENSING ORDINANCES

Licensing ordinances represent the least-defined regulatory framework available to counties seeking to regulate nonferrous metallic mining operations. Counties may consider instituting a licensing ordinance for the regulation of nonferrous metallic mining based on the Wisconsin Supreme Court's decision in *Zwiefelhofer*, which upheld a licensing ordinance as a method to regulate nonmetallic mining without adopting a zoning ordinance.[68] However, counties should proceed with caution in adopting a licensing ordinance rather than a zoning ordinance for comprehensive regulation of nonferrous metallic mining for the reasons discussed below.

1. Licensing Ordinances Must Be Distinguished From Zoning Ordinances. While the *Zwiefelhofer* Court went into great detail describing the similarities between a licensing ordinance and a zoning ordinance,[69] ultimately, licensing ordinances are much different than zoning ordinances, both in terms of their substance and the manner in which they are enacted. Therefore, a licensing ordinance should be considered a *complete* alternative to a zoning ordinance in nonferrous metallic mining regulation.

Licensing ordinances for nonferrous metallic mining should not be considered for adoption in counties with county-wide zoning, nor should they be used as a means to avoid procedural protections inherent to the development of a zoning ordinance. In counties without county-wide zoning, licensing ordinances may substitute for a zoning ordinance as a means to provide a consistent, predictable and well-defined framework to regulate nonferrous metallic mining but should not attempt to incorporate elements that would otherwise be considered zoning. The result may be an invalidation of the licensing ordinance for failure to follow the approval process for a zoning ordinance, as the plaintiffs claimed in *Zwiefelhofer.*[70]

Licensing ordinances should be limited to considerations affecting the health and public safety of residents and should not be vague, arbitrary or capricious. A process for receiving public input should be developed and followed. Public noticing requirements should be developed and followed. *See Section IV - Procedural Limitations and Considerations* for more information regarding adopting licensing ordinances.

2. County Authority to Adopt Licensing Ordinances. Counties have the express authority to enact and enforce ordinances "to preserve the public peace and good order within the county" pursuant to the terms of Wis. Stat. § 59.69(4). Counties also have express statutory authority to regulate aspects related to some mining activities, such as enacting ordinances for buildings, on-site wastewater treatment systems, and wells. Counties should still be mindful of any preemption issues.[71] Counties must also be mindful of specific local rules that govern the

[68] *See Zwiefelhofer*, 2012 WI 7 at ¶65
[69] *See also Section VI/1 – Considerations for Both Zoning Ordinances and Licensing Ordinances/Similarities and Differences Between Zoning Ordinances and Licensing Ordinances.*
[70] *See id.* at ¶5.
[71] Wis. Stat. § 59.70.

ordinance adoption process. Counties must follow all of those local rules in addition to the procedures set forth in Wis. Stat. Chapter 59 and Chapter 66.

3. Legal Risks in Adopting Licensing Ordinances vs. Zoning Ordinances for Regulation of Nonferrous Metallic Mining: A Licensing Ordinance May Be Deemed a Zoning Ordinance. The *Zwiefelhofer* case clarifies one legal risk in choosing a licensing ordinance over a zoning ordinance for comprehensive regulation of nonferrous metallic mining: a licensing ordinance may be deemed a zoning ordinance, and unless the required approval process was followed for a zoning ordinance, the licensing ordinance will be invalidated.

In *Zwiefelhofer*, the Wisconsin Supreme Court upheld a licensing ordinance that required a mining operator to obtain a permit, i.e. a license, for the entire mining operation. There was no underlying zoning ordinance addressing nonmetallic mining operations. The plaintiffs argued that the licensing ordinance was really a zoning ordinance given its terms, language, and extent of regulation. Because the ordinance was really a zoning ordinance, plaintiffs argued, the ordinance should be invalidated because the approval process for a zoning ordinance was not followed. While the *Zwiefelhofer* Court did not deem the ordinance a zoning ordinance, counties should be mindful that a licensing ordinance may face legal challenges and may be overturned if it is found to actually be a zoning ordinance.

The plaintiffs in *Zwiefelhofer* argued that the Wisconsin Supreme Court should adopt a rule to determine whether a licensing ordinance was actually a zoning ordinance if the ordinance "constitutes, or would constitute, a substantial interference with land use."[72] Other Wisconsin courts have held when a proposed initiative constitutes a pervasive prohibition on the use of land within a jurisdiction, it is either a zoning ordinance or an amendment to a zoning ordinance; it cannot be a licensing ordinance.[73] While the Wisconsin Supreme Court declined to adopt the "substantial interference" test in *Zwiefelhofer*, counties should consider taking additional steps to adopt a zoning ordinance that contains any desired elements of a licensing ordinance to avoid these legal challenges.[74]

4. Another Legal Risk in Adopting Licensing Ordinances vs. Zoning Ordinances for Regulation of Nonferrous Metallic Mining: Potential Loss of WisDNR's "Local Approval" Requirement. Pursuant to Wis. Stat. § 293.49(1)(a)6, WisDNR must issue a mining permit if certain conditions are met in an application. One of these conditions is that the application demonstrates that "the proposed mining operation complies with all applicable *zoning* ordinances" (*emphasis added*).[75] This language is unlike Wis. Stat. § 293.41(1), which references a "zoning *or land use ordinance* (*emphasis added*)."

Wisconsin courts have not determined whether WisDNR's permit issuance is conditioned upon an applicant securing local approvals if those approval requirements are set forth in a licensing

[72] *See Zwiefelhofer*, 2012 WI 7 at ¶60.
[73] *See id.* at ¶62, *citing See Heitman v. City of Mauston Common Council,* 226 Wis. 2d 542, 595 N.W.2d 450 (Ct. App. 1999); *see also* 76 Op. Att'y Gen. 60, 68 (1987).
[74] *See* Wis. Stat. § 293.41(2)(f).
[75] Wis. Stat. § 293.49(1)(a)6.

ordinance, rather than in a zoning ordinance. Given the lack of case law for guidance, a county faces the risk of its approvals no longer being a condition of WisDNR's approval if a county elects to use a licensing ordinance to regulate nonferrous metallic mining. In effect, a county's use of a licensing ordinance, rather than a zoning ordinance, would excuse an applicant's failure to obtain local approvals when obtaining the mining permit from WisDNR.

5. And Another Legal Risk in Adopting Licensing Ordinances vs. Zoning Ordinances for Regulation of Nonferrous Metallic Mining: Potential Loss of Ability to Use a Local Agreement. Wisconsin Statute § 293.41(1) clearly allows a county to enter into a local agreement with a mine operator if that county has a zoning code. It is less clear whether a Wisconsin court would allow a local agreement to be used in conjunction with a licensing ordinance. This uncertainty is due to the language of Wis. Stat. § 293.41(1) stating that a local agreement may be used if an operator is required "to obtain an approval or permit under a zoning or land use ordinance." While a licensing ordinance seems to meet the "permit…under a land use ordinance" requirement in Wis. Stat. § 293.41(1), a court may determine that a licensing ordinance is not a land use ordinance, thereby eliminating a county's ability to use a local agreement. In addition, a court may interpret a comprehensive licensing ordinance that meets the requirements of a "land use ordinance" as a zoning ordinance, thus requiring the necessary statutory approval process of a zoning ordinance.[76]

6. Best Practices for Adopting a Licensing Ordinance to Regulate Nonferrous Metallic Mining:

- *Consider a Zoning Ordinance Rather than a Licensing Ordinance.* Counties committed to entering into a local agreement pursuant to Wis. Stat. § 293.41 may wish to adopt a zoning ordinance rather than a licensing ordinance. Having a nonferrous metallic mining zoning ordinance should eliminate any question of whether a county may use a local agreement because Wis. Stat. § 293.41(1) clearly allows a local agreement to be used in conjunction with a zoning ordinance.

- *Only for Use in Counties Without a Zoning Code.* Counties that currently have a zoning code should not use a licensing ordinance for regulation of nonferrous metallic mining.

- *Limitations.* Licensing ordinances should be limited to considerations affecting the health and public safety of residents and should not be vague, arbitrary or capricious.

- *Approval Requirements.* Counties must still adhere to all applicable approval requirements, and it is recommended to give the public and other stakeholders amply opportunity for input.

[76] *See Zwiefelhofer*, 2012 WI 7 at ¶62-63; 76 Op. Att'y Gen. 60, 68 (1987).

SECTION IX: LOCAL IMPACT COMMITTEES

Chapter 293 of the Wisconsin Statutes provides counties with two powerful tools to address concerns with nonferrous metallic mining: local impact committees and local agreements. Local impact committees and local agreements may work in tandem or separately. This section discusses key issues with local impact committees. *See Section X – Local Agreements* for additional information regarding local agreements.

1. Statutory Authority for Local Impact Committees. Counties enjoy administrative home rule authority under Wis. Stat. § 59.03(1), which provides that "[e]very county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county." In addition, Wis. Stat. § 293.33 expressly allows a county to form a local impact committee if a county deems it "likely to be substantially affected by potential or proposed mining." Act 134 did not alter a county's ability to form a local impact committee, nor did Act 134 alter a local impact committee's rights and obligations set forth in Wis. Stat. § 293.33.

2. Local Impact Committee Powers. Wisconsin Statute § 293.33(1) allows a county to form a local impact committee if the county is "likely to be substantially affected by potential or proposed mining." The primary goal of a local impact committee is to engage in the following activities and consider implications of nonferrous metallic mining:[77]

- Facilitate communications between the committee and the mine operator.
- Analyze implications of mining.
- Review and comment on reclamation plans.
- Develop solutions to mining-induced growth problems.
- Recommend priorities for county actions.
- Formulate recommendations to the investment and local impact fund board regarding distribution of funds under Wis. Stat. § 70.395, which regulates distribution of general property taxes.
- Negotiate a local agreement under Wis. Stat. § 293.41.

The local impact committee should represent a comprehensive snapshot of groups that may be impacted by nonferrous metallic mining, and therefore the committee's input may be of great

[77] Wis. Stat. § 293.33(1)(a)-(g).

benefit to the decision-making body. The statute references the types of representatives that may be included on a local impact committee, which "include representatives of affected units of government, business and industry, manpower, health, protective service agencies, school districts, or environmental and other interest groups or interested parties."[78]

3. Operator Representation on a Local Impact Committee. Local impact committees also provide an opportunity to engage with the potential nonferrous metallic mine operator prior to the operator's formal application. Upon a potential nonferrous metallic mine operator's pre-application notice as required by Wis. Stat. § 293.31, the potential operator must appoint a "liaison person" to a local impact committee.[79] That person must provide "such reasonable information as is requested by the local impact committee."[80] Thoroughly discussing issues at the local impact committee level may save time and energy in comprehensively addressing concerns while also allowing direct negotiations with the mine operator.[81] Thereafter, an operator or other person giving notice under Wis. Stat. § 293.31 must "make reasonable efforts to design and operate mining operations in harmony with community development objectives."[82] All of these efforts may result in a smoother negotiation and approval of a local agreement.

4. Joint Impact Committees. Multiple units of government may also form a joint impact committee.[83] A joint committee may include representatives of affected units of government, business, industry, manpower, health, protective or service agencies, school districts, and environmental and other interest groups or other interested parties.[84] A joint local impact committee may be an appropriate tool if a town and county have joint zoning authority. Because Wis. Stat. § 293.41(1) permits multiple governmental bodies to enter into one local agreement, the governmental bodies represented on a joint impact committee may then also be joint parties to a local agreement.

5. Funding For Local Impact Committees. A local impact committee may receive funding from its appointing authority, request operating funds, hire staff, enter into contracts with private firms or consultants, or contract with another agency for staff services.[85] Counties may require reimbursement for these services from an applicant so long as the costs have a "reasonable relationship" to the service for which the fee is imposed.[86] Professional fees charged to an applicant must be at a rate "customarily paid" for "similar services" by the county.[87] Recovery of costs may also be included in a local agreement.[88]

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[78] Wis. Stat. § 293.33(2).
[79] Wis. Stat. § 293.33(3).
[80] *Id.*
[81] *See Nicolet Minerals Co., 2002 WI App at ¶12.*
[82] *Id.*
[83] Wis. Stat. § 293.33(2).
[84] *Id.*
[85] Wis. Stat. § 293.33(4).
[86] *See* Wis. Stat. § 66.0628(2).
[87] *See* Wis. Stat. § 66.0628(3).
[88] *See* Wis. Stat. § 293.41(d).

SECTION X: LOCAL AGREEMENTS

In addition to the local impact committee, Chapter 293 of the Wisconsin Statutes sets forth another tool for counties to use in regulating nonferrous metallic mining: the local agreement. While both local impact committees and local agreements may work in tandem or separately, a local agreement may only be used if a county has a zoning or other "land use ordinance."[89] Whether a county may create a separate ordinance that requires a local agreement, if that county does not have a zoning ordinance or a licensing ordinance, is a separate question that is discussed below.

1. Statutory Authority for Local Agreements. Counties enjoy administrative home rule authority under Wis. Stat. § 59.03(1), which provides that "[e]very county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county." Together with Wis. Stat. § 59.69(1), providing counties the ability to regulate by its police power in the interests of the public's health, welfare and safety, this statute allows counties to enter into agreements relating to development and operation of nonferrous metallic mines and its associated facilities.

In addition to a county's general police power, Wis. Stat. § 293.41(1) expressly allows a county and a nonferrous metallic mine operator to enter into a local agreement for the development of a mining operation if that operator is required to obtain other approvals or permits from the county.

Local agreements are legally binding contracts that counties may use to regulate site-specific aspects of nonferrous metallic mines. Local agreements may be used if a county has a zoning ordinance; it is less certain whether a local agreement may be used if a county has just a licensing ordinance. This uncertainty is due to the language of Wis. Stat. § 293.41(1) stating that a local agreement may be used if an operator is required "to obtain an approval or permit under a zoning or land use ordinance." While a licensing ordinance's approvals seems to meet the "permit…under a land use ordinance" requirement in Wis. Stat. § 293.41(1), a court may deem that a licensing ordinance is not actually a "land use ordinance," and therefore a county may not use the licensing ordinance as a basis to waive permit requirements. In addition, Wisconsin courts may interpret a comprehensive licensing ordinance, which *does* meet the definition of a "land use ordinance," as a zoning ordinance. In this case, a county is required to follow the necessary statutory approval process of a zoning ordinance.[90]

If a county is committed to use a local agreement, it may be best to implement a zoning ordinance rather than a licensing ordinance for regulation of nonferrous metallic mining. *See Section VII/3-5 – Licensing Ordinances* for more information regarding the use of licensing ordinances rather than zoning ordinances for nonferrous metallic mining regulation.

[89] Wis. Stat. § 293.41(1).
[90] *See* 76 Op. Att'y Gen. 60, 68 (1987).

2. Components and Requirements of Local Agreements. Wisconsin Statute § 293.41 sets forth the specific points that must be addressed in a local agreement. These points are:

- A legal description of the land subject to the agreement and the names of its legal and equitable owners.[91]
- The duration of the agreement.
- The uses permitted on the land.
- A description of any conditions, terms, restrictions or other requirements determined to be necessary by the county for the public health, safety or welfare of its residents.
- A description of any obligation undertaken by the county to enable the development to proceed.
- The applicability or non-applicability of county ordinances, approvals or resolutions.
- A provision for amendment of the agreement.
- Other provisions deemed reasonable and necessary by the parties to the agreement.[92]

Counties should ensure that all statutory requirements and local rules are followed when adopting a local agreement. A public hearing is required to afford the community an opportunity to comment on the draft local agreement prior to the local agreement's adoption.[93] After the public hearing, a county must adopt the local agreement in a public meeting of the governing body.[94] While a local impact committee may negotiate the terms of a local agreement, the local agreement may not become affective until the public hearing is held and the local agreement is adopted pursuant to Wis. Stat. § 293.41(4). *See Section IV – Procedural Limitations and Considerations*, which apply to the adoption of local agreements, for more information.

[91] Requiring a legal description of all land subject to the local agreement may avoid the issues before the Wisconsin Supreme Court in *Golden Sands Dairy*, which relate to the land subject to Golden Sands' vested rights to use 6000+ acres when all the land was not legally described in the building permit application. *See Section VII/6 – Zoning Ordinances/Timing and Vested Rights* for additional discussion of vested rights and nonferrous metallic mining ordinances.

[92] This provision renders a local agreement similar to a standard arms-length transaction, the terms of which must be agreed to by all parties thereto.

[93] Wis. Stat. § 293.41(4).

[94] *Id.*

In addition to the statutorily required terms, only terms that are considered "reasonable and necessary" should be included in a local agreement. A local agreement should not be used as a mechanism to reduce or eliminate local authority or frustrate public input. Rather, it should be viewed as a way to provide greater flexibility to address and memorialize solutions for the impacted community. A county should be mindful of requiring environmental conditions that may be preempted by state or federal laws. *See also Section V – Environmental Regulatory Considerations* for more information regarding preemption issues.

3. Waiver of Zoning Requirements in Local Agreements. A significant benefit of a local agreement is a county's ability to waive zoning requirements and approvals through the negotiation and execution of a local agreement. In *Nicolet Minerals Co. v. Town of Nashville*, the mining company was required to obtain its local approvals in order to secure its state and federal operating permits.[95] The question was whether the mining company had secured its local approvals by virtue of entering into a local agreement, rather than proceeding through the standard approval processes. The Wisconsin Court of Appeals held that the mining company had indeed secured all necessary local approvals by virtue of entering into a local agreement.[96]

The *Nicolet Minerals* Court was explicit that Wis. Stat. § 293.41 "provides a specific exception to the general zoning regulations. It allows local governments to combine in a single agreement zoning and land use permits and approvals in exchange for payments from the mining companies and attention to their concerns about the mine development."[97] The *Nicolet Minerals* Court also observed that local governments and mining companies could negotiate terms prior to commencing the actual approval process, thus resolving all issues so that the parties would not need to incur the time and expense of renegotiation at each step of the mining project.[98]

4. Separate Ordinance Requiring a Local Agreement. Counties may elect to adopt a separate ordinance, outside of a comprehensive regulatory ordinance, requiring a nonferrous metallic mine operator to enter into a local agreement. However, as discussed below, several legal risks accompany the use of a separate ordinance to require a local agreement.

A local agreement pursuant to Wis. Stat. § 293.41 must be used in conjunction with a zoning or other land use ordinance.[99] However, Wis. Stat. § 293.41 neither specifically permits, nor prohibits, a county from adopting a *separate* ordinance, outside of its zoning ordinance or a licensing ordinance, that requires a county and an operator to enter into a local agreement for a nonferrous metallic mining operation. A separate ordinance would have to meet the requirements of any other ordinance and must be an appropriate use of a county's police power to protect the public's health, welfare and safety.

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[95] Nonferrous metallic mining companies must still obtain all local zoning approvals prior to securing final operating permits from WisDNR pursuant to Wis. Stat. § 293.49(1)(a)6.
[96] *Nicolet Minerals Co.*, 2002 WI App 50 at ¶29.
[97] *Id*. at ¶12.
[98] *Id.*
[99] Wis. Stat. § 293.41(1).

Several legal risks accompany the use of a separate ordinance for requiring a local agreement. First, the question arises of whether a county is allowed to waive certain approvals and permits when entering into a local agreement pursuant to Wis. Stat. § 293.41.[100] Counties are clearly allowed to waive certain approvals and permits required pursuant to a zoning or land use ordinance when entering into a local agreement pursuant to Wis. Stat. § 293.41 and based on the *Nicolet Minerals* holding.[101] However, it is unclear whether a county would be granted the ability to waive certain approvals and permits if it relied on a separate ordinance requiring a local agreement, which was not a zoning ordinance or a "land use ordinance" as defined by Wis. Stat. § 293.41. The *Nicolet Minerals* Court did not address this issue when determining whether a local agreement under Wis. Stat. § 293.41 may be an exception to the general approval process. As such, counties should not rely upon the *Nicolet Minerals* case for its ability to waive certain approvals and permits if a separate ordinance requiring a local agreement is adopted.

Also, a county's adoption of a separate, non-zoning ordinance requiring a local agreement is also vulnerable to the same legal challenges as a licensing ordinance. For example, the separate ordinance may not be deemed a "land use ordinance" pursuant to Wis. Stat. § 293.41, thus triggering the right to use a local agreement. Second, the separate ordinance may be deemed a zoning ordinance, even if it passes as an appropriate use of a county's police power, thus requiring a higher level of approval pursuant to Wis. Stat. § 59.69(5). Wisconsin courts have held that local governments may not avoid an ordinance being construed as a zoning ordinance by calling it something else.[102] Counties should not use a separate ordinance as a mechanism by which to avoid the procedural steps required for adoption of a zoning ordinance pursuant to Wis. Stat. § 59.69(5).

5. Additional Benefits of Local Agreements. A local agreement offers additional benefits beyond the ability to waive certain zoning and land use requirements and permits. These benefits include:

- *Greater Flexibility.* Local agreements provide greater flexibility – both in terms of the types and scope of issues that can be dealt with – than approvals based exclusively on a zoning or licensing ordinance. A local agreement may be uniquely crafted to address any operation-specific issues.

- *Recovery of Costs.* Counties may include provisions for the recovery of a variety of costs in a local agreement. In *Nicolet Minerals*, the Wisconsin Court of Appeals acknowledged the acceptability of a $100,000 application fee, past and future legal expenses incurred in negotiating the local agreement, $120,000 a year for five years minus setoffs, property taxes levied for expenses, tax equalization payments and tax-sharing payments.[103] Counties should ensure

[100] *See Nicolet Minerals Co.*, 2002 WI App at ¶12.
[101] *See Nicolet Minerals Co.*, 2002 WI App at ¶12.
[102] *See Heitman*, 226 Wis. 2d at 553.
[103] *See id.* at ¶9.

that any fee recovery provisions comply with the requirements of Wis. Stat. § 66.0628.

- *Open Dialogue.* Discussion of a local agreement between an operator, community leaders, the public, and other stakeholders may occur throughout the course of a less formal process. The open dialogue allows for more efficient communication.

- *Tailored Agreement.* A local agreement grants a county the opportunity to address site-specific concerns and conditions by tailoring each local agreement to the unique circumstances of each nonferrous metallic mine operation.

- *Streamlined Amendment Process.* The statutes require that a local agreement include amendment provisions.[104] Modification or renegotiation of local agreements may be easier than modifying or amending ordinances. This provides certainty to the county, its residents and the operator of how and when a local agreement may be changed.

6. Limitations of Local Agreements. Local agreements may also present limitations. These limitations include:

- *Potential Inconsistent Application.* Having multiple local agreements for multiple nonferrous metallic mining operations may create inconsistent application of land use, zoning or licensing ordinances due to the ability to waive zoning requirements and approvals.

- *Operator's Agreement.* A local agreement must be agreed to by both the county and the nonferrous metallic mine operator. The possibility exists that a nonferrous metallic mine operator will challenge the county's required terms and conditions within the local agreement. Wisconsin courts have not addressed the issue of whether a county's alleged unreasonable demands may give rise to a takings claim or other claim. This is a particularly complicated issue given that Wis. Stat. § 293.41 renders a local agreement similar to an arms-length transaction.

- *Amendment Upon Leadership Change.* A general amendment provision in a local agreement may result in easy modification or renegotiation upon changes in county leadership.

7. Additional Best Practices for Local Agreements. In addition to the best practices set forth above, counties entering into local agreements with operators for nonferrous metallic mining should consider the following:

[104] Wis. Stat. § 293.41(2)(g).

- *Early Engagement of Local Impact Committee.* Engage a local impact committee early in the process to gather as much information and data as soon as possible.

- *Early Engagement of WisDNR.* Engage WisDNR at each step of developing a local agreement. Communication with WisDNR is necessary to ensure WisDNR's assistance in enforcing the provisions of a local agreement that are within the expertise of WisDNR.[105] WisDNR may refuse to enforce a local agreement that it deems not legally binding, so communication with WisDNR during the development of the local agreement is essential.

- *Comprehensive and Supportable Local Agreement.* Address each required term and condition, even standard terms and conditions, in the local agreement. A local agreement should include the basis upon which each term and condition is justified. Even though the local agreement is negotiated between a county and an operator, a county's requirements must still be reasonable and in the best interests of its residents' health, welfare and safety.

- *Full Legal Description.* Counties should require the applicant to provide the full and complete legal description of all lands to be used in the nonferrous metallic mining operation. This will avoid the issues before the Wisconsin Supreme Court in *Golden Sands Dairy.*[106]

- *Description of Costs.* Counties should make sure that all costs to be recovered from a nonferrous metallic mine operator, pursuant to a local agreement, are clearly defined in the local agreement. The costs must meet the requirements of Wis. Sta. § 66.0628, and the local agreement should set forth the factors demonstrating compliance with Wis. Stat. § 66.0628. The local agreement should also include justification for any other payments made by the nonferrous metallic mine operator to the county.

[105] Wis. Stat. § 293.41(5).
[106] *See generally Golden Sands Dairy*, 375 Wis. 2d 797 (2017).

SECTION XI: DEVELOPMENT MORATORIA

Counties may be tempted to use moratoria on nonferrous metallic mining operations given the effective date of Act 134 on July 1, 2018, or because nonferrous metallic mining is a complex area of development and a county wants to take sufficient time to construct its ordinances. ***Regardless of the circumstances, counties are advised not to use a development moratorium for nonferrous metallic mining given the legal risks set forth below.***

1. Counties Lack Statutory Authority to Impose a Development Moratorium on Nonferrous Metallic Mining. Unlike cities, villages and towns, counties are expressly prohibited from instituting a development moratorium, as defined in Wis. Stat. § 66.1002(1)(b). Wisconsin Statute § 59.69(4) states "the board may not enact a development moratorium, as defined by s. 66.1002(1)(b), under this section or s. 59.03 (home rule), by acting under ch. 236 (land divisions) or by acting under any other law." A county board may "enact a moratorium that is not a development moratorium."[107] Unless a county implements a moratorium that is not a "development moratorium," it should not adopt a moratorium against nonferrous metallic mining.

2. Moving Ahead With a Moratorium on Nonferrous Metallic Mining. In the event a county determines to implement a moratorium on nonferrous metallic mining regardless of the legal risks and lack of express statutory authority to do so, a county should establish that its power to enact a moratorium can be derived from the county's general power to regulate under Wis. Stat. § 59.69(1). A county should also establish that the moratorium is not a development moratorium. If a county determines to move ahead with a moratorium on nonferrous metallic mining, a county should abide by the requirements for a city, village or town moratorium.

3. Evidentiary Precautions. A moratorium may be perceived by affected parties as an extreme action due to the temporary suspension of landowners' rights. Therefore, if a county decides to adopt a moratorium on nonferrous metallic mining despite the legal risks, it is advisable for a county to proceed cautiously and provide findings of the necessity of the moratorium prior to its adoption. Such findings may include:

- Evidence of conditions that give rise to the need for the moratorium.
- Evidence that no other alternatives exist to the adoption of a moratorium to protect the public health, welfare and safety.

[107] Wis. Stat. § 59.69(4).

- Evidence of deficiencies in any existing land use plans currently in place to address potential mining, or the need to adopt sufficient land use plans to address proposed mining.

- Evidence of the severity of the circumstances.

- Evidence of sufficient timelines.

- Evidence of the "reasonableness" of the moratorium.

- Other evidence documenting the necessity of the moratorium.

4. Best Practice for Implementing Development Moratoria. Counties are advised not to adopt a moratorium of nonferrous metallic mining.

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