WPS
LAW

MEMORANDUM

TO: **Brian Desmond, Oneida County Corporation Counsel**

FROM: **William Scott**

DATE: **April 10, 2018**

RE: **Overview of Vulnerabilities in Metallic Mining Ordinance**

INTRODUCTION

Oneida County's Zoning and Shoreland Protection Ordinance, Chapter 9, Article 6, regulates non-metallic mining and metallic mineral exploration, prospecting and mining (the "Ordinance"). The Ordinance was adopted before significant changes to the Wisconsin statutes pertaining to metallic mining, shoreland zoning and conditional use permits.

Significant statutory changes include, without limitation, the following: creation of new distinction between ferrous and non-ferrous metallic mining; creation of new regulations on bulk sampling; shortened timeline for regulatory decisions regarding mine permit application; mine permit hearing changes; solid waste changes; restriction of allowable controls to shorelands; and constraints on award and denial of conditional use permits. Although there have been many statutory changes, the Department of Natural Resources (the "DNR") administrative codes pertaining to non-ferrous metal mining and waste have not changed, and thus are out of date.

If Oneida County wants to regulate either ferrous or non-ferrous metallic mining, or both, the Ordinance should be rewritten.

ISSUES

1. One purpose of the Ordinance is to coordinate County requirements with state and federal law (Ord. 9.61 A. 2.). To the extent the Ordinance is not conformed to state law, the differences must be supported by clear authority under ss. 59.03, 59.04 and 59.69, Wis. Stats.

2. The Ordinance does not distinguish between ferrous and non-ferrous minerals. If the County desires to regulate both, a new section on ferrous mineral must be developed consistent with the ferrous mining statute (Ch. 295, Wis. Stat.).

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3. The Ordinance regulates a mining permit as a conditional use permit (Ord. 9.61 C. 1.).

    a. Conditional use permits are subject to new and untested statutory language requiring specific standards that are reasonable and if possible measurable, and decisions to award or deny must be supported by substantial evidence (2017 Wis. Act 67, creating Sec. 59.69 (5e), Wis. Stat.).

    b. Conditional use ordinances must now contain standards that are "reasonable, and to the extent practicable, measurable" (s. 59.69 (5e) (b) 2., Wis. Stat.). Decisions to award or deny must be based on substantial evidence may not be based on "personal preferences or speculation." (s. 59.69 (5e) (a) 2., Wis. Stat.). Both the standard and the justification for the standard must be reasonable. Data and expert opinion will be required to support both permit denial and award. Any deviation from state mining standards will be suspect and must be supported by data-backed expert opinion.

4. Conditional use permits must be considered in conjunction with a hearing (s. 59.69 (5) (c), Wis. Stat.). The County mine permit hearing process appears to comply, but the notice of hearing required by Ord. 9.61 D. 4. must be specified to be a Class 2 notice as per s. 985.07(2), Wis. Stat.

5. Conditional use permits must remain in effect once granted, and may not be modified as per Ord. 9.61 G. 4. c. (1). Thus, Ord. 9.61 G. 4. c. must be stricken from the Ordinance.

6. The Ordinance adopted all statutory definitions by reference, unless defined differently in the Ordinance (Ord. 9.61 B.). That was an intentional, default provision to assure the intent of the Ordinance would prevail over the statute if a statutory definition should unintentionally overlap. There were no terms defined differently when the Ordinance was adopted. All definitions must now be compared and conformed to avoid confusion and facilitate comparison of state and local data and actions. All terms specifically defined in the Ordinance should be checked against the statutes and any like terms should be addressed by rewriting the Ordinance so the Ordinance retains the desired meaning with the use of the new term.

7. State law now defines "bulk sampling" and distinguishes it from prospecting and mining (ss. 293.01 (2m), (9) and (18), Wis. Stat.). The Ordinance does not specifically regulate bulk sampling and without modification the Ordinance would regulate bulk sampling as "prospecting," which would be inconsistent with state law. The County must decide to either create a new ordinance section regulating bulk sampling or expressly decline to regulate bulk sampling (such as by expressly excluding it from the definition of mining and prospecting). One challenge in regulating bulk sampling would be the tight state timeline of 144 days from notice of intent to the DNR approval or denial. Another challenge would be the burden of maintaining confidentiality of certain information, if required by the applicant.

8. The time tables in the statute changed substantially to become much shorter. An accurate comparison is difficult and has not been resolved precisely.

    a. The first timetable is triggered by the mining company's "Notice of Intent." The Notice of Intent timetable involves information gathering by the mining company and a Mining Committee comment on the adequacy of the proposed information gathering. The Notice of Intent timetable is compatible.

b. The second timetable is triggered by submittal of an application to prospect or mine, and is referred to in this memo as the "Application Timetable" (Ord. 9.61 D. 3, 4, 5, 6). The Application Timetable is not compatible. The Application Timetable could be compatible if the County schedule were made definite and limited in duration such that the review, public informational hearing, Mining Committee deliberation and recommendation to the County Board is limited to not more than 300 days, and the time from the Mining Committee recommendation to County Board decision is limited to not more than 50 days.

c. The Notice of Intent and Application Timetables could be revised to include "allowances" of additional time triggered and based on actual timetable extensions at the state level. Such allowances are desirable to ensure the County is not acting too far in advance of information developed at the state level.

d. There is another timetable for bulk sampling, and the County will need to match its own timetable to the state 144-day timetable if the County decides to regulate bulk sampling.

9. The DNR has not updated its code sections for many years. The DNR codes addressing exploration, prospecting, mining and waste from non-ferrous mining are not consistent with the mining and solid waste statutes. In late March 2018, the DNR began the process of revising Wisconsin Administrative Code Chapters NR 130, 131, 132 and 182. The revisions will not be final for more than one year. Consequently, those codes were not reviewed for this memo and specific references to these NR codes and any special terms or concepts in those codes should be avoided. The Ordinance currently contains almost no references to the DNR codes. Because all the code sections will be rewritten, general references to code chapters would be possible, but references to specific sections should be avoided in any re-write of the Ordinance.

10. Financial responsibility has changed in the statute, but has not been thoroughly analyzed for significance to the County's Ordinance. There does not appear to be a limitation in the statute on the financial responsibility requirements of the Ordinance. However, the statute does limit the forms of financial assurance to only those specified. This topic deserves more analysis.

11. Several distances are specified in the Ordinance, but they were not individually checked for this memorandum. The validity of the distances would seem to involve and address valid concerns other than shoreland zoning, because Ord. Ch. 6 is not a shoreland zoning statute and has a different basis for the regulation. However, it is not helpful to have the title of the code of ordinances include the word "shoreland." The County should consider creating a separate code chapter for mining ordinances to separate them from shoreland protection ordinances.

CONCLUSIONS

1. The Ordinance should be revised. The revisions should be based on the statutes, not on the codes. The general content of the codes would be a useful guide, because any topic addressed by the statutes will continue to be addressed by the codes in approximately the same way, but since the codes have not been rewritten, great care is required in using or referring to the codes.

2. The most difficult analysis, possibly leading the most significant revisions, will be to apply the new conditional use statute to the Ordinance to ensure the standards meet the statutory requirements.

3. An expanded effort on creating and comparing timelines between the state and County is needed. The publicly available DNR timelines are very dated. A comparison of the state and local timelines is essential to producing a workable ordinance and maximizing the County's leverage in any negotiations with the mining company.

4. The overall effort to rewrite the Ordinance would be less if the County decided not to regulate ferrous metallic exploration, ferrous prospecting or ferrous mining. That regulation could be added later at the County's discretion. If there was a known ferrous deposit in the County, there would be more reason to prepare a ferrous ordinance, but if the County were to prioritize the work, the ferrous ordinance would be prepared following completion of the non-ferrous ordinance.

5. The types and amounts of financial assurances should be examined for current validity and usefulness, compared to the statutory methods for accomplishing the same objectives and then the Ordinance should be amended to include a clear justification for each instance of assurance required in the Ordinance.

DISCUSSION

The County has a great deal of County-owned land, which may include County-owned mineral rights (the "Mineral Estate"). The County does not need the Ordinance to regulate mining on lands to which the County owns the Mineral Estate. Those lands would only be mined after the County entered a contract to allow exploration, prospecting and mining. The County formerly had a model lease for such activities, but it was not reviewed for this memorandum. If the County would decide not to grant permission to explore, prospect or mine on lands with County-owned Mineral Estate, the zoning regulation is of no effect, so long as there is no County resolution or requirement in the Code of Ordinances to allow mining on County lands. Of course, private lands and any lands that do not include County-owned Mineral Estate would not benefit from the County's discretionary ability to refuse to allow exploration, prospecting and mining on lands underlain by County-owned Mineral Estate. Consequently, protection of lands for which the County does not own the Mineral Estate would benefit from an enforceable County Ordinance.

If the County wanted to minimize its zoning regulation it could trim back the detail and complexity of its Ordinance, or choose not to regulate certain activities such as exploration, prospecting, bulk sampling or ferrous mining, without eliminating the Ordinance in its entirety. A valid Ordinance is valuable to the County because under the statutes, if the mining company needs a County permit or approval under any zoning or land use ordinance, the County may enter a "Local Agreement" with the mining company (s. 293.41, Wis. Stat.). The Local Agreement would apply to both County owned Mineral Estate and lands not subject to County ownership of the Mineral Estate and would allow the County to negotiate for what the County wants in return for allowing the mining venture to proceed. To that end, any 'teeth' in the zoning ordinance would provide leverage to the County in negotiating terms beneficial to the County with respect to deposits located anywhere in the County. Pursuant to a Local Agreement, the County may waive other permits and approvals, including compliance with Ordinance Ch. 9.61.

The County cannot make its Ordinance so difficult as to prohibit mining in the County. Zoning cannot prohibit an otherwise lawful activity, it can only control where the activity may take place and to some extent how and when it may occur. Although zoning powers are different than powers that allow other types of ordinances, with respect to ordinances generally, the courts have been clear and consistent in finding that, "municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but rather complement, the state legislation." *Fox v. Racine,* 225 Wis. 542, 546, 275 N.W. 513 (1937) (quoting *Milwaukee v. Childs Co.,* 195 Wis. 148, 151, 217 N.W. 703 (1928)). Therefore, wrote the *Fox* court, where " 'the state has entered the field of regulation, municipalities may not make regulation inconsistent therewith' " because "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." *Fox,* 225 Wis. at 545, 275 N.W. 513; (quoting *Hack v. Mineral Point,* 203 Wis. 215, 219, 221, 233 N.W. 82 (1930)). The principle announced in *Fox* "has been the rule in Wisconsin and still is" the rule when addressing the question of whether state legislation preempts a municipal ordinance. *Anchor,* 120 Wis.2d at 397, 355 N.W.2d 234; *see also Wisconsin Ass'n of Food Dealers v. City of Madison,* 97 Wis.2d 426, 433 n. 7, 293 N.W.2d 540 (1980).

A modern case established a four-part test for determining when a local ordinance is preempted by state law. *Lake Beulah Mgmt. Dist. v. E. Troy,* 2011 WI 55, 335 Wis. 2d 92, 799 N.W.2d 787. The test is as follows:

> Local regulation is preempted by state law when
> "(1) the legislature has expressly withdrawn the power of municipalities to act;
> (2) it logically conflicts with state legislation;
> (3) it defeats the purpose of state legislation; or
> (4) it violates the spirit of state legislation."

Lake Beulah at ¶, citing to *DeRosso,* 200 Wis. 2d at 651-52 (footnotes omitted).

W. Scott.