Zwiefelhofer v. Town of Cooks Valley – Towns May Regulate Frac Sand Mining

In a closely watched case, the Wisconsin Supreme Court held that the Town of Cooks Valley (with village powers) had the power, under its police power, to adopt a non-zoning ordinance licensing and regulating non-metallic (for example, frac sand) mining. Arguing that the ordinance at issue was really a disguised zoning ordinance, the plaintiff asked the court to uphold the decision of the circuit court which struck down the ordinance. In declining to adopt the plaintiff's position, the court recognized that while zoning ordinances and pure police power regulations are closely related, they are not the same. As a result, so long as towns do not cross the line separating zoning ordinances and police power regulations (meant to protect the health, safety and welfare of residents), towns have the authority to adopt regulatory and licensing ordinances. Importantly, this authority extends to the regulation of activities involving land use, such as non-metallic mining.

This decision is extraordinarily important for towns in west-central Wisconsin which are attempting to deal with the explosion of frac sand mines in the area. This decision provides towns with clear authority to adopt ordinances requiring a license to operate a frac sand mine (and related activities). It appears that this regulation may be accomplished either directly through the provisions contained in the ordinance or by placing conditions on the issuance of the license (similar to a conditional use permit). Many towns in west-central Wisconsin have either adopted, or have begun the process of considering the adoption of, these types of non-metallic licensing ordinances. The court's decision in this case ends the debate as to whether towns with village powers have the authority required to adopt and enforce these kinds of ordinances.

If you are a town board member in a west-central Wisconsin town, we encourage you to consider whether non-metallic mining should be regulated in your town. If your board believes it should be, this case provides a clear process for enacting those regulations.

- First, your town should adopt village powers (if it has not already done this).
- Second, if you are not located in a county with a moratorium currently in place, you should consider adopting a short moratorium on non-metallic mining.
- Third, use the breathing room provided by the moratorium to study, prepare, debate and possibly enact a licensing and regulatory ordinance.

To be clear, the goal cannot be to completely prohibit frac sand mining in your town. Instead, the goal of your ordinance should be to provide reasonable regulations to protect the health, safety and welfare of your residents. There are a number of factors to consider when adopting such ordinances, and no town is exactly like another. However, at a minimum, most towns believe it is important to accomplish the following: (i) protection of roads, air quality and water; (ii) mitigation of noise, dust and debris; (iii) prevention of high intensity lights at night; (iv) eliminate unsightliness (and associated property price decreases for neighbors); (v) regulate hours and method of blasting; and (vi) financial security.

If your town is considering adopting such an ordinance, yesterday's Supreme Court decision is good news. However, it is important to remember that unless you go through the procedure of adopting a zoning ordinance (which generally requires county approval), you must still be careful not to cross the line between zoning and pure police power regulations.

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