



2013 ASSEMBLY BILL 816

February 26, 2014 - Introduced by Representative BALLWEG, cosponsored by Senator TIFFANY. Referred to Committee on Jobs, Economy and Mining.

1 **AN ACT** *to renumber and amend* 59.69 (10) (ab), 60.61 (5) (ab), 62.23 (7) (ab)
2 and 295.20 (2) (a); *to amend* 84.06 (12) (b) (intro.), 85.193 (2) (intro.), 295.20
3 (1) (a) 2., 295.20 (2) (title), 295.20 (2) (b) and 295.20 (3) (a); and *to create* 59.69
4 (10) (ab) 1., 59.69 (10) (as), 60.61 (5) (ab) 1., 60.61 (5) (as), 62.23 (7) (ab) 1., 62.23
5 (7) (hs), 66.0416, 85.193 (3) and 295.20 (2) (a) 2. of the statutes; **relating to:**
6 local regulation of nonmetallic mining and preservation of marketable
7 nonmetallic mineral deposits.

Analysis by the Legislative Reference Bureau

Zoning

Under current law, a political subdivision (a city, village, town that is authorized to exercise village powers, or county) is authorized to enact zoning ordinances that regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards and other open spaces, the density of population, the location and use of buildings, structures, and land for various purposes, and the areas in which agriculture, industry, mining, and other activities may be conducted. If a county has a county zoning ordinance, current law requires that before a town that is authorized to exercise village powers may enact or amend a zoning ordinance, the town must obtain county board approval. Similar authority to zone may be exercised by towns

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that are not authorized to exercise village powers (limited towns) if certain conditions are met, including a situation under which the town is located in a county that does not have a county zoning ordinance and the county fails to enact such an ordinance after the town petitions the county to do so.

Also under current law, a zoning ordinance enacted by a political subdivision or limited town may not prohibit the continued lawful use of any building, premises, structure, or fixture for any trade or industry for which the building, premises, structure, or fixture is used when the ordinance takes effect, although in limited towns such an ordinance may prohibit the alteration of, or addition to, any existing building, premises, structure, or fixture that is used to carry on an otherwise prohibited trade or industry within the area that is subject to the ordinance (district).

In political subdivisions, the alteration of, addition to, or repair in excess of 50 percent of the assessed value of any existing building, premises, structure, or fixture to carry on any prohibited trade or industry within the district may be prohibited. Generally, if such a nonconforming use of a building, premises, structure, or fixture is discontinued for 12 months, any future use of the building, premises, structure, or fixture must conform to the political subdivision's zoning ordinance. Under county law, the continued use of a nonconforming temporary structure may be prohibited.

Under a current decision of the Wisconsin Supreme Court, *Zwiefelhofer v. Town of Cooks Valley*, 338 Wis. 2d 488 (2012), the court held that a town ordinance enacted under its police power, which regulated nonmetallic mining in the town, did not require county board approval because the ordinance enacted by the town was not a zoning ordinance. Because the town of Cooks Valley was authorized to exercise village powers, its zoning ordinances must be approved by the county board. The court stated that although the exercise of zoning authority is carried out under the town's police power, not all ordinances enacted under the police power are zoning ordinances. The court further held that although the town's nonmetallic mining ordinance had some similarities to a zoning ordinance, many traditional characteristics of a zoning ordinance were not present. Therefore, according to the court, the town of Cooks Valley's ordinance was a valid exercise of its police power, was not a zoning ordinance, and did not require county board approval.

Diminishing asset rule

Under the bill, a zoning ordinance enacted by a political subdivision or limited town that became effective after nonmetallic mineral extraction began at a nonmetallic mining location (NMML), and which is more restrictive than the requirements of any ordinance that was in effect at the time nonmetallic mineral extraction began, or that imposes a new restriction, may not apply to or affect the continued extraction of a nonmetallic mineral from an NMML. The bill defines an NMML as land on which nonmetallic mining was occurring when nonmetallic mining became a nonconforming use, including land that is contiguous to such land if the contiguous land is under the common ownership or control of the person who owns or controls the land on which the mining was occurring. The bill specifies that such continued extraction from an NMML is considered an existing use and may not be considered an expansion of a nonconforming use. This provision codifies the diminishing asset rule, which has been adopted in a number of decisions of the

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Wisconsin Court of Appeals, including the case of *Schroeder v. Dane County Board of Adjustment*, 228 Wis. 2d 324 (Ct. Apps. 1999), and further limits a political subdivision's or limited town's authority to enact an ordinance that applies to or affects nonmetallic mining.

Nonmetallic mineral mining

Also under this bill, if a political subdivision enacts an ordinance, other than a zoning ordinance, that applies to or affects nonmetallic mining, the diminishing assets rule applies to such an ordinance in areas where extraction was occurring at any time during the 365 days before the effective date of the local ordinance. In addition, if a political subdivision enacts or amends an ordinance, other than a zoning ordinance, the ordinance may not apply to or affect an existing off-site nonmetallic mineral processing facility or an existing off-site transportation facility that is related to nonmetallic mining, and the ordinance may not affect or apply to an activity other than nonmetallic mining. The bill does not affect a political subdivision's ability to exercise any current law authority to enact any ordinance unrelated to nonmetallic mining to the extent that such an ordinance has no regulative effect on nonmetallic mining.

Registered nonmetallic mineral deposits

Current law authorizes a person who owns land that has a marketable nonmetallic mineral deposit to register the land if nonmetallic mining is a permitted or conditional use under any zoning that is in effect on the day on which the person begins the registration process. A registration is valid for ten years and may generally be renewed for ten-year periods. Under current law, a political subdivision, through zoning or rezoning, granting a variance, or other official action or inaction, may generally not do either of the following:

1. Permit the erection of a building on registered land in a manner that would permanently interfere with the extraction of the nonmetallic mineral deposit.
2. Otherwise permit the use of registered land in a manner that would permanently interfere with the extraction of the nonmetallic mineral deposit.

The law authorizes a political subdivision to change the zoning of land that is registered if mining has not begun on any portion of the land and the zoning change is necessary to implement a land use plan that had been in effect for at least one year. The law also does not prohibit a use of land that is permissible under a zoning ordinance in effect before the land is registered.

Under this bill, a political subdivision, through the currently specified means or through enactment of an ordinance that is not a zoning ordinance, may generally not do any of the following:

1. Permit the erection of a building on registered land in a manner that would permanently interfere with the extraction of the nonmetallic mineral deposit.
2. Otherwise permit the use of registered land in a manner that would permanently interfere with the extraction of the nonmetallic mineral deposit.
3. Prevent the extraction of the nonmetallic mineral deposit that is located on registered land.

ASSEMBLY BILL 816***Borrow sites and material disposal sites for DOT projects***

Under current law, a “borrow site” is a site off of project property from which borrow is excavated for use in a Department of Transportation (DOT) transportation project. “Borrow” is soil or a mixture of soil, stone, gravel, or similar material for use as part of a DOT transportation project. A “material disposal site” is a site off of project property used for the lawful disposal of surplus materials from a DOT transportation project and that is controlled by the project contractor or subcontractor. If specified requirements are met, a local zoning ordinance may not apply to a borrow site or a material disposal site.

Under this bill, a political subdivision may not enact or enforce any ordinance, resolution, or other requirement, including a zoning ordinance, that applies to a borrow site or a material disposal site. The bill also requires DOT or its contractor to give notice to each county and municipality in which a borrow site or material disposal site is located that the borrow site or material disposal site has been established.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 59.69 (10) (ab) of the statutes is renumbered 59.69 (10) (ab) (intro.)
2 and amended to read:

3 59.69 **(10)** (ab) (intro.) In this subsection “~~nonconforming~~:

4 2. “Nonconforming use” means a use of land, a dwelling, or a building that
5 existed lawfully before the current zoning ordinance was enacted or amended, but
6 that does not conform with the use restrictions in the current ordinance.

7 **SECTION 2.** 59.69 (10) (ab) 1. of the statutes is created to read:

8 59.69 **(10)** (ab) 1. “Nonconforming nonmetallic mining location” means land on
9 which nonmetallic mining was occurring at any time during the 365 days before
10 nonmetallic mining became a nonconforming use, including land that is contiguous
11 to such land if the contiguous land is under the common ownership or control of the
12 person who owns or controls the land on which the mining was occurring, and

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1 includes leasehold interests, without regard to whether public or private roads or
2 waterways run through the land.

3 **SECTION 3.** 59.69 (10) (as) of the statutes is created to read:

4 59.69 (10) (as) An ordinance enacted under this section, that became effective
5 after nonmetallic mineral extraction began at a nonmetallic mining location, and
6 which is more restrictive than the requirements of any ordinance in effect at the time
7 nonmetallic mineral extraction began, or that imposes a new restriction, may not
8 apply to or affect the continued extraction of a nonmetallic mineral from a
9 nonconforming nonmetallic mining location. Such continued extraction from such
10 a location shall be considered an existing use and may not be considered an
11 expansion of a nonconforming use.

12 **SECTION 4.** 60.61 (5) (ab) of the statutes is renumbered 60.61 (5) (ab) (intro.)
13 and amended to read:

14 60.61 (5) (ab) (intro.) In this subsection "~~noneonforming~~:

15 2. "Nonconforming use" means a use of land, a dwelling, or a building that
16 existed lawfully before the current zoning ordinance was enacted or amended, but
17 that does not conform with the use restrictions in the current ordinance.

18 **SECTION 5.** 60.61 (5) (ab) 1. of the statutes is created to read:

19 60.61 (5) (ab) 1. "Nonconforming nonmetallic mining location" means land on
20 which nonmetallic mining was occurring at any time during the 365 days before
21 nonmetallic mining became a nonconforming use, including land that is contiguous
22 to such land if the contiguous land is under the common ownership or control of the
23 person who owns or controls the land on which the mining was occurring, and
24 includes leasehold interests, without regard to whether public or private roads or
25 waterways run through the land.

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1 **SECTION 6.** 60.61 (5) (as) of the statutes is created to read:

2 60.61 **(5)** (as) An ordinance enacted under this section, that became effective
3 after nonmetallic mineral extraction began at a nonmetallic mining location, and
4 which is more restrictive than the requirements of any ordinance in effect at the time
5 nonmetallic mineral extraction began, or that imposes a new restriction, may not
6 apply to or affect the continued extraction of a nonmetallic mineral from a
7 nonconforming nonmetallic mining location. Such continued extraction from such
8 a location shall be considered an existing use and may not be considered an
9 expansion of a nonconforming use.

10 **SECTION 7.** 62.23 (7) (ab) of the statutes is renumbered 62.23 (7) (ab) (intro.)
11 and amended to read:

12 62.23 **(7)** (ab) *Definition Definitions.* (intro.) In this subsection
13 “~~nonconforming~~”:

14 2. “Nonconforming use” means a use of land, a dwelling, or a building that
15 existed lawfully before the current zoning ordinance was enacted or amended, but
16 that does not conform with the use restrictions in the current ordinance.

17 **SECTION 8.** 62.23 (7) (ab) 1. of the statutes is created to read:

18 62.23 **(7)** (ab) 1. “Nonconforming nonmetallic mining location” means land on
19 which nonmetallic mining was occurring at any time during the 365 days before
20 nonmetallic mining became a nonconforming use, including land that is contiguous
21 to such land if the contiguous land is under the common ownership or control of the
22 person who owns or controls the land on which the mining was occurring, and
23 includes leasehold interests, without regard to whether public or private roads or
24 waterways run through the land.

25 **SECTION 9.** 62.23 (7) (hs) of the statutes is created to read:

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1 62.23 (7) (hs) *Nonmetallic mining.* An ordinance enacted under this
2 subsection, that became effective after nonmetallic mineral extraction began at a
3 nonmetallic mining location, and which is more restrictive than the requirements of
4 any ordinance in effect at the time nonmetallic mineral extraction began, or that
5 imposes a new restriction, may not apply to or affect the continued extraction of a
6 nonmetallic mineral from a nonconforming nonmetallic mining location. Such
7 continued extraction from such a location shall be considered an existing use and
8 may not be considered an expansion of a nonconforming use.

9 **SECTION 10.** 66.0416 of the statutes is created to read:

10 **66.0416 Local regulation of nonmetallic mining and related activities.**

11 **(1) DEFINITIONS.** In this section:

12 (a) “Approval” means a permit, license, or other authorization, from a political
13 subdivision, for building or for any other activity related to the transportation of
14 nonmetallic minerals or the processing of nonmetallic minerals.

15 (b) “Nonmetallic mining” has the meaning given in s. 295.11 (3).

16 (c) “Nonmetallic mining location” means land on which nonmetallic mining is
17 a lawful existing use, including land that is contiguous to such land if the contiguous
18 land is under the common ownership or control of the person who owns or controls
19 the land on which the mining is a lawful existing use, and includes leasehold
20 interests, without regard to whether public or private roads or waterways run
21 through the land.

22 (d) “Political subdivision” means a city, village, town, or county.

23 (e) “Zoning ordinance” means an ordinance enacted or amended by a political
24 subdivision under s. 59.69 (4), 60.61 (2), 60.62 (1), 61.35, or 62.23 (7) (am).

ASSEMBLY BILL 816**SECTION 10**

1 **(2) LIMITATIONS ON REGULATION.** (a) If a political subdivision enacts or amends
2 an ordinance, other than a zoning ordinance, that applies to or affects nonmetallic
3 mining, and that became effective after nonmetallic mineral extraction began at a
4 nonmetallic mining location, and which is more restrictive than the requirements of
5 any ordinance in effect at the time nonmetallic mineral extraction began, or that
6 imposes a new restriction, the ordinance may not apply to or affect the continued
7 extraction of a nonmetallic mineral from a nonmetallic mining location where
8 extraction was occurring at any time during the 365 days before the effective date
9 of the political subdivision's ordinance. Such continued extraction from such a
10 location shall be considered an existing use, and may not be considered an expansion
11 of a nonconforming use.

12 (b) 1. Subject to subd. 2., if a political subdivision enacts or amends an
13 ordinance, other than a zoning ordinance, the ordinance may not apply to or affect
14 any of the following:

15 a. An existing off-site nonmetallic mineral processing facility.

16 b. An existing off-site transportation facility that is related to nonmetallic
17 mining.

18 2. For purposes of subd. 1., an existing facility includes a facility for which a
19 person has submitted an application for an approval or, if an approval is not required,
20 a facility for which construction activities have commenced before the effective date
21 of an ordinance which would otherwise apply to the facility.

22 (c) A political subdivision's ordinance that specifically regulates nonmetallic
23 mining may not affect or apply to any activity other than nonmetallic mining.

24 **SECTION 11.** 84.06 (12) (b) (intro.) of the statutes is amended to read:

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1 84.06 (12) (b) (intro.) No political subdivision may enact or enforce any
2 ordinance, resolution, or other requirement, including a zoning ordinance enacted
3 under s. 59.69, 60.61, 60.62, 61.35, or 62.23 may apply, that applies to a borrow site
4 if all of the following apply:

5 **SECTION 12.** 85.193 (2) (intro.) of the statutes is amended to read:

6 85.193 (2) EXEMPTION FROM LOCAL ZONING REQUIREMENTS. (intro.) No political
7 subdivision may enact or enforce any ordinance, resolution, or other requirement,
8 including a zoning ordinance enacted under s. 59.69, 60.61, 60.62, 61.35, or 62.23
9 may apply, that applies to a borrow site or material disposal site if all of the following
10 apply:

11 **SECTION 13.** 85.193 (3) of the statutes is created to read:

12 85.193 (3) NOTICE TO POLITICAL SUBDIVISIONS. Prior to the commencement of any
13 work at a borrow site or material disposal site, the department shall give notice to
14 each political subdivision in which the borrow site or material disposal site is located
15 that the borrow site or material disposal site has been established. In lieu of giving
16 notice directly, the department may require the transportation project contractor for
17 the transportation project to give the notice required under this subsection.

18 **SECTION 14.** 295.20 (1) (a) 2. of the statutes is amended to read:

19 295.20 (1) (a) 2. The landowner notifies each county, city, village and town that
20 has authority to zone the land or in which the land is located of his or her intent to
21 register the marketable nonmetallic mineral deposit. The notification shall include
22 the evidence required under subd. 1.

23 **SECTION 15.** 295.20 (2) (title) of the statutes is amended to read:

24 295.20 (2) (title) LIMITATION ON ZONING LOCAL REGULATION.

ASSEMBLY BILL 816**SECTION 16**

1 **SECTION 16.** 295.20 (2) (a) of the statutes is renumbered 295.20 (2) (a) (intro.)
2 and amended to read:

3 295.20 **(2)** (a) (intro.) A county, city, village or town may not by zoning, rezoning,
4 granting a variance, enacting an ordinance other than a zoning ordinance, or other
5 official action or inaction, ~~permit~~ do any of the following:

6 1. Permit the erection of permanent structures upon, or otherwise permit the
7 use of, any land, while a registration under this section is in effect for that land, in
8 a manner that would permanently interfere with the present or future extraction of
9 the nonmetallic mineral deposit that is located on the land.

10 **SECTION 17.** 295.20 (2) (a) 2. of the statutes is created to read:

11 295.20 **(2)** (a) 2. Prevent the extraction of the nonmetallic mineral deposit that
12 is located on land while a registration under this section is in effect for that land.

13 **SECTION 18.** 295.20 (2) (b) of the statutes is amended to read:

14 295.20 **(2)** (b) 1. A county, city, village or town may enact an ordinance ~~changing~~
15 ~~the zoning of~~ that would otherwise be prohibited under par. (a) with respect to land
16 that is registered under this section if mining has not begun on any portion of the
17 registered land and the ordinance is necessary to implement a master plan,
18 comprehensive plan or land use plan that was adopted at least one year before the
19 ~~rezoning~~ enactment of the ordinance.

20 2. ~~A zoning change~~ An ordinance authorized by subd. 1. does not apply to the
21 registered land during the registration period in effect when the ~~zoning~~ ordinance
22 takes effect or during the 10-year renewal period under sub. (4) (e) or (f) if the land
23 is eligible for that renewal.

24 3. ~~A zoning change~~ An ordinance authorized by subd. 1. prevents the
25 registration of the land after the period under subd. 2.

