

1/22/14 Per Anna Henning, Leg. Council:

Sen. Tiffany wants a new nonmetallic mining bill (as a P draft) that contains the diminishing assets provisions of SB 349 plus the provision in the instructions for the sub to SB 349 that "grandfathers" existing nonmetallic mining operations with respect to local ordinance changes (the 2nd bullet point under Police Powers on page 2 of the instructions).

Betsy Trudewell

Police powers

- (See by Net I, too)
- Apply the diminishing assets rule of nonconforming continued use to all non-zoning police power ordinances as they relate to nonmetallic mining. This will "grandfather" existing nonmetallic mining operations with respect to local ordinance changes.

Shovers, Marc

From: Konopacki, Larry
Sent: Tuesday, January 28, 2014 12:44 PM
To: Shovers, Marc
Cc: Henning, Anna
Subject: New nonmetallic mining bill

Hi Marc,

Anna asked me to pass on a request that the new bill intended to grandfather existing nonmetallic mining uses (using a diminishing assets scope for grandfathering) include within the affected nonmetallic mining uses off-site transportation facilities related to nonmetallic mining and off-site nonmetallic mineral processing facilities.

Thanks, and please let us know if you have any questions.

Larry

Larry A. Konopacki
Wisconsin Legislative Council
(608) 267-0683
larry.konopacki@legis.wisconsin.gov



WANTED ASAP
not a new but...

RMP

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

WANTED
wednesday

D-NOTE

[Signature]

[Signature]

1 AN ACT ...; relating to: local regulation of nonmetallic mining.

Analysis by the Legislative Reference Bureau

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 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.

Under the bill, a zoning ordinance enacted by a political subdivision or limited town may not prohibit the continued extraction of a nonmetallic mineral from a nonconforming nonmetallic mining location, which is defined 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. This provision codifies the diminishing asset rule, which has been adopted in a number of decisions of the Wisconsin Court of Appeals, including the case of *Schroeder v. Dane County Board of Adjustment*, 228 Wis. 2d 324 (Ct. Apps. 1999).

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 is occurring on the effective date of the local ordinance.

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~~:"

→ { b. *Off-site transportation facilities that are related to nonmetallic mining*
 { c. *Off-site nonmetallic mineral processing facilities*

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

4 SECTION 2. 59.69 (10) (ab) 1. of the statutes[✓] is created to read:

5 59.69 (10) (ab) 1. "Nonconforming nonmetallic mining location" means ^{all of the following:} ~~land~~ on _{all of a land}
 6 which nonmetallic mining was occurring when nonmetallic mining became a
 7 nonconforming use, including land that is contiguous to such land if the contiguous
 8 land is under the common ownership or control of the person who owns or controls
 9 the land on which the mining was occurring, and includes leasehold interests,
 10 without regard to whether private roads or waterways run through the land.

11 SECTION 3. 59.69 (10) (as) of the statutes[✓] is created to read:

12 59.69 (10) (as) An ordinance enacted under this section[✓] may not prohibit the
 13 continued extraction of a nonmetallic mineral from a nonconforming nonmetallic
 14 mining location. Such continued extraction from such a location shall be considered
 15 an existing use, may not be considered an expansion of a nonconforming use, and
 16 may not be prohibited in areas of the nonconforming nonmetallic mining location
 17 that have not previously been under actual excavation.

18 SECTION 4. 60.61 (5) (ab) of the statutes[✓] is renumbered 60.61 (5) (ab) (intro.)
 19 and amended to read:

20 60.61 (5) (ab) (intro.) In this subsection "~~nonconforming~~:"

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

24 SECTION 5. 60.61 (5) (ab) 1. of the statutes[✓] is created to read:

-4-
b. off-site transportation facilities that are related to nonmetallic mining
c. off-site nonmetallic mineral processing facilities

all of the following:

1 60.61 (5) (ab) 1. "Nonconforming nonmetallic mining location" means ~~land~~ *land* on
2 which nonmetallic mining was occurring when nonmetallic mining became a
3 nonconforming use, including land that is contiguous to such land if the contiguous
4 land is under the common ownership or control of the person who owns or controls
5 the land on which the mining was occurring, and includes leasehold interests,
6 without regard to whether private roads or waterways run through the land.

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

8 60.61 (5) (as) An ordinance enacted under this section may not prohibit the
9 continued extraction of a nonmetallic mineral from a nonconforming nonmetallic
10 mining location. Such continued extraction from such a location shall be considered
11 an existing use, may not be considered an expansion of a nonconforming use, and
12 may not be prohibited in areas of the nonconforming nonmetallic mining location
13 that have not previously been under actual excavation.

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

16 62.23 (7) (ab) ~~Definition~~ Definitions. (intro.) In this subsection
17 "~~nonconforming~~:"

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

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

22 62.23 (7) (ab) 1. "Nonconforming nonmetallic mining location" means ~~land~~ *land* on
23 which nonmetallic mining was occurring when nonmetallic mining became a
24 nonconforming use, including land that is contiguous to such land if the contiguous
25 land is under the common ownership or control of the person who owns or controls

all of the following:
a. Land

Ups: first insertion use b. & c. Second insert 2. & 3.

b(2) off-site transportation facilities that are related to nonmetallic mining.

c(3) off-site nonmetallic mineral processing facilities.

the land on which the mining was occurring, and includes leasehold interests, without regard to whether private roads or waterways run through the land.

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

62.23 (7) (hs) *Nonmetallic mining.* An ordinance enacted under this subsection may not prohibit the continued extraction of a nonmetallic mineral from a nonconforming nonmetallic mining location. Such continued extraction from such a location shall be considered an existing use, may not be considered an expansion of a nonconforming use, and may not be prohibited in areas of the nonconforming nonmetallic mining locations that have not previously been under actual excavation.

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

66.0416 Local regulation of nonmetallic mining. (1) DEFINITIONS. In this section:

- (a) "Nonmetallic mining" has the meaning given in s. 295.11 (3).
- (b) "Nonmetallic mining location" means ^{all of the following: # 4} land on which nonmetallic mining is occurring, 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 is occurring, and includes leasehold interests, without regard to whether private roads or waterways run through the land.
- (c) "Political subdivision" means a city, village, town, or county.
- (d) "Zoning ordinance" means an ordinance enacted or amended by a political subdivision under s. 59.69 (4), 60.61 (2), 60.62 (1), 61.35, or 62.23 (7) (am).

(2) LIMITATIONS ON REGULATION. If a political subdivision enacts an ordinance, other than a zoning ordinance, that applies to or affects nonmetallic mining, the ordinance may not prohibit the continued extraction of a nonmetallic mineral from a nonmetallic mining location where extraction is occurring on the effective date of

* * *
PLR
Read
this
whole
FF

1 the political subdivision's ordinance. Such continued extraction from such a location
2 shall be considered an existing use, and may not be prohibited in areas of the
3 nonmetallic mining locations that have not previously been under actual excavation.

4 (END)

D-NOTE

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4072/P1dn

MES...*kg*

Date

Senator Tiffany:

Please review this bill very carefully, especially bill section 10, to ensure that it is consistent with your intent. The instruction to apply the diminishing assets rule to all zoning police power ordinances was not entirely clear to me but, based on my understanding of the instructions, I think this bill section meets your intent. Please let me know if any changes to the bill are needed.

Marc E. Shovers
Managing Attorney
Phone: (608) 266-0129
E-mail: marc.shovers@legis.wisconsin.gov

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4072/P1dn
MES:kjf:jf

January 29, 2014

Senator Tiffany:

Please review this bill very carefully, especially bill section 10, to ensure that it is consistent with your intent. The instruction to apply the diminishing assets rule to all nonzoning police power ordinances was not entirely clear to me but, based on my understanding of the instructions, I think this bill section meets your intent. Please let me know if any changes to the bill are needed.

Marc E. Shovers
Managing Attorney
Phone: (608) 266-0129
E-mail: marc.shovers@legis.wisconsin.gov

Shovers, Marc

From: Konopacki, Larry
Sent: Wednesday, January 29, 2014 5:37 PM
To: Shovers, Marc; Henning, Anna
Cc: Williams, Vincent; Searing, Eric; Esser, Jennifer
Subject: Draft review: LRB -4072/P1 Topic: Nonmetallic mining, diminishing asset rule

Hi Marc, would you please make the following changes to this draft:

- Please remove lines 16 and 17 from Section 2 on page 3 and the same provisions in Sections 5 and 8 of the bill.
- ✓ Please remove lines 11 and 12 from Section 10 on page 6 and create a separate prohibition against the application of a new or amended non-zoning police power ordinance that applies to or affects nonmetallic mining to an existing off-site transportation facility related to nonmetallic mining or an existing off-site nonmetallic mineral processing facility. In particular, please define "existing" to include uses for which a person has submitted an application for an approval from a political subdivision, or, if an approval is not required by a political subdivision, uses for which construction activities have commenced. Please define "approval" to include a permit, license, or other authorization for building or other activity related to transportation of nonmetallic minerals or processing of nonmetallic minerals.

Thanks!

Larry

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larry.konopacki@legis.wisconsin.gov

From: LRB.Legal
Sent: Wednesday, January 29, 2014 11:07 AM
To: Sen.Tiffany
Subject: Draft review: LRB -4072/P1 Topic: Nonmetallic mining, diminishing asset rule

Following is the PDF version of draft LRB -4072/P1 and drafter's note.

Shovers, Marc

From: Konopacki, Larry
Sent: Thursday, January 30, 2014 9:01 AM
To: Shovers, Marc
Cc: Henning, Anna; Williams, Vincent; Searing, Eric; Esser, Jennifer
Subject: LRB 4072

Hi Marc, please also include revisions to accomplish the following in LRB 4072. Feel free to modify the wording if you can come up with a better way to accomplish these objectives.

- 295.20 (1) (a) 2. – “The landowner notifies each county, city, village and town that has authority to ~~zone the land~~ regulate the land through zoning or other authority of his or her intent to register the marketable nonmetallic mineral deposit. The notification shall include the evidence required under subd. 1.”
- 295.20 (2) Title – “LIMITATION ON ~~ZONING~~ LOCAL REGULATION.”
- 295.20 (2) (b) – “ 1. A county, city, village or town may enact an ordinance changing the zoning of land that is registered under this section or imposing other regulation that applies to or affects nonmetallic mining if mining has not begun on any portion of the registered land and the ordinance is necessary to implement a master plan, comprehensive plan or land use plan that was adopted at least one year before the rezoning.”
“2. A zoning change or regulation authorized by subd. 1. does not apply to the registered land during the registration period in effect when the zoning ordinance or regulation takes effect or during the 10-year renewal period under sub. (4) (e) or (f) if the land is eligible for that renewal.”
“3. A zoning change or regulation authorized by subd. 1. prevents the registration of the land after the period under subd. 2.”
- 295.20 (3) (a) – “A use of land permissible under a zoning ordinance and other regulations in effect on the day before a mineral deposit is registered under sub. (1).”
- 295.20 (4) (e) – “Procedures and criteria for renewing the registration of land under sub. (1). The rules shall allow renewal for one 10-year period without review of the marketability of the deposit or the zoning of the land or other regulation applicable to the land, except that, if mining has begun on any portion of the registered land, the rules shall allow the person to renew the registration for an unlimited number of 10-year periods as long as active mining continues.”

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1/30/14

- 4072

Larry Konopacki and I discussed what current s. 295.20 (2)(a) means and whether the requester's intent can be accomplished without changing it. His understanding is basically they want to have this provision do with respect to zoning ordinances what it does with respect to zoning ordinances. He thinks that way to do that is to prohibit the local governments from prohibiting ^(or preventing) the present or future extraction of the nonmetallic mineral deposit.

Larry agreed that there is no need to amend sub. (4)(e).

RLT

Shovers, Marc

From: Konopacki, Larry
Sent: Friday, January 31, 2014 12:15 PM
To: Shovers, Marc
Cc: Henning, Anna
Subject: RE: LRB 4072

Please pull the draft to make this change. Thanks Marc.

Larry A. Konopacki
Wisconsin Legislative Council
(608) 267-0683
larry.konopacki@legis.wisconsin.gov

From: Shovers, Marc
Sent: Friday, January 31, 2014 12:13 PM
To: Konopacki, Larry
Cc: Henning, Anna
Subject: RE: LRB 4072

Hi Larry:

The /P2 is in editing and should be out today. I can't do this right away, but do you want me to pull the draft from editing this afternoon and make this change, which might mean that it doesn't go out today, or would you like the /P2 to go out, and have me make this change for the next version? Thanks.

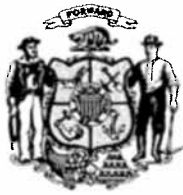
Marc

From: Konopacki, Larry
Sent: Friday, January 31, 2014 12:10 PM
To: Shovers, Marc
Cc: Tradewell, Becky; Henning, Anna
Subject: LRB 4072

Marc, would you please add a subsection in proposed section 66.0416 in LRB 4072 that limits the activities that can be regulated under a nonmetallic mining ordinance of a political subdivision in the following way: Prohibit a political subdivision from enacting or enforcing provisions in an ordinance that specifically regulates nonmetallic mining to the extent that such provisions apply to activities not included under the definition of nonmetallic mining under s. 295.11 (3). It is not the author's intent to prohibit a political subdivision from regulating activities that are not included under the statutory definition of nonmetallic mining, but to require the political subdivision to do so in a separate ordinance.

Thanks,
Larry

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larry.konopacki@legis.wisconsin.gov



State of Wisconsin
2013 - 2014 LEGISLATURE

Today



LRB-4072/F1

MES:kjf:jf

2
RGRCT

RMR

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT *to renumber and amend* 59.69 (10) (ab), 60.61 (5) (ab) and 62.23 (7) (ab);
2 and *to create* 59.69 (10) (ab) 1., 59.69 (10) (as), 60.61 (5) (ab) 1., 60.61 (5) (as),
3 62.23 (7) (ab) 1., 62.23 (7) (hs) and 66.0416 of the statutes; **relating to:** local
4 regulation of nonmetallic mining. *Insert 1-4-RT*

Analysis by the Legislative Reference Bureau

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 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.

Under the bill, a zoning ordinance enacted by a political subdivision or limited town may not prohibit the continued extraction of a nonmetallic mineral from a nonconforming nonmetallic mining location, which is defined 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. This provision codifies the diminishing asset rule, which has been adopted in a number of decisions of the Wisconsin Court of Appeals, including the case of *Schroeder v. Dane County Board of Adjustment*, 228 Wis. 2d 324 (Ct. Apps. 1999).

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 is occurring on the effective date of the local ordinance. *(INSANE MES NO 7)*

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

→ nolepis
interest
KT

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 ~~all of~~
9 ~~the following:~~

10 (a) Land on which nonmetallic mining was occurring when nonmetallic mining
11 became a nonconforming use, including land that is contiguous to such land if the
12 contiguous land is under the common ownership or control of the person who owns
13 or controls the land on which the mining was occurring, and includes leasehold
14 interests, without regard to whether private roads or waterways run through the
15 land.

16 b. ~~Off-site transportation facilities that are related to nonmetallic mining.~~

17 c. ~~Off-site nonmetallic mineral processing facilities.~~

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

19 59.69 (10) (as) An ordinance enacted under this section may not prohibit the
20 continued extraction of a nonmetallic mineral from a nonconforming nonmetallic
21 mining location. Such continued extraction from such a location shall be considered
22 an existing use, may not be considered an expansion of a nonconforming use, and
23 may not be prohibited in areas of the nonconforming nonmetallic mining location
24 that have not previously been under actual excavation.

1 SECTION 4. 60.61 (5) (ab) of the statutes is renumbered 60.61 (5) (ab) (intro.)
2 and amended to read:

3 60.61 (5) (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 5. 60.61 (5) (ab) 1. of the statutes is created to read:

8 60.61 (5) (ab) 1. "Nonconforming nonmetallic mining location" means ~~any~~

9 ~~any~~

10 (a) Land on which nonmetallic mining was occurring when nonmetallic mining
11 became a nonconforming use, including land that is contiguous to such land if the
12 contiguous land is under the common ownership or control of the person who owns
13 or controls the land on which the mining was occurring, and includes leasehold
14 interests, without regard to whether private roads or waterways run through the
15 land.

16 b. Off-site transportation facilities that are related to nonmetallic mining.

17 c. Off-site nonmetallic mineral processing facilities.

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

19 60.61 (5) (as) An ordinance enacted under this section may not prohibit the
20 continued extraction of a nonmetallic mineral from a nonconforming nonmetallic
21 mining location. Such continued extraction from such a location shall be considered
22 an existing use, may not be considered an expansion of a nonconforming use, and
23 may not be prohibited in areas of the nonconforming nonmetallic mining location
24 that have not previously been under actual excavation.

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

3 62.23 (7) (ab) ~~Definition~~ Definitions. (intro.) In this subsection
4 “nonconforming:

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

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

9 62.23 (7) (ab) 1. “Nonconforming nonmetallic mining location” means ~~all of the~~
10 ~~following~~

11 a. Land on which nonmetallic mining was occurring when nonmetallic mining
12 became a nonconforming use, including land that is contiguous to such land if the
13 contiguous land is under the common ownership or control of the person who owns
14 or controls the land on which the mining was occurring, and includes leasehold
15 interests, without regard to whether private roads or waterways run through the
16 land.

17 ~~b. Off-site transportation facilities that are related to nonmetallic mining.~~

18 ~~c. Off-site nonmetallic mineral processing facilities.~~

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

20 62.23 (7) (hs) *Nonmetallic mining.* An ordinance enacted under this subsection
21 may not prohibit the continued extraction of a nonmetallic mineral from a
22 nonconforming nonmetallic mining location. Such continued extraction from such
23 a location shall be considered an existing use, may not be considered an expansion
24 of a nonconforming use, and may not be prohibited in areas of the nonconforming
25 nonmetallic mining locations that have not previously been under actual excavation.

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

2 66.0416 Local regulation of nonmetallic mining. (1) DEFINITIONS. In this
3 section:

INS
6-22-23

4 (b) (a) "Nonmetallic mining" has the meaning given in s. 295.11 (3).

5 (c) (b) "Nonmetallic mining location" means all of the following:

6 (1) Land on which nonmetallic mining is occurring, including land that is
7 contiguous to such land if the contiguous land is under the common ownership or
8 control of the person who owns or controls the land on which the mining is occurring,
9 and includes leasehold interests, without regard to whether private roads or
10 waterways run through the land.

~~11 2. Off-site transportation facilities that are related to nonmetallic mining.
12 3. Off-site nonmetallic mineral processing facilities.~~

13 (d) (c) "Political subdivision" means a city, village, town, or county.

14 (e) (d) "Zoning ordinance" means an ordinance enacted or amended by a political
15 subdivision under s. 59.69 (4), 60.61 (2), 60.62 (1), 61.35, or 62.23 (7) (am).

16 (2) LIMITATIONS ON REGULATION. ^(a) If a political subdivision enacts an ordinance,
17 other than a zoning ordinance, that applies to or affects nonmetallic mining, the
18 ordinance may not prohibit the continued extraction of a nonmetallic mineral from
19 a nonmetallic mining location where extraction is occurring on the effective date of
20 the political subdivision's ordinance. Such continued extraction from such a location
21 shall be considered an existing use, and may not be prohibited in areas of the
nonmetallic mining locations that have not previously been under actual excavation.

INS
6-22-23

(END)

Insc. 16-22-RT

2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4072/P2ins
MES:kjf:jf

1 INS ANL-MES

no # In addition, if a political subdivision enacts or amends an ordinance, other than a zoning ordinance, that applies to or affects nonmetallic mining, 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.

2 INS 6-4

FUS
AA

3 (a) "Approval" means a permit, license, or other authorization, from a political
4 subdivision, for building or for any other activity related to the transportation of
5 nonmetallic minerals or the processing of nonmetallic minerals.

6 INS 6-22

7 (b) 1. Subject to subd. 2., if a political subdivision enacts or amends an
8 ordinance, other than a zoning ordinance, that applies to or affects nonmetallic
9 mining, the ordinance may not apply to or affect any of the following:

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

11 b. An existing off-site transportation facility that is related to nonmetallic
12 mining.

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

INS B →

2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4072/P2insMES-2
MES:kjf:jf

INS AA

, and the ordinance may not affect or apply to an activity that is not related to nonmetallic mining

INS B

(c) If a political subdivision enacts an ordinance described in par. (a) or (b) that specifically regulates nonmetallic mining, that nonmetallic mining ordinance may not affect or apply to any other activity that is not related to nonmetallic mining, although the political subdivision may exercise any lawful authority to regulate such an activity by enacting or amending any other type of ordinance.

1 **Insert 1-4-RT**

2 and preservation of marketable nonmetallic mineral deposits

3 **Analysis insert RT**

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 10 years and may generally be renewed for 10 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.

4 **Insert 6-22-RT**

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

6 295.20 (1) (a) 2. The landowner notifies each county, city, village and town that
7 has authority to zone the land or in which the land is located of his or her intent to
8 register the marketable nonmetallic mineral deposit. The notification shall include
9 the evidence required under subd. 1.

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

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

3 History: 1995 a. 227 s. 811; 1997 a. 27, 300.

3 **SECTION 3.** 295.20 (2) (a) of the statutes is renumbered 295.20 (2) (a) (intro.)
4 and amended to read:

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

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

12 History: 1995 a. 227 s. 811; 1997 a. 27, 300.

12 **SECTION 4.** 295.20 (2) (a) 2. of the statutes is created to read:

13 295.20 (2) (a) 2. Prevent the extraction of the nonmetallic mineral deposit that
14 is located on land while a registration under this section is in effect for that land.

15 **SECTION 5.** 295.20 (2) (b) of the statutes is amended to read:

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

22 2. ~~A zoning change~~ An ordinance authorized by subd. 1. does not apply to the
23 registered land during the registration period in effect when the ~~zoning~~ ordinance

1 takes effect or during the 10-year renewal period under sub. (4) (e) or (f) if the land
2 is eligible for that renewal.

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

History: 1995 a. 227 s. 811; 1997 a. 27, 300.

5 **SECTION 6.** 295.20 (3) (a) of the statutes is amended to read:

6 295.20 (3) (a) A use of land permissible under ~~a zoning~~ an ordinance in effect
7 on the day before a mineral deposit is registered under sub. (1).

History: 1995 a. 227 s. 811; 1997 a. 27, 300.

8 **SECTION 7. Initial applicability.**

9 (1) PRESERVATION OF MARKETABLE NONMETALLIC MINERAL DEPOSITS. The treatment
10 of section 295.20 (1) (a) 2., (2) (title) and (b), and (3) (a) of the statutes, the
11 renumbering and amendment of section 295.20 (2) (a) of the statutes, and the
12 creation of section 295.20 (2) (a) 2. of the statutes first apply to ordinances enacted
13 on the effective date of this subsection.

Shovers, Marc

From: Konopacki, Larry
Sent: Monday, February 03, 2014 10:15 AM
To: Shovers, Marc; Tradewell, Becky
Cc: Esser, Jennifer; Searing, Eric; Williams, Vincent; Henning, Anna
Subject: RE: Draft review: LRB -4072/P2 Topic: Nonmetallic mining, diminishing asset rule

Good morning Marc and Becky,
With one exception for a provision I didn't explain very well to Marc, the P2 draft appears to accomplish the intent of the authors, as I understand it, very well. Thank you for your efforts and good work.

On page 7, lines 16-17, the draft requires that a local ordinance "may not affect or apply to any other activity that is not related to nonmetallic mining, . . ." This should be changed to something to the effect of "may not affect or apply to any ~~other~~ activity other than nonmetallic mining" to clarify that only nonmetallic mining, as defined in the bill, may be regulated under such an ordinance, not "related activities."

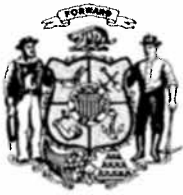
Thanks!

Larry A. Konopacki
Wisconsin Legislative Council
(608) 267-0683
larry.konopacki@legis.wisconsin.gov

From: LRB.Legal
Sent: Friday, January 31, 2014 4:18 PM
To: Konopacki, Larry
Subject: Draft review: LRB -4072/P2 Topic: Nonmetallic mining, diminishing asset rule

Draft Requester: Sen. Thomas Tiffany

Following is the PDF version of draft LRB -4072/P2.



3

fur

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

today

repeal

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

Analysis by the Legislative Reference Bureau

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 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.

Under the bill, a zoning ordinance enacted by a political subdivision or limited town may not prohibit the continued extraction of a nonmetallic mineral from a nonconforming nonmetallic mining location, which is defined 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. This provision codifies the diminishing asset rule, which has been adopted in a number of decisions of the Wisconsin Court of Appeals, including the case of *Schroeder v. Dane County Board of Adjustment*, 228 Wis. 2d 324 (Ct. Apps. 1999).

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 is occurring on the effective date of the local ordinance. In addition, if a political subdivision enacts or amends an ordinance, other than a zoning ordinance, that applies to or affects nonmetallic mining, the ordinance may not apply to or affect an existing off-site nonmetallic mineral processing facility or an existing off-site transportation facility

a political subdivision's ability to exercise authority to enact any ordinance unrelated to nonmetallic mining.

that is related to nonmetallic mining, and the ordinance may not affect or apply to an activity ~~that is not related to~~ ^{other than} nonmetallic mining. *The bill does not affect*

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.

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.

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

2 59.69 (10) (ab) 1. “Nonconforming nonmetallic mining location” means land on
3 which nonmetallic mining was occurring when nonmetallic mining became a
4 nonconforming use, including land that is contiguous to such land if the contiguous
5 land is under the common ownership or control of the person who owns or controls
6 the land on which the mining was occurring, and includes leasehold interests,
7 without regard to whether private roads or waterways run through the land.

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

9 59.69 (10) (as) An ordinance enacted under this section may not prohibit the
10 continued extraction of a nonmetallic mineral from a nonconforming nonmetallic
11 mining location. Such continued extraction from such a location shall be considered
12 an existing use, may not be considered an expansion of a nonconforming use, and
13 may not be prohibited in areas of the nonconforming nonmetallic mining location
14 that have not previously been under actual excavation.

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

17 60.61 (5) (ab) (intro.) In this subsection “~~noneonforming~~”:

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

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

22 60.61 (5) (ab) 1. “Nonconforming nonmetallic mining location” means land on
23 which nonmetallic mining was occurring when nonmetallic mining became a
24 nonconforming use, including land that is contiguous to such land if the contiguous
25 land is under the common ownership or control of the person who owns or controls

1 the land on which the mining was occurring, and includes leasehold interests,
2 without regard to whether private roads or waterways run through the land.

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

4 60.61 (5) (as) An ordinance enacted under this section may not prohibit the
5 continued extraction of a nonmetallic mineral from a nonconforming nonmetallic
6 mining location. Such continued extraction from such a location shall be considered
7 an existing use, may not be considered an expansion of a nonconforming use, and
8 may not be prohibited in areas of the nonconforming nonmetallic mining location
9 that have not previously been under actual excavation.

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 when nonmetallic mining became a
20 nonconforming use, including land that is contiguous to such land if the contiguous
21 land is under the common ownership or control of the person who owns or controls
22 the land on which the mining was occurring, and includes leasehold interests,
23 without regard to whether private roads or waterways run through the land.

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

1 62.23 (7) (hs) *Nonmetallic mining*. An ordinance enacted under this subsection
2 may not prohibit the continued extraction of a nonmetallic mineral from a
3 nonconforming nonmetallic mining location. Such continued extraction from such
4 a location shall be considered an existing use, may not be considered an expansion
5 of a nonconforming use, and may not be prohibited in areas of the nonconforming
6 nonmetallic mining locations that have not previously been under actual excavation.

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

8 **66.0416 Local regulation of nonmetallic mining. (1) DEFINITIONS.** In this
9 section:

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

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

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

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

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

22 **(2) LIMITATIONS ON REGULATION.** (a) If a political subdivision enacts an
23 ordinance, other than a zoning ordinance, that applies to or affects nonmetallic
24 mining, the ordinance may not prohibit the continued extraction of a nonmetallic
25 mineral from a nonmetallic mining location where extraction is occurring on the

1 effective date of the political subdivision's ordinance. Such continued extraction
2 from such a location shall be considered an existing use, and may not be prohibited
3 in areas of the nonmetallic mining locations that have not previously been under
4 actual excavation.

5 (b) 1. Subject to subd. 2., if a political subdivision enacts or amends an
6 ordinance, other than a zoning ordinance, that applies to or affects nonmetallic
7 mining, the ordinance may not apply to or affect any of the following:

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

9 b. An existing off-site transportation facility that is related to nonmetallic
10 mining.

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

15 (c) If a political subdivision enacts an ordinance described in par. (a) or (b) that
16 specifically regulates nonmetallic mining, that nonmetallic mining ordinance may
17 not affect or apply to any ~~other~~ activity ^{other than} that is not related to nonmetallic mining. ←

18 ~~although the political subdivision may exercise any lawful authority to regulate such~~
19 ~~an activity by enacting or amending any other type of ordinance.~~
that is unrelated to nonmetallic mining

20 **SECTION 11.** 295.20 (1) (a) 2. of the statutes is amended to read:

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

25 **SECTION 12.** 295.20 (2) (title) of the statutes is amended to read:

1 295.20 (2) (title) LIMITATION ON ~~ZONING~~ LOCAL REGULATION.

2 **SECTION 13.** 295.20 (2) (a) of the statutes is renumbered 295.20 (2) (a) (intro.)
3 and amended to read:

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

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

11 **SECTION 14.** 295.20 (2) (a) 2. of the statutes is created to read:

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

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

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

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

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

3 **SECTION 16.** 295.20 (3) (a) of the statutes is amended to read:

4 295.20 (3) (a) A use of land permissible under ~~a zoning~~ an ordinance in effect
5 on the day before a mineral deposit is registered under sub. (1).

6 **SECTION 17. Initial applicability.**

7 (1) **PRESERVATION OF MARKETABLE NONMETALLIC MINERAL DEPOSITS.** The treatment
8 of section 295.20 (1) (a) 2., (2) (title) and (b), and (3) (a) of the statutes, the
9 renumbering and amendment of section 295.20 (2) (a) of the statutes, and the
10 creation of section 295.20 (2) (a) 2. of the statutes first apply to ordinances enacted
11 on the effective date of this subsection.

12

(END)

Shovers, Marc

From: Esser, Jennifer
Sent: Monday, February 10, 2014 9:46 AM
To: Shovers, Marc
Cc: Tradewell, Becky; Searing, Eric; Williams, Vincent
Subject: Changes to LRB 4072

Hi Marc,

Welcome back and many thanks to you and to Becky for all the assistance with LRB 4072. It is much appreciated by our office. I know how stressful this time of year is and we are grateful for all that you and your colleagues do for us.

Based on a discussion that took place last Wednesday/Thursday, we'd ask that you please consider the below revisions notwithstanding and in addition to those that were submitted last Wednesday. The wording that was discussed last week is what we want inserted into the draft.

We're hoping that these revisions can please be inputted into the system and a draft can be sent later today or early tomorrow. We are trying to notice a hearing so appreciate the turn around.

Thanks for everything,

Jen

[SECTION 3] 59.69 (10) (as) ~~AN~~ A new ordinance provision enacted under this section may not ~~prohibit~~ apply to or affect the continued extraction of a nonmetallic mineral from a nonconforming nonmetallic mining location. Such continued extraction from such a location shall be considered an existing use, and may not be considered an expansion of a nonconforming use, ~~and may not be prohibited in areas of the nonconforming nonmetallic mining location that have not previously been under actual excavation.~~

(Define "new ordinance provision" as an ordinance provision that became effective after nonmetallic mineral extraction commenced at a nonmetallic mining location and that is more restrictive than the requirements of any ordinance in effect at the time nonmetallic mineral extraction commenced or that imposes a new restriction.)

Please make the same modifications under SECTIONS 6 and 9.

Similarly, to make SECTION 10 more consistent with the provisions above, revise proposed s. 66.0416 (2) (a) to replace the following from page 7 lines 2 and 3: "and may not be prohibited in areas of the nonmetallic mining locations that have not previously been under actual excavation" with "and may not be considered an expansion of a nonconforming use."

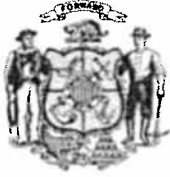
Please also replace the words "is occurring on" under SECTION 10, page 6, line 25, with "was occurring at any time during the 12 months prior to"

Please also make the following modifications for internal consistency with the definition of "nonmetallic mining:"

- Revise the title of proposed s. 66.0416 under SECTION 10 to be "Local regulation of nonmetallic mining and related activities."
- Remove ", that applies to or affects nonmetallic mining," from SECTION 10, page 7, lines 6 and 7.

Lastly, please replace SECTION 11 with the following: "(c) An ordinance of a political subdivision that specifically regulates nonmetallic mining may not affect or apply to any activity other than nonmetallic mining."

Do you mean Section 102,
Sen: 706



INST. ACTIONS
for 11

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

- please add sections 11 and 12 from 2013 Senate Bill 349 to this bill.
- please also require that the DOT provide notice to the county and city, village, or town prior to beginning work on a borrow site or a material disposal site under Chs. 84 & 85.

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

Analysis by the Legislative Reference Bureau

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 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.

Under the bill, a zoning ordinance enacted by a political subdivision or limited town may not prohibit the continued extraction of a nonmetallic mineral from a nonconforming nonmetallic mining location, which is defined 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. This provision codifies the diminishing asset rule, which has been adopted in a number of decisions of the Wisconsin Court of Appeals, including the case of *Schroeder v. Dane County Board of Adjustment*, 228 Wis. 2d 324 (Ct. Apps. 1999).

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 is occurring on the effective date of the local ordinance. In addition, if a political subdivision enacts or amends an ordinance, other than a zoning ordinance, that applies to or affects nonmetallic mining, 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.

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.

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.

SECTION 2

public or

at any time during the 12 months prior to the date on which

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

2 59.69 (10) (ab) 1. "Nonconforming nonmetallic mining location" means land on
3 which nonmetallic mining was occurring ~~when~~ nonmetallic mining became a
4 nonconforming use, including land that is contiguous to such land if the contiguous
5 land is under the common ownership or control of the person who owns or controls
6 the land on which the mining was occurring, and includes leasehold interests,
7 without regard to whether private roads or waterways run through the land.

X

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

applies to or affect

X

regulated under the ordinance

9 59.69 (10) (as) An ordinance enacted under this section may not prohibit the
10 continued extraction of a nonmetallic mineral from a nonconforming nonmetallic
11 mining location. Such continued extraction from such a location shall be considered
12 an existing use, may not be considered an expansion of a nonconforming use, and
13 may not be ~~prohibited~~ in areas of the nonconforming nonmetallic mining location
14 that have not previously been under actual excavation.

X

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

17 60.61 (5) (ab) (intro.) In this subsection ~~nonconforming~~:

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

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

22 60.61 (5) (ab) 1. "Nonconforming nonmetallic mining location" means land on
23 which nonmetallic mining was occurring ~~when~~ nonmetallic mining became a
24 nonconforming use, including land that is contiguous to such land if the contiguous
25 land is under the common ownership or control of the person who owns or controls

X

at any time during the 12 months prior to the date on which

1 the land on which the mining was occurring, and includes leasehold interests,
2 without regard to whether private roads or waterways run through the land.

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

4 60.61 (5) (as) An ordinance enacted under this section may not ~~prohibit~~ the
5 continued extraction of a nonmetallic mineral from a nonconforming nonmetallic
6 mining location. Such continued extraction from such a location shall be considered
7 an existing use, may not be considered an expansion of a nonconforming use, and
8 ~~may not be prohibited~~ in areas of the nonconforming nonmetallic mining location
9 that have not previously been under actual excavation.

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 ~~when~~ nonmetallic mining became a
20 nonconforming use, including land that is contiguous to such land if the contiguous
21 land is under the common ownership or control of the person who owns or controls
22 the land on which the mining was occurring, and includes leasehold interests,
23 without regard to whether private roads or waterways run through the land.

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

at any time during the 12 months prior to the date on which

regulated under
the ordinance

public or

apply to or affect

public or

apply to or affect

1 62.23 (7) (hs) *Nonmetallic mining*. An ordinance enacted under this subsection
 2 may not ~~prohibit~~ the continued extraction of a nonmetallic mineral from a X
 3 nonconforming nonmetallic mining location. Such continued extraction from such
 4 a location shall be considered an existing use, may not be considered an expansion
 5 of a nonconforming use, and may not be ~~prohibited in areas~~ of the nonconforming X
 6 nonmetallic mining locations that have not previously been under actual excavation.

regulated under the ordinance

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

8 **66.0416 Local regulation of nonmetallic mining.** (1) DEFINITIONS. In this
 9 section:

public or a lawfully existing use

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

13 (b) "Nonmetallic mining" has the meaning given in s. 295.11 (3).

14 (c) "Nonmetallic mining location" means land on which nonmetallic mining is
 15 ~~occurring~~, including land that is contiguous to such land if the contiguous land is X
 16 under the common ownership or control of the person who owns or controls the land
 17 on which the mining is ~~occurring~~, and includes leasehold interests, without regard X
 18 to whether private roads or waterways run through the land. X

19 (d) "Political subdivision" means a city, village, town, or county.

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

or amends

22 (2) LIMITATIONS ON REGULATION. (a) If a political subdivision enacts X
 23 an ordinance, other than a zoning ordinance, that applies to or affects nonmetallic
 24 mining, the ordinance may not ~~prohibit~~ the continued extraction of a nonmetallic X
 25 mineral from a nonmetallic mining location where extraction is occurring on the

apply to or affect

1 effective date of the political subdivision's ordinance. Such continued extraction
2 from such a location shall be considered an existing use, and may not be prohibited
3 in areas of the nonmetallic mining locations that have not previously been under
4 actual excavation.

5 (b) 1. Subject to subd. 2., if a political subdivision enacts or amends an
6 ordinance, other than a zoning ordinance, that applies to or affects nonmetallic
7 mining, the ordinance may not apply to or affect any of the following:

- 8 a. An existing off-site nonmetallic mineral processing facility.
9 b. An existing off-site transportation facility that is related to nonmetallic
10 mining.

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

15 (c) If a political subdivision enacts an ordinance described in par. (a) or (b) that
16 specifically regulates nonmetallic mining, that nonmetallic mining ordinance may
17 not affect or apply to any activity other than nonmetallic mining.

18 **SECTION 11.** 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 12.** 295.20 (2) (title) of the statutes is amended to read:

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

*regulated under
the ordinance*

1 **SECTION 13.** 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 14.** 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 15.** 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.

