

**LOCAL GOVERNMENT  
ROLE  
IN REGULATING AND  
CONTROLLING  
NON-METALLIC MINING  
OPERATIONS  
IN WISCONSIN**

**TOOLBOX FOR TOWNS LEGAL HANDBOOK**

By

Attorney Thomas W. Harnisch  
Wisconsin Towns Association

December 2011

# LOCAL GOVERNMENT ROLE IN REGULATING AND CONTROLLING NON-METALLIC MINING OPERATIONS IN WISCONSIN

By Attorney Thomas W. Harnisch, Wisconsin Towns Association, December 2011

## TABLE OF CONTENTS

I. Introduction	1
II. Initial Municipal Procedures and Concerns	2
A. Open Meetings Law	4
B. Open Records Law	5
C. Ethics Law	6
D. Civil Forfeiture/Criminal Administrative Laws	7
E. Public Meeting Procedures	8
F. Specific County and Municipal Concerns	9
G. Conclusions	10
III. County and Local Legal Controls	12
A. County and Local Municipal Zoning Ordinances	12
1. Town Zoning	13
2. Towns Under County Zoning	14
3. Benefits/Detriments	15
4. Zoning Content	15
B. County and Local Municipal Non-Metallic Mining Reclamation Ordinance	18
C. Local Public Health and Safety “Police Power” Licensing Ordinances	19
D. County and Local Municipal Building Permit Ordinances	19
E. County and Local Subdivision/Land Division Ordinances	20
F. County and Local Municipal Land Use Moratorium Ordinances	20
G. County and Local Public Road Use Controls	21
H. Local Municipal Rail Use Controls	21
I. County and Local Municipal Civil Public Nuisance Litigation	21
J. Local Property Tax/Special Assessments in Mining Operations	22
K. County and Municipal or Citizen Litigation to Challenge the Proposed Non-Metallic Mining	23
IV. Conclusion	24

# LOCAL GOVERNMENT ROLE IN WISCONSIN IN REGULATING AND CONTROLLING NON-METALLIC MINING OPERATIONS IN WISCONSIN

By

Attorney Thomas W. Harnisch

Wisconsin Towns Association

December 2011

## I. INTRODUCTION.

I always hope that persons who review any Federal, State, County or local Municipal laws, regulations, ordinances and policy regulating certain proposed land use operations, including government laws and policy regarding Non-Metallic Mining Operations, do not review the laws, regulations, ordinances and policy in a total cultural vacuum. Hopefully, they understand the many cultural impacts caused by these proposed, and, later, real land use operations. With that hope, I have provided a cultural music review of some of our related mining, sand and rock music (not rock and roll music). For those who simply have no appreciation of the cultural impact caused by Non-Metallic Mining Operations, or any other Mining Operations, including on our music history, can ignore the below noted selections of music. \*

In Wisconsin there are State Statutory and State Administration controls on Non-Metallic Mining Operations. These State Statutory and Administrative controls are limited compared to the State Statutory and Administrative controls over Metallic Mining. The Department of Natural Resources will normally regulate the Non-Metallic Mining Operation sites and related Operations by Air Permits, Storm Water Permits, High Capacity Well Permits, and, if near surface water, Shoreland, Flood Plains or Wetland controls, including Dredge Permits, Pond Permits and Grade Permits, under Chapter 30 and 31 Wis Stats, and, specifically, the rules in State NR 103, NR 115, NR 116, NR 117, NR 135, NR 216, NR 340, NR 400 and NR 440 Administrative controls.

---

\* Busted (Coal Miner's Daughter (Loretta Lynn), Working in the Coal Mine (Lee Dorsey), Harlan Howard)(revised Johnny Cash), North to Alaska (Johnny Horton), Sixteen Tons (Merle Travis) (Tennessee Ernie Ford), Hard Travellin' (Woody Guthrie) (Lester Flatt/Earl Scruggs), Big, Bad John (Jimmy Dean), Mr. Sandman (Chordettes), Love Letters in the Sand (Pat Boone), Sands of Iwo Jima (Drive-By Truckers), Rock of Ages (Christian Hymn), The Solid Rock a/k/a My Hope is Built on Nothing Less (Christian Hymn), Built on the Rock (Christian Hymn), Heigh-Ho (Seven (7) Dwarfs), North Country Blues (Bob Dylan), Crystal Chandelier (Charlie Pride), Big Rock Candy Mountain (Burl Ives), Rock and Hard Place (Rolling Stones), Heart of Gold (Neil Young), Lucy in the Sky with Diamonds (John Lennon), She Got the Gold Mine/I got the Shaft (Jerry Reed), and There's a Gold Mine in the Sky (Pat Boone) are certain songs, that may represent for many persons, all types of mining operations and the financial, environmental, personal and cultural impact of such operations on these persons. In

addition, there are many mining classic protest songs that I, unfortunately, have never heard, like The Mountain (Steve Earle), Miner's Prayer (Ralph Stanley), They Can't Put it Back (Billy Edd Wheeler), Paradise (John Prine), The Ballad of Dan Gibson (Gurney Norman), and Black Waters (Jean Ritchie).

---

The Wisconsin Department of Transportation may regulate vehicle weight limits on State highways. The Wisconsin Commissioner of Railroads may regulate rail line use near Non-Metallic Mining Operations. The Wisconsin Department of Transportation may also provide financial assistance for road and railroad improvement. Finally, while the Environmental Assessments and Environmental Impact Statements (see NR 2.085) may be made by any of the pertinent Federal or Wisconsin State Departments, any possible National or State Environmental Impact Statements to be requested by any Federal or State Departments will be quite unlikely denied for any proposed Non-Metallic Mining Operations, unless substantial and very specific environmental, cultural or historical data can be provided to these Federal or State Departments regarding the proposed site(s) and other related proposed commercial and industrial operations. The Federal government, as noted herein, will need a specific Federal action to go forward with an Environmental Assessment, and, later, an Environmental Impact Statement.

Beyond the Federal Environmental Assessment and Environmental Impact Statements, the Federal agencies, including the Environmental Protection Agency (EPA), the United States Fish and Wildlife Service, the Federal Mine Safety and Health Administration (MSHA), the Occupation, Safety and Health Administration (OSHA), the Surface Transportation Board (railways), and the Corps of Engineers may also all play a regulatory role in the siting, operation, maintenance, closure and reclamation of a Non-Metallic Mining Operation site and the related operations, with or without cooperation, with the appropriate State agencies (DOT, DNR, DHS). Again, any Federal regulatory involvement in these Non-Metallic Operations will depend, with or without State cooperation, in great part, on any potential water pollution, potential air pollution, any potential destruction of threatened or endangered species, any possible proposed rail construction, and any major potential worker or major local resident air, noise, water and public nuisance, health and safety issues.

It must be stated that Federal laws and Federal regulations for controlling Non-Metallic Mining Operations, unlike Metallic Mining Operations, are often limited in scope. Often, the specific State Departments in each State (e.g. Wis. DNR), will take, by its contract with Federal Departments, primacy for the enforcement of specific Federal laws and Federal regulations. Certain specific Federal laws and regulations that may and will, in some cases, regulate and control any proposed or existing Non-Metallic Mining Operations related to the exploration, surfacing mining, processing, refining, closure, reclamation, worker safety and inspection of these Non-Metallic Operations may be:

- 1) The National Environmental Policy Act (NEPA) - 42 USC 4321 and 40CFR 6
- 2) The Federal Land Planning and Management Act - 43 CFR 3809
- 3) The National Historic Preservation Act - 16 USC 470(f)
- 4) The Mine Safety and Health Act of 1977, as amended 30 USC 801

- 5) The Federal Clean Air Act of 1970, as amended 42 USC 85
- 6) The Federal Clean Water Act of 1972, as amended 33 USC 1251
- 7) The Federal Safe Water Drinking Act of 1974 - 42 USC 300f
- 8) The Federal Endangered and Threatened Species Act of 1973 - 16 USC 1531
- 9) The Interstate Commerce Act (Railway) - 49 USC 10901
- 10) The Occupational Safety and Health Act of 1970 - 29 USC 651

For County and local Municipal officials, the County or local regulatory controls (County, Town, City or Village) for the Non-Metallic Mining Sitings and Operations, and, later, with the Non-Metallic Mining Closure/Reclamation, all can be based on the specific individual County ordinances or local Municipality ordinances. These ordinances can be varied in scope and content and varied in their public health, safety, fiscal, economic and environmental regulatory protections and enforcement for the County or local Municipality and their residents. It should be added that the County and any local Municipal Non-Metallic Mining Reclamation Ordinances must, when created, enacted and enforced contain Non-Metallic Mining Standards consistent with the State NR 135 and Chapter 295 Wis Stats.

The traditional legal areas of possible County and local Municipal regulatory, litigation, tax and Statutory order controls over Non-Metallic Mining Operations would be the following:

- A. County and local Municipal Zoning Ordinances (consistent with Comprehensive Planning).
- B. County and local Municipal Non-Metallic Mining Reclamation Control Ordinances.
- C. Local Municipal Public Health/Safety “Police Power” Licensing Ordinances.
- D. County and Local Municipal Building Permit Ordinances.
- E. County and Local Municipal Subdivision/Land Division Ordinances (with Comprehensive Planning).
- F. County and Local Municipal Land Use Moratorium Ordinances.
- G. County and Local Municipal Public Road Controls.
- H. Local Municipal Rail Use Controls.
- I. County and local Municipal Civil Public Nuisance Litigation against the real Non-Metallic Mining Operations.
- J. Local Property Tax/Special Assessments in the Mining Operations.
- K. County, Municipal or Citizen Litigation to Challenge the Proposed Non-Metallic Mining Operations.

## II. INITIAL MUNICIPAL PROCEDURES AND CONCERNS.

Prior to any specific substantive actions to be taken for County or local regulation and control related to Non-Metallic Mining Controls, these County and local Municipal officials must first establish proper County and local Municipal procedures and address certain legal concerns, including, if desired, methods to create properly, timely enact, publish, and, finally, enforce certain regulatory ordinances. The initial County and local

Municipal Administrative procedures and the related legal concerns for these local public official procedural actions may involve strict compliance with: a) The State Open Meeting laws; b) The State Open Records laws; c) The State Ethics laws and any local Ethics Ordinances; d) The State Civil Forfeiture/Criminal Administration laws, and, finally, e) The County and Municipal Public Meeting Procedures.

#### A. OPEN MEETINGS LAW

Wisconsin has an Open Meeting Law for County and local Municipal public officials under Chapter 19 Wis Stats. These officials, when they meet in a quorum of their local governing body, for both their discussions and for their possible or real vote and decision actions, must meet in properly and timely noticed public meetings and with an Agenda in the Notice of the Open Public meeting, with the officials accessible to be seen and heard by the public, unless there exists properly noticed specific legal Closed Meetings closed by exemptions cited under Chapter 19 Wis Stats. Local officials can from the Wisconsin Attorney General on line find a booklet called The Open Meetings Law Compliance Guide. Also, the State Bar of Wisconsin has produced a comprehensive document called the Wisconsin Public Records and Open Meetings Handbook written by Melanie R. Swank. Both excellent resources to hopefully aid in full compliance.

County and local Municipal officials, when meeting together in their respective governing body, must understand that when they have gathered at these meetings sufficient number of their public Municipal officials from their governing body unit to take public action, these gatherings will then constitute an Open Public Meeting under Chapter 19 Wis Stats. These public officials must be always sensitive to possible legal claims that they acted illegally with an improper meeting, where there was not a proper public notice of the meeting, or there was no prior written Public Agenda for the meeting. These illegal meetings, with the illegal actions at these meetings (including simple discussions), may serve to later void these County or Municipal public actions, including any ordinance enactment or enforcement.

County and local Municipal public officials should be highly sensitive to claims of improper “walking quorums”, “improper negative quorums”, along with illegal meetings with other government units, illegal communications by and between County and local Municipal officials, all that may create improper and illegal Public government meetings (i.e. e-mail, teleconferences, text messaging and facsimiles).

County and local Municipal officials can meet in Closed Sessions of their respective County or local Municipal government unit under certain limited exemptions in §19.85 Wis Stats. These officials should be very careful, if and when, they meet in Closed Sessions. They should insure these Closed Sessions are properly noticed and properly allowable for a Closed Session under the Public Agenda and State law. Specifically, Closed Sessions may be allowed for County or local Municipal public officials where:

- a. These County or local Municipal officials are conferring with their legal counsel on litigation which a County or the Municipality is or likely to be involved in;
- b. Where competitive or bargaining reasons for the County or the local Municipality dictate (i.e. negotiations with competing opposing parties);
- c. Where local judicial or quasi-judicial County or local Municipality hearings are being held;
- d. Where local employment and licensing matters are being acted upon by the County or the local Municipality, and
- e. Where there is consideration of financial, medical, social or personal information of County or local Municipal employees.

What can be specifically discussed, in the Closed Session, what specific action (i. e. votes) can be taken, in Closed Session, and who can be allowed in these Closed Sessions (beyond the specific local governing body members), are all questions that should be addressed by County or local Municipal public officials well prior to such Closed Session. Here, County and Municipal legal counsel should be asked to confer and advise the County or local Municipal officials regarding these Closed Sessions prior to the convening by the respective County or local Municipal officials into such Closed Sessions.

How then are County or local Municipal officials to avoid legal contests and legal claims regarding State Open Meeting violations by these County or local government officials related to these Non-Metallic Mining Operations under the Wisconsin Open Meeting laws:

- Avoid any Quorums of the local officials of the respective governing body without proper and timely written notice and Agenda when meeting with Mining officers, employees or agents.
- When possible, to avoid illegal Public Meeting claims, use County or local Municipal employees or agents, or limit the number (less than Quorum of the Board), of public officers of the governing body, when meeting with these Mining officials, their agents or their employees.
- Avoid telephone calls, e-mails, memos, letters and other correspondence by and between Non-Metallic Mining officers, employees or agents and the County and local Municipal officials on the governing body, as well as between these respective County and local Municipal governing body officers, regarding the public issues involving Mining. The County or local Municipal Open Public Hearings, with proper and timely Notice and with proper Agenda is certainly the preferred communication and discussion method.

## B. OPEN RECORDS LAW

The Wisconsin Open Records Law, like the Open Meeting Law, is found in Chapter 19 Wis Stats. The key is to understand what is a “record” is defined in §19.32(2) Wis Stats. These public “records” might include:

1. E-mail
2. Recordings
3. Photos
4. Paper records
5. Contractor's records all in the custody of a custodian.

County and local public Municipal officials, in their correspondence with Non-Metallic Mining operators, their employees or agents, or with other persons involved in related matters, must recognize their documents and their specific correspondence (i.e. e-mails, letters, tape recordings, videos, photos, et. alia) sent and received may be subject to an Open Records request which then may force surrender copies of these documents or correspondence to the requestor.

County and local public Municipal officials, however, may have certain records limited or negated from initial public access under the Closed Public Record provisions. These Closed Public Records, for example, may be, by Statute, protected as, 1) Attorney-Client materials; 2) personnel records; 3) law enforcement records, and 4) Closed Public Records related to Closed Meetings.

It should be understood that with these Closed Records, once the legal issues for protection under these Closed Record provisions no longer exists, these Records may be made open, upon request, to the public, including the media. Thus, for example, County or local Municipal officials, with their Closed Meeting Sessions, and with their associated Closed Records in those sessions, may find, later, these Closed Records with the Closed material (revealing, embarrassing, and, yes, possibly, defamatory) will be open upon request for public review by interested persons or the media.

### C. ETHICS LAW

County and local Municipal officials must recognize that the State Ethics law, in Section §19.59 Wis Stats, limits certain financial activities and involvement by County and local Municipal public officials with private individuals, including in and with the Non-Metallic Mining Operation officials, agents and their employees. County and local Municipal officials must not take actions, 1) to use their local public office to obtain private financial gain; 2) to use their local public office to solicit or accept anything of value from persons if it could be reasonably expected to influence the local official's actions; 3) to take any official local public action in a manner in which the local public official has a substantial financial interest, and 4) to use his or her local public position to substantially benefit, directly or indirectly, members of the official's immediate family, or any organization with which the official is associated.

In summary, County and Local officials must first recognize their possible "conflict of interest with any application or operation. Second, they must recognize they, as officials, can not take "anything of value" (e.g. dinners) from applicants or their

operations. Finally, they must recognize with these operations any “nepotism” act or other act to directly or indirectly benefit family or associated organization by use of his or her office is improper.

#### D. CIVIL FORFEITURE/CRIMINAL ADMINISTRATIVE LAWS

County and local Municipal public officials, especially members of the County and local decision making governing body, must recognize in their involvement with Non-Metallic Mining Operations that certain of their activities and their involvement with persons (including here Non-Metallic Mining officials, agents and employees), can lead to possible civil forfeiture or criminal charges (i.e. misdemeanors/felonies). These charges can be brought against the County and local Municipal public officials and Non-Metallic Mining officers, employees or agents. These possible civil forfeiture and possible criminal Administrative law charges might include:

- 1) Public Record/Public Meeting/Ethics forfeiture charges.
- 2) Bribery felony.
- 3) Misconduct in office felony.
- 4) Perjury felony.
- 5) False swearing felony.
- 6) Extortion felony.
- 7) Racketeering felony.
- 8) Obstructing an officer of law misdemeanor.
- 9) Private interest in public contract felony.
- 10) Special privileges from public utilities

In addition, Non-Metallic Mineral Mining officers, employees or agents, in their specific involvement with the County or the local Municipality, clearly may find other legal concerns often unique to their operations with possible misdemeanor/felony charges, including:

- 1) Road damage – Chapter 86/Chapter 943 Wis Stat
- 2) Trespass on others land – Chapter 943 Wis Stat
- 3) Non-metallic mining violations – Chapter 295 Wis Stat
- 4) Air pollution violations – Chapter 285 Wis Stat
- 5) Damage to water supply – Chapter 281 Wis Stat

## E. PUBLIC MEETING PROCEDURES

For a County or local public Municipal official or a County or the local Municipal governing body to properly take and enact local governing body actions, including any adoption of public contracts, public orders, public motions, public resolutions and public ordinances (including creation/adoption and ordinance enforcement), certain basic public meeting procedures must be followed by the County or local Municipal governing body and by its County and local public Municipal governing body officials. These procedures are:

- 1) The State Open public meetings of the County or local Municipal governing body must be legally and timely noticed with stated specific dates/times and locations for the public meeting, with the specific action item(s) to be noticed on the Public Agenda, as published or posted for discussion and possible action at the meeting. This will include notice of any possible Closed Sessions and will include the specific Statutory basis for any such Closed Session. Normally, the County or local Municipal governing body Chair is responsible for the timely and properly posted notice, and for the items to be included on the Agenda
- 2) A quorum of the County committee or local public governing body at these Open Public meetings must be, at the time, present and noted on the record to take any noted public action, including any discussion and any vote action on any proposed motion, order, resolution, control, contract or ordinance, with its creation, enactment and publication.
- 3) A majority vote in favor or opposition of the public action by the County committee or local public Municipal governing body members in quorum should be in the public record are the members “present” and those eligible to vote, including for any proposed ordinance creation and publication. Absent and abstaining members should be also noted, but should not be counted in the number needed to enact such motion, order/resolution or ordinance.
- 4) At the Open Public meetings of the County committee or local public Municipal governing body, the actual approval and enactment of the motions/orders/resolutions/contracts and ordinances should be timely posted or published, when required, under the appropriate Municipal requirements, with any ordinance with forfeiture provisions must be published in a local public newspaper under any allowed method of publication for such ordinance.
- 5) These Open public meetings of the County committee or the local public Municipal governing body should be conducted by the Chair and its members to allow the public to clearly see and hear the discussions and actions by and between the County committee or the local public Municipal governing members and by and between any private persons permitted to participate at the meetings. Order and decorum is to be properly and fully maintained by the governing body Chair at the public meeting. No hissing, booing, shouting, clapping or other public outbursts should be allowed by the Chair or the governing body.

- 6) State Open public meetings of the County committee or the local public Municipal governing body do not require nor allow “public comment” unless so noted on the Public Agenda. The type/amount and where on the Public Agenda is “public comment” to be located and when and where to be authorized is controlled by the County Committee or the local Municipal governing body and the respective Chairs. Such limits and controls should be so noted on the Public Agenda “public comment” item. In addition, Open Public hearings on any specific subject, with or without time limits, may be authorized with proper and timely Agenda notice by the County Committee or the local Municipal governing body.

#### F. SPECIFIC COUNTY AND MUNICIPAL CONCERNS

With the specific applications by a proposed Non-Metallic Mining Operator to the County and the local Municipality to address specific ordinances and controls prior to issuance of the necessary and appropriate permits and approvals, the Non-Metallic Mining Operations, and its related commercial and industrial Operations, may be required by Federal and State regulations to comply with those laws and regulations, and then to obtain proper County or Municipal Zoning Permits, Non-Metallic Mining Reclamation Permits, local County or Municipal Building Permits, and any Municipal Licensing Permits. The proposed Operator will need to hopefully, fully and honestly answer specific concerns in any application regarding the proposed Operations and the related commercial or industrial operating areas. The application should address specific Federal and State laws and regulations related to exploration, mining, processing, refining, transporting, closure, reclamation, water safety, and inspection of the site and related commercial and industrial Operations. At minimum, these proposed Operations should, in any application to the County or the Municipality, be required to answer certain specific questions regarding the proposed Operation site and the related commercial or industrial off-site areas related to:

- 1) Any specific Threatened or Endangered Species concerns.
- 2) Any specific Cultural, Scenic, Habitat, Archeological or Historical Resources on-site or off-site concerns
- 3) Any specific Groundwater, Wetland, Shoreland, Floodplain and Surface water on-site and off-site concerns.
- 4) Any specific Public Health on-site and off-site concerns, including toxic waste, potable wells and air quality.
- 5) Any specific Public Safety on-site and off-site concerns, including any ponds, roads and rail lines.
- 6) Any specific local negative and positive Tax, Fiscal and Economic Municipal and resident concerns, including financial assurances to allow proper and timely closure/reclamation.
- 7) Any specific potential Public Nuisance on-site and off-site concerns, including dust, noise, traffic congestion, odor, blasting, drilling, light pollution and erosion.

- 8) Any specific Closure/Reclamation on-site and off-site concerns.
- 9) Any specific on-site and off-site work place and local near resident safety health and financial concerns

Moreover, the County and local Municipal officials should recognize that with the proposed or current Non-Metallic Mining Operations there will be many local infrastructure concerns and questions. Again, hopefully, complete and honest answers will be provided to the County and the local Municipal officials by the proposed Operator. Comprehensive application questions by the County or the local Municipality should address these relevant infrastructure issues related to the roads, bridges, railroads and water quality and quantity, and how these infrastructure items are all to be provided, protected and maintained by the proposed Operator. Here, specific long-term contracts related to roads can be executed between County or local Municipalities and the proposed Operator under Chapter 86 Wis. Stats. These infrastructure questions, and, hopefully, the complete and honest answers to these questions, all should be of extreme interest to the Non-Metallic Mining Operations, the County, the local Municipal officials, and, finally, the local residents.

Finally, the local property tax, the property assessment and the fee issues, and the necessary revenues to be needed by the County and the local Municipality to properly monitor, supervise, and, when necessary, enforce actions related to the Operation closure and reclamation of the Non-Metallic Mining site(s) and the related commercial or industrial implications can all become of special interest to the proposed Non-Metallic Mining Operations, the local residents, and, obviously, to the County and local Municipal officials. The tax, assessment and fee methods chosen and the local revenues projected to be necessary for proper monitoring, supervision, administration and enforcement are and will be of certain County and Municipal interest for local officials now and in the future.

County and local Municipal officials have certain Federal and State Statutory laws and Federal and State Administrative regulations, along with their County and Municipal ordinances and permits to protect their residents and their County and Municipality from the possible local negative environmental, public nuisance, public safety, public health, fiscal and economic impacts of the Non-Metallic Mining Operations and their related operations. Obviously, the type of and the comprehensive nature of the County and local Municipal ordinance permits and permit conditions, the type and the comprehensive nature of the ordinance regulations, and the timely and aggressive monitoring, supervision and enforcement, and, when necessary, litigation, can serve all, in part, to require full compliance with the Federal, State laws and regulations and the County and local ordinances, to serve to avoid public nuisances, to protect the local environmental quality, public safety, public health and the economic well-being of the residents, and, finally, to protect the fiscal integrity of the County and local Municipal governments.

County and local Municipal officials, when addressing the many legal issues involved in any potential County or local Municipal regulations and controls, should have, or attempt to have, a good basic understanding of certain key legal land use terms, including, 1) Permitted uses; 2) Conditional uses; 3) Principal uses; 4) Accessory uses; 5) Zoning districts; 6) Variances (use and area); 7) Non-conforming uses; 8) Rezone; 9) Board of Appeals/Adjustment; 10); Municipal Plan Commission; 11) Licensing Ordinance; 12) Shoreland Zoning; 13) Flood Plain Zoning; 14) Wetland Zoning; 15) Non-Metallic Mining Operations; 16) Industrial Operations, and 17) Commercial Operations.

Finally, it should be noted here that there are statutory, regulatory and financial limits or weaknesses in the laws in Wisconsin for Non-Metallic Mining Operations, specifically, in comparison to the Wisconsin Metallic Mining Operation laws. First, while Metallic Mining operations allow for “citizen suit” actions (see §293.89 Wis Stats), no such right exists for Non-Metallic Mining Operations. Second, while the Metallic Mining Statute specifically allows for negotiated local agreements with perspective Metallic Mining Operations by local communities (see 293.33 Wis Stats), no such specific Statutory authority exists in the Wisconsin Statutes for Non-Metallic Mining Operations. Quare: Is there sufficient common law inherent authority for a Municipality to execute and enforce a Comprehensive Developer’s Agreement with a Non-Metallic Mining Operation? How far can this Developer’s Agreement go in surrendering or delegating the “Police Powers” authority of the Municipality? Does “surrender” of the Permit Revocation authority by contract violate the illegal “surrender” of the “Police Power?” Third, the penalty provisions for proposed or real Metallic Mining Operation violations are more severe and more comprehensive (see 293.87 Wis. Stats), than those penalty provisions for Non-Metallic Mining Operations. (See 295.19 Wis Stats). Fourth, for every Metallic Mining Permit there must be prepared by the DNR an Environmental Impact Statement (see 293.99 Wis Stats). No such Statutory mandatory requirement exists for any type or size of Non-Metallic Mining Operation. Finally, a municipality with a Metallic Mining Operations, under Chapter 293 Wis Stats, will have a local impact fund available to the Municipality, beyond any funds that may have been negotiated by the County or the Municipality under their Local Development Agreement with the Metallic Mining Operator. No such local impact fund exists in the Statute to reimburse the County or the local Municipalities for local costs incurred as a result of any Non-Metallic Mining Operations.

## G. CONCLUSIONS

The Public Meetings, Public Records, Ethics, and the Civil Forfeiture/Criminal Administrative laws in Wisconsin should be carefully followed by the County or the local public Municipal officials and their respective governing bodies. County and Municipal Clerks and County Committee and Municipal Chairs should be properly, timely and completely advising the County Committee and the local Municipal governing body members, and other County or Municipal officers and employees of the County or Municipality of the procedures and concerns to be followed to avoid

later civil or criminal alleged charges and violations. It should be understood that improper and illegal actions by the County Committee or local public Municipal governing body, and their respective officers and employees, may ultimately lead to the voiding of any prior enacted public actions, as well as the possibility of charges against County or Municipal officers, with civil or criminal violations against such officers, including required payments of any associated costs, restitution and fees. Finally, the specific County and Municipal concerns noted herein should be addressed by the comprehensive County and Municipal applications and the required proper public hearings that both will fully address the many tax, environmental, fiscal, public health, public safety, public nuisance and economic issues.

### III. COUNTY AND LOCAL LEGAL CONTROLS

There are, with any proposed Non-Metallic Mining Operations, and related Operations in Wisconsin, certain possible County and local Municipal legal controls by these appropriate County or local governing bodies with these controls likely having varied possible legal, economic, fiscal, environmental/public health/public safety impacts and results on the Non-Metallic Mining Operation, the County or its local Municipal body, the local community and its residents. These local regulatory controls are, 1) County and local Municipal Zoning Ordinances; 2) County and local Municipal Non-Metallic Mining Reclamation Control Ordinances; 3) Local Public Health and Safety “Police Power” Licensing Ordinances; 4) County and Local Municipal Building Permit Ordinances; 5) County and Local Municipal Land Use Moratorium Ordinances; 6) County and Local Municipal Subdivision/Land Division Ordinances.

In addition to these County and local Municipal regulatory Ordinances there are also other local regulatory, financial and litigation controls related to, 1) County and local Municipal public road controls; 2) Local Municipal rail use controls; 3) Local real and personal property taxes/special assessments; 4) County and local Municipal civil public nuisance litigation controls; 5) County, Municipal or citizen litigation to challenge the proposed Non-Metallic Mining Operations.

#### A. COUNTY AND LOCAL MUNICIPAL ZONING ORDINANCES

By County or local Municipal zoning, the County or local Municipality can regulate 1) the location, the specific type, size and depth of the Non-Metallic Mining Operations, including any related commercial and industrial Operations; 2) hours and days of Operation; 3) setbacks from roadways and property lines; 4) noise, odor, visual and light emission controls; 5) financial protections for the County or Municipality; 6) closure/reclamation requirements; 7) blasting, stockpiling, drilling and excavation requirements; 8) waste disposal requirements; 9) specific operation plan approvals; 11) offsite requirements; 12) air and ground water protection requirements; 13) hazardous waste controls; 14) reporting, inspection and security requirements, and 15) penalty provisions.

A crucial element for any such County or Municipal Zoning ordinance and the respective permits is for the County or the local Municipality with the applicable

ordinance to receive initially complete and honest answers to a comprehensive application from the applicant Non-Metallic Mining Operation, or its agent. Initial decisions to approve, approve on condition, or deny such application, including any later issuance of permit(s), will be based on these complete and honest answers, along with any appropriate public hearing(s), with, hopefully, accurate and honest testimony, including expert testimony where necessary, and other relevant information obtained by the County or Municipality, or any approving authority under the Zoning Ordinance from varied sources including Federal and State Departments.

There are now 246 Towns in Wisconsin out of 1,257 Towns in Wisconsin with no Town or County Zoning (except County Shoreland, Floodplain and any Non-Metallic Reclamation Ordinances).

The remaining Towns in Wisconsin have either their own Town Zoning or are under County Zoning.

#### 1. TOWN ZONING

For Towns in a County where the County already has a County general zoning ordinance, the Town can enact Town Zoning if it first has Village Powers approved by the Town electors. The Town electors have to grant such Town Board Village Powers at a formal Town meeting of the electors. (See §60.10(2)(c) Wis Stats). Beyond that approval, the electors then have to grant the Town Board Zoning authority by either an elector meeting or a referendum. (See §60.10(2)(h) and §60.62(2) Wis Stats). Having gained these proper legal authorities, the Town may exercise Town Zoning by using the same Zoning Statute that Cities and Villages use, namely §62.23 Wis Stats. However, these Towns must still have the County Board approve of any such Town Zoning Ordinance or any amendments thereto. (See §60.62(3) Wis Stats). There are 242 Towns with this type of Town Zoning. In addition, these Towns also must have a Comprehensive Plan “consistent” with their Town Zoning actions.

Town Zoning with Village Powers can have a political, an administrative, fiscal and a personnel cost and expense. Both a Plan Commission and a Zoning Board of Appeals will need to be properly staffed. The Town will bear all the costs of the Ordinance creation and its amendment, administration and enforcement. Enforcement, in particular, includes Ordinance prosecutions by the Town attorney, as well as the initiation of any defense against lawsuits related to the Town’s Zoning. These Town Ordinance actions have the obvious political, legal, personnel and fiscal costs related to local control. Also, these Town Zoning actions taken must again be “consistent” with the Town Comprehensive Plan.

There is also beyond Town Zoning with Village powers under §60.10 Wis Stat the availability for Town Zoning under §60.61 Wis. Stats. This Zoning authority is, however, only available where the County has not enacted County

Comprehensive Zoning. Thus, it is limited for enactment by Towns in a very few Counties in Wisconsin.

## 2. TOWNS UNDER COUNTY ZONING

There are 767 Towns under County Zoning. It is very easy for a Town Board to place its Town under County Zoning; all it takes is an enacted Town Board Resolution. (See §59.69(5)(c) Wis Stats). However, it is very difficult for a Town Board to later ever exit County Zoning. This should be clearly understood by the Town Board and its residents of the Town.

If a County undertakes a “Comprehensive Revision” of its Zoning Ordinances, the Town Board can confirm its wishes to remain under County Zoning, or else the Town Board can exit the County Zoning. The County can extend its old ordinances for up to one (1) year to give the Town Board some time to consider. Here, the devil is in the details because a Court has never considered the issue of the required actions to create a “Comprehensive Revision” and so certain Counties and their legal advisors have different views of how to properly comply with this “Revision” Statute. The only way for a Town to be absolutely sure without testing the Courts is when the County Board actually announces that it is undertaking a complete “Comprehensive Revision”, that the County, in fact, completes that “Comprehensive Revision” under Chapter 59 Wis Stats for each Town.

The relationship between a Town and a County consists of the Town not being able to force a change in the Zoning covering its jurisdiction. A key fact is that Towns can not legally approve or disapprove of any conditional use approvals to be provided at the request of a landowner by the County under County Zoning. Yes, the Town can veto any proposed change in the Zoning covering its jurisdiction. There are notices and public hearing requirements before any such County Zoning may be changed.

It is not clear in the State law at this time whether a Town under County Zoning must also have a Comprehensive Plan. While at first it might appear that a Town under County Zoning is not exercising Zoning, the process still involves Town-level decisions in approving Zoning changes that arguably need to be “consistent” with a Town Comprehensive Plan. Due to the legal uncertainty, Towns under County Zoning should have a Comprehensive Plan, and then their specific actions regarding County Zoning should be “consistent” with their Town Comprehensive Plan.

Finally, it should be understood that the County, under Chapters 59 and 87 Wis Stats, without Town approval, can have enacted and have enforced County Shoreland Zoning and County Floodplain Zoning. Cities and Villages can also enact and enforce their own Shoreland and Floodplain Zoning.

### 3. BENEFITS/DETRIMENTS

So what is the main benefit and detriment for a Town to be under County Zoning? The major benefit is simply that the Town Board is often spared the political exposure, as well as the financial expense of Ordinance creation, amendment, administration and enforcement because the politics and the costs are addressed, in large part, at the County level. The major detriment to County Zoning is the surrendering of significant local Town Board control with little legal opportunity for a Town to later have no zoning or to have its own Town Zoning. The Town Board needs a proper “Comprehensive Revision” by the County Board to have the Town removed from County Zoning. Because a Town Board under County Zoning has limited political exposure, and the Town witnesses limited Town financial and fiscal expense, that is significantly why County Zoning has become in Wisconsin the more popular method over the local Town Zoning method.

### 4. ZONING CONTENT

The important understanding for regulation and control of Non-Metallic Mining is whether a Town has its own Zoning or if the Town is under County Zoning, is for the County Board and Town Board to understand the actual and specific regulatory content within the Zoning Ordinance that will serve to regulate, administer and enforce against the Non-Metallic Mining Operations, closure and reclamation, including the related commercial or industrial Operations. Crucial items to be included in such Municipal or County Non-Metallic Mining Zoning Ordinance would be:

- a) The proper definition of what specific type or types of “Non-Metallic Minerals” are to be regulated by the Zoning Ordinance.
- b) In what Zoning districts are the Non-Metallic Mineral operations and related commercial and industrial operations to be “permitted uses” and in what Zoning districts are all these operations to be “conditional” uses”
- c) The proper definition and description of what is to be the new “Non-Metallic Site” including the related commercial and industrial operations, or any expansion of a current site or other related operations which is the present and proposed contiguous mining areas in the Municipality where one or more of the below conditions fit:
  - ii. The location where the mining is proposed, and where it is now conducted, if any
  - iii. The proposed and current, if any, storage and processing areas for the mining operation, and other related commercial and industrial operations

- iv. The proposed and current areas, if any, where the mining refuse and waste is to be stored and disposed
  - v. The likely and current areas, if any, to be impacted by the mining operations and the related commercial and industrial operations or any later expansion
  - vi. The proposed and current areas, if any, where grading or regarding is necessary
  - vii. The proposed and current areas, if any, for reclamation activities including related commercial and industrial operations.
- d) A detailed Comprehensive Application form created by the County or Town is to be completed by the proposed Operator, or other authorized applicants, for any Non-Metallic Mining Conditional Use Permits, or rezoning and the appropriate permits and approval(s) sought by the proposed Operator, or other authorized applicant(s), including the specific requirements for a submittal, with such Application, of a complete Non-Metallic Mining Reclamation Plan that will meet the County or Town Non-Metallic Mining Reclamation Ordinance requirements. This Application should, as noted previously, address specific concerns and compliance under Federal and State laws and regulations, including specific concerns related to the exploration, mining, processing, refining, transporting, closure, reclamation, worker safety and inspection concerns and compliance with the Non-Metallic Mining Operation Ordinance.
- e) The specific Operation requirements for the proposed new or expansion site Operation, including the Non-Metallic Mining site and the related and associated Commercial or Industrial Operations, are to be in full compliance with Federal and State law and regulations, and with the proposed Conditional Use Permits. The Ordinance should include information in the Permit that will contain, at minimum, the following:
- i. Specific property on-site mine control provisions in the permit for protection of adjacent or near land owners and residents, including:
    - a) Buffer zones/setbacks from property and road lines
    - b) Berms/screening/other aesthetic controls
    - c) Fencing
    - d) Specific Notice provisions to neighbors regarding blasting, drilling or other possible nuisance actions
    - e) Erosion/run-off controls
    - f) Noise Controls
    - g) Air/dust controls
    - h) Light pollution controls
    - i) Ground water/surface water protection controls
    - j) Hazardous waste controls

- k) Specific site boundaries
- ii. Specific off-site requirements, including the related and associated commercial or industrial site requirements.
- f) A detailed closure and reclamation plan with proper and complete financial security (e.g. bond, line of credit) to be filed with County or local Municipality to provide financial assurance of full land restoration in compliance with the restoration requirements of the State, County and local governments, where applicable
- g) Specific insurance requirements for bodily injury coverage at the site and related operations with required certificate of insurance demonstrating the required coverage and amounts for coverage.
- h) Specific topsoil removal and topsoil storage requirements for the estimated term of the operation.
- i) Specific road control and usage requirements, for Non-Metallic Mining operators, employees, agents and independent contractors, at the site(s) and related operations including access routes, transport routes, transport vehicle weight limits, road speed limits, road parking and specific required contracts for road maintenance and use.
- j) Specific daily operation requirements, related to the following:
  - i. Hours/days of site operation (including related off-site facilities site)
  - ii. Road access location(s) at site
  - iii. Water usage at site
  - iv. Hazardous waste storage at site
  - v. Chemical/flammable material storage at site
  - vi. Specific areas to be mined at site, including the timeline and sequence or areas to be mined
  - vii. Location of buildings, structures and equipment at site
  - viii. Erosion/surface water controls to site from adjacent or near landowners
  - ix. Specific public health and safety daily requirements at, near or as a result of the site operations, including:
    - a. Vehicle traffic impacts as a result of the daily operations
    - b. Material or dust discharge off-site from transport vehicles from site.
- k) The criteria for registration of marketable Non-Metallic mineral deposits, under §295.20 Wis Stats, and the DNR Rules, specifically NR 135.53-64

**B. COUNTY AND LOCAL MUNICIPAL NON-METALLIC MINING RECLAMATION ORDINANCE**

In Wisconsin, every County, pursuant to §295.13 Wis Stats, must have now enacted and now must be in administration and enforcement of a Non-Metallic Mining Reclamation Ordinance. Such ordinance jurisdiction will not apply to Cities, Villages or Towns in that County that now have chosen to enact, to now administer and enforce their own Non-Metallic Mining Reclamation Ordinance. All these ordinances must comply in content and enforcement with the DNR rules in NR135 requirements. This requirement is important for County and local Municipal officials to understand for this specific Ordinance related to site reclamation. Certain Counties were “grandfathered” outside these rules (Sec 295.13(2)(2m)). Finally, certain activities were made exempt (see §295.16 Wis Stats) from these ordinances controls and jurisdiction.

The statutory provisions under §295.12 Wis Stat and the rules under NR 135.05 and 135.06 address the standards required to be contained in the Reclamation Ordinance. The statutes and rule provisions to be contained in the ordinance must address protecting surface water, wetlands, groundwater, topsoil management, final grading, topsoil redistribution, vegetation and site stabilization, assessment of the completion of successful reclamation and maintenance of the site(s) and related operations.

Finally, these must be administrative provisions that allow for site and related operations inspection for ordinance compliance and statutory compliance by the agents of these Counties and Municipal unites that have enacted an ordinance. (See §295.17 Wis Stats). Also, these statutes (see §295.13 Wis Stats) and the rules (NR 135 – 43) that cite the required penalties to be contained in and enforced by the County or Municipal Ordinance.

Again, as noted, Towns, Cities and Villages can have their own Municipal Non-Metallic Mining Reclamation Ordinance to enact, administer and enforce. It must be clearly noted that these local Municipal Reclamation Ordinances, like the County Non-Metallic Reclamation Ordinances, however, must meet the minimum DNR rule requirements. However, they, like the County Non-Metallic Mining Reclamation Ordinance, will not normally address the many other Operational concerns at the site and the related commercial and industrial concerns, including concerns related to traffic, setbacks from the property line and roadways, blasting, drilling, dewatering, hours and days of operation, noise, dust or simply the right to use a particular parcel for a proposed Non-Metallic Mining Operation. Thus, there should be, beyond the County or local Municipal Non-Metallic Mining Reclamation Ordinance, normally, a comprehensive, distinct and separate County or Municipal Zoning Ordinance, or any other local Municipal “Police Power” Ordinances.

### C. LOCAL PUBLIC HEALTH AND SAFETY “POLICE POWER” LICENSING ORDINANCES

Towns with Village Powers and Cities and Villages can enact, administer and enforce a Non-Metallic Mineral Mining “Police Power” Licensing Ordinance. This local regulatory Ordinance is not a County or City, Village or Town Zoning Ordinance. It does not, unlike a City, Village, Town or County Zoning Ordinance, establish where in the Municipality a Non-Metallic Mining Operation may be sited, and, therefore, where it may be operated. It will not have specific zoning districts with specific permitted and conditional uses. It may, however, establish first, specific Operation closure and reclamation requirements, and license standards for the site and for related commercial or industrial operations off-site. It may even, under “Nuisance” control, actually require existing Non-Metallic Mining Operations to obtain a license and meet new requirements from their existing Operation and the later closure and reclamation of such Operations. These actual Operation, closure and reclamation requirements in this Licensing Ordinance, except for the actual location authorized for use, may be very similar in content to the operation, closure and reclamation requirements and standards established for any Municipal or County Zoning Non-Metallic Mineral Mining Ordinance, and any Non-Metallic Mining Reclamation Ordinance. This Licensing Ordinance may be supplemental to any existing County or Municipal Zoning Ordinance.

The specific legal authority of a Municipality, including Towns with Village Powers, to require a license and to regulate a Non-Metallic Mining Operation under its “Police Powers”, in lieu of or in addition to any Town or County Zoning, is now being legally challenged before the Wisconsin State Supreme Court in a case labeled Zwiefelhofer v. Town of Cooks Valley (Wis App. 2011). This State Supreme Court decision should, hopefully, establish whether such Municipal licensing ordinances, if not County approved as a Zoning Ordinance, will be valid and enforceable against any proposed or even current Non-Metallic Mineral Mining Operations. This decision will be extremely important for Towns with Village Powers with no County or Town Zoning in their Town who may now wish to enact, administer and enforce through their “Police Powers” specific regulations upon the proposed or even any current Non-Metallic Mineral Mining Operation in their Towns.

### D. COUNTY AND LOCAL MUNICIPAL BUILDING PERMIT ORDINANCES

Counties, Cities, Villages and Towns can regulate Non-Metallic Mining Operations, in part, under their specific statutory ordinance authority to issue Building Permits, and regulate buildings and other structures in their individual Municipality. This would include buildings and structures related to Non-Metallic Mining Operations and the associated industrial and commercial Operations. Counties can have building code authority in Municipalities that have not enacted ordinances of the same subject matters. (See 59.70 Wis Stats). Villages have authority under 61.35 Wis Stats and Cities have authority under 62.23 Wis Stats. Towns with Village Powers have specific building permit authority under §60.61,

§62.17, and §62.23(9) Wis Stats. Towns without Village Powers will need to rely on §60.627 Wis Stats,. and the cited other sections.

Beyond the Building Permit Ordinance, a specific Site Erosion and Storm Water Control Ordinance authority exists for Towns, under §60.627 Wis Stats; for Counties, under §59.693 Wis Stats; for Villages, under §61.354 Wis Stats, and, finally, for Cities, under §62.234 Wis Stats. Again, the Non-Metallic Mining Operations and related commercial and industrial Operations will be required to comply with these Ordinances.

#### E. COUNTY AND LOCAL SUBDIVISION/LAND DIVISION ORDINANCES

Counties, Villages, Cities and Towns all have authority by Ordinance to approve and regulate any proposed subdivision and land division in a Municipality, under §236.45 Wis Stats. Non-Metallic Mining Operations, with their related commercial and industrial operations, may desire to divide certain lands. The County and the Municipalities, by their respective Land Division and Subdivision Ordinances, may regulate the minimum size for subdivision of any land. This Subdivision and Land Division Ordinance may also address for approval, approval on condition, or denial, whether the land proposed to be divided is to be then “suitable” for the proposed Non-Metallic Mining Operation and related uses based on specific environmental concerns including flooding, drainage, wetland, unfavorable topography or other features harmful to the health, safety and welfare of the residents in the Municipality.

#### F. COUNTY AND LOCAL MUNICIPAL LAND USE MORATORIUM ORDINANCES

Counties, Cities, Villages and Towns with Village Powers may adopt Land Use “Moratorium” Ordinances that will serve to limit or negate new land use development (or specific types of development) for a time certain in the County or in the specific Municipality. This includes any proposed Non-Metallic Mining operations and the associated commercial or industrial operations. This “freeze” on land use development (or specific types of development), provides legal land use control protection for the County or Municipality to then allow the timely enactment of regulatory ordinances in the interim time period that will serve to then later regulate these proposed “frozen” uses. When the “Moratorium” Ordinance is once timely and properly adopted and published, it should serve to negate or limit any later legal claim of legal “Vested Rights” by a developer who would normally oppose the new Ordinance and its regulatory requirements. With the newly enacted ordinance or ordinances the proposed land uses will then be legally regulated and controlled where such uses previously would not have been regulated, or previously would not have been regulated to the level of controls that would exist under the new ordinance(s). The legal and political question is the realistic timeline in the Ordinance for which the Moratorium should apply. The usual “freeze” timeline is one (1) year or less with a

possible extension of time available in the Moratorium Ordinance for the County or Municipality to continue the development “freeze” upon their respective option.

#### G. COUNTY AND LOCAL PUBLIC ROAD USE CONTROLS

Counties, Villages, Cities and Towns have numerous statutory controls that may serve to regulate road use activity in the County or Municipality involving Non-Metallic Mineral Mining Operations and their associated commercial or industrial operations. The statutory County and local Municipal controls would be:

1. Local special or seasonal road weight limits (§348.17, §349.15, §349.16 Wis Stat)
2. Local truck routes (§348.16 Wis Stat)
3. Local Class B road weight limits (§348.16 Wis Stat)
4. One way traffic control (§349.10 Wis Stat)
5. Speed and no-passing controls (§349.11, §349.12 Wis Stat)
6. Parking controls (§86.07(2) Wis Stats)
7. Road access permit control (§86.07(2) Wis Stat)
8. Road damage controls (§86.02, §86.021 Wis Stat)
9. Bridge protection controls (§86.14 Wis Stat)
10. Road repair contracts with the prospective Non-Metallic Metal Mining operation (§349.16(1)(c) Wis Stat)

#### H. LOCAL MUNICIPAL RAIL USE CONTROLS

In addition to the road controls, there are also specific Statutory rail controls

- A. Freight road assistance to municipality (§85.08 Wis Stat)
- B. Acquisition of abandoned rail property (§85.09 Wis Stat)
- C. Sale of abandoned railway (§192.73 Wis Stat)
- D. Highway railroad grade crossing (§86.12 Wis Stat)
- E. Railroads to maintain crossings (§86.13 Wis Stat)
- F. Municipal control of spur track construction (§190.16 Wis Stat)
- G. Municipal stop signs at railways authority (§349.085 Wis Stat)

#### I. COUNTY AND LOCAL MUNICIPAL CIVIL PUBLIC NUISANCE LITIGATION

Counties, Cities, Villages and Towns can, by litigation, regulate, limit and possibly prohibit real or possible public nuisances associated with Non-Metallic Mining Operations and the related industrial or commercial operations, including the closure and the reclamation. The statutory authority and the related ordinance authority provided to the County or the Municipality to regulate these public nuisances are provided in §30.294, §66.0413, §66.0415, §87.30 and §254.595 Wis Stats, and in Chapter 823 Wis Stats. The County, City, Village and Town with Village Powers may, under their individual ordinance authority, and its authority under Chapter 295 Wis Stats, commence litigation to obtain Court injunctive orders to cause cessation of the Non-Metallic Mining Operation and its related commercial

and industrial operations, and make for claims of penalties against the Non-Metallic Mining Operations due to the public nuisance violations under State statutes or under the County or Municipal Non-Metallic Mining Ordinance and, specifically, pursuant to violations of the related permits issued under the County or Municipal Non-Metallic Mining Operations Ordinances by the County or Municipality under their Ordinance authority.

#### J. LOCAL PROPERTY TAX/SPECIAL ASSESSMENTS IN MINING OPERATIONS

The State or local taxing authorities (City, Village or Town) may assess Non-Metallic Mining property at fair market value, with the possible different assessment approaches to obtain that value to be the income approach, the recent sales of the subject property approach, the comparable sales approach, or the cost to construct and approval. Normally, these operations will be assessed by State assessors. What specific tax assessment impact these Non-Metallic Mining Operation sites and the related commercial and industrial operations will have on new or adjacent real property assessment is a very interesting and, in some cases, quite alarming concern.

Beyond property tax assessment for the Non-Metallic Mining and the related industrial and commercial operations, there is also the right of the local Municipality to place special assessment and special charges on specific lands, including the Non-Metallic Mining Operation land. (See §66.0701, §66.0703, §66.0627 Wis Stats). These special assessments will relate to special improvements provided to the subject land and will relate to the special charges for special services provided to the subject land.

Also, a County, City, Village or Town may impose a reasonable special fee under §66.0628 Wis Stats for Municipal services provided in the regulation of the Non-Metallic Mining Operations. These Municipal fees relate to the Non-Metallic Mining Operations would often be imposed for related costs for a permit review and issuance under a local Municipal ordinance (e.g. the Town Non-Metallic Mining Reclamation Permit). In addition, under §295.15 Wis Stats, fees can be collected by the County or Municipality that has a Non-Metallic Mining Reclamation Ordinance with a portion of these fees to remain with the County or Municipality for administrative costs.

Finally, the local Municipality, including Towns, may create Tax Incremental Financing Districts, including Town Tax Incremental Finance Districts and Environmental Tax Incremental Finance Districts. The Districts are available as a tax mechanism to provide funding for the subject Municipality to meet local Municipal costs that will be incurred related to the Non-Metallic Mining Operations and the related industrial and commercial operations. This often involves certain infrastructure costs that will be necessary to be incurred by the Municipality if the developer does not, by voluntarily agreement, pay all these projected costs. (See §60.868, §66.1105 and §66.1106 Wis Stats)

K. COUNTY AND MUNICIPAL OR CITIZEN LITIGATION TO CHALLENGE THE PROPOSED NON-METALLIC MINING

The County, City, Village or Town, or any resident with proper legal standing, may litigate, against any proposed Non-Metallic Mining Operation claiming that with the proposed Non-Metallic Mining Operation an alleged injury will occur to the County, the Municipality, or its residents due to the proposed environmental physical changes. Legal actions can be taken against the appropriate Federal or State Department (e.g. EPA/DNR) to enjoin the proposed Non-Metallic Mining Operations based on a necessary and inadequate Federal or State Environmental Assessment (EA), or an inadequate Federal or State Environmental Impact Statement (EIS), when both are claimed to be necessary to be completed by the appropriate Federal or State agencies (e.g. EPA/DNR/DOT/ PSC).

The important legal issues will be what type of public hearing in any Environmental Assessment/Environmental Impact Statement should be held, if any, and, specifically, also, whether any Federal or State Environment Impact Statement will be required to be prepared by the appropriate Federal or State Department, which in the case of a Non-Metallic Mining Operation, is discretionary with the appropriate Federal or State Department. In the area of environmental law, (see NR 150) for any Environmental Impact Statements (EIS) to be provided, due to any alleged legal injury by a party with standing, it is not limited to only a physical or economic injury; allegations of aesthetic, conservational, recreational, health and safety interest will confer proper standing so long as the alleged injury is to be caused by a proposed change in the physical environment. A resident living in the Municipality, or in the Municipality of the proposed site, may be most likely to successfully claim proper standing to make a claim to a Federal or State Department with either claiming a need for an Environmental Impact Statement because the proposed action will significantly harm the environment where the Municipality is located or where that person resides. A specific Non-Metallic Mining Operation with a multitude of nuisance, public health, public safety and the specific air and water concerns within the site(s), and the related commercial and industrial Operations, has a better likelihood to demonstrate significant harm potential that would demand a Federal or State Environmental Impact Statement. Under the National Environmental Policy Act (NEPA) the Federal Departments will con commence an Environmental Impact Statement unless the action (e.g. Federal licensing/Federal funding) is a major Federal action significantly affecting the quality of the human environment.

The purpose of a Federal or State Environmental Impact Statement (EIS) is to first enable a Federal or State agency (e.g. DNR/DOT/PSC) to take a “hard look” at the environmental consequences of a proposed claim and to look at alternatives to the proposed site and Operation involved in the action. The second purpose is to allow the greater public audience information to make important decisions regarding the proposed project.

In addition, beyond any Environmental Impact Statement challenge for a proposed Non-Metallic Mining operation and related operations, any Municipality or any “citizen” under State law, pursuant to §68.11 Wis Stats and §227.42(1) Wis Stats, may seek to obtain a State contested case hearing and individual review of a County or local Municipal State decision to allow, or not, issuance of the necessary Non-Metallic Mining Permits and approvals, specifically, including, the Permits issued under the County or Municipal Non-Metallic Reclamation Ordinance. (See NR 135.30). Other State laws and regulations, and any County and local Municipal Zoning and other Ordinances may also have included similar rights for Municipalities and “citizens” to contest nuisances, to contest violations of other related issued State, County and local Permits and to require a hearing for review of the decision to issue such Permits or any approval under Chapter 68 Wis Stats. For example, air pollution permits issued under the State NR 407.09 can be addressed by “citizen suits”.

Finally, under the Federal Clean Water Act, Clean Air Act, the Safe Drinking Water Act, the Endangered Species Act, the Toxic Waste Control Act, the Noise Control Act, along with other Federal Emergency Government and Environmental laws, specific “citizen suits” may be brought against the Federal agencies, and others, where such “citizen” persons have, with the proposed Non-Metallic Mine Operation, standing to litigate if they are to be “adversely” affected by the proposed operation.

### **CONCLUSION**

Protecting the public health and safety of its residents is the first common law public trust charge for all County and local Municipal officials in Wisconsin. This charge involving the public trust is often, unfortunately, forgotten by certain County or local public officials who may, instead, involve themselves in other economic or fiscal concerns and actions in their County or Municipal role. Proper and timely Federal, State, County and local regulations and controls, with proper supervision, monitoring, administration and enforcement against any Non-Metallic Mining Operations, and related Operations, by Federal, State, County and local Municipal officials, hopefully, can serve to provide some of the necessary and important local health and safety protections, also may avoid possible future public nuisances, and, finally, may serve to protect the long-term economic, fiscal and environmental viability of the local community and its residents. Nevertheless, local Municipal officials and their residents should never simply rely on Federal, State or County laws and regulations to protect their local community and residents with any proposed Non-Metallic Mining Operation, or any of the other related Operations.

County and local Municipal officials, in attempting to provide proper and timely local regulations and controls, must always, first, recognize their proper and timely Open Meeting, Open Records, Ethics and criminal avoidance responsibilities and to address lawfully certain requirements in the process and the procedures to create, provide and enforce such local regulations and controls. County and local Municipal officials also must then recognize that any proposed Non-Metallic Mining Operation, or related Operation, may contain many varied mining, industrial, commercial and

transportation land use and environmental challenges, both on-site and off-site, with possible short-term and long-term costly negative environmental, economic, fiscal, public safety, public health and public nuisance ramifications to the County, Municipality, or its residents that may continue for many years after the final closure and reclamation of the sited and related Operations.

County and local Municipal officials, where possible, should timely and properly enact, or have enacted by the County or the Municipality, both a Comprehensive County or Municipal Zoning Ordinance and a County or local Non-Metallic Mining Reclamation Ordinance. Towns, without Town or County Zoning, should, to hopefully protect their Towns and its residents, related to the public health and public safety, environment, fiscal, and economic concerns, at minimum, should enact a proper “Police Power” Licensing Ordinance that addresses for proper regulation the specific Non-Metallic Mining Operations and the related industrial or commercial Operations. What specific fiscal protections, economic protections, environmental protections, public nuisance protections and public health and safety protections should be contained within these zoning and licensing ordinance(s) is very important for the timely, proper and meaningful application and enforcement of regulations and controls on these Non-Metallic Mining Operations and their related commercial on industrial operations.

Until adequate and comprehensive County or local Municipal zoning, building permit and other licensing and permit ordinance(s) can be enacted and published, a Moratorium Ordinance should strongly be considered by the County or Municipality to be timely and properly enacted and published that will, when timely and properly enacted and published, provide adequate time for the County or the local Municipal officials to enact or amend and publish their zoning, licensing, building permit, and any other “Police Power” regulatory ordinance(s).

Finally, the County and any of the likely impacted Municipalities with an existing or proposed Non-Metallic Mining Operation site, and related Operations, will have previously completed a Comprehensive Plan that addresses many of the possible environmental, public health, public safety, public nuisance, fiscal and economic concerns and likely impacts of any proposed or existing Non-Metallic Mining Operations and the related commercial and industrial Operations. County and Municipal officials, under Wisconsin law, always must understand that the County and the local Municipal Zoning actions, and the County and local Municipal Subdivision actions, including any amendments (e.g. rezoning), will need to be “consistent” with any existing and respective County or local Municipal Comprehensive Plan, under Chapter 66 Wis Stats. The other ordinances, including the Building Permit and the “Police Power” and the Licensing Ordinances, will not need to be “consistent” by the Statutory requirement with the County or Municipal Comprehensive Plan.