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December 17, 2013

Assembly Committee on Urban and Local Affairs
Public Hearing
10:00 AM – 300 Northeast

Chairman Brooks and Members of the Committee:

I want to thank you for the opportunity to speak on AB 483. This legislation allows for more local control when it comes to regulating the hours of operation and the noise or traffic volume for borrow or material disposal sites when surrounded by a high density population.

Under this legislation, a county, city, village or town (political subdivision) is provided with more regulation authority, to assure that its citizens are not disrupted during transportation projects in their subdivision.

Thank you for taking the time to discuss AB 483. I am open to any questions the committee may have.

Thank you,

Dale P. Kooyenga

A handwritten signature in black ink that reads "Dale P. Kooyenga". The signature is written in a cursive style and is positioned to the right of the typed name.

AB 483

Comments/Suggestions:

I. Sec. 1 --- Revise sentence to read:

Except as provided in sub. (3), no zoning ordinance enacted under s. 59.69, 60.61, 60.62, 61.35, or 62.23 may apply to a borrow site or material disposal site if, as determined by the department

ADD: in a chapter 227 proceeding, after a 60 day notification to the political subdivision in which the proposed borrow site or material disposal site is to be located, that all of the following apply.

(This insures that the local government unit is aware of the application and can notify its affected residents).

II. Line 8 --- should read:

that has more than 500 residents residing on property, of which any portion is within a one-mile radius of the perimeter of the property on which a borrow site or material disposal site is to be located.

(This makes it much easier to count residents).

III. Eliminate "volume" in line 11.

(This allows consideration of other traffic issues, such as size of vehicles and route of vehicles).

Quarry Photos

Nature balances itself: Aerial photo taken 6/13/13 at 8:00 a.m.
Notice high water elevation.





Wisconsin Department of Transportation

www.dot.wisconsin.gov

Scott Walker
Governor

Mark Gottlieb, P.E.
Secretary

Office of the Secretary
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P O Box 7910
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Telephone: 608-266-1113
FAX: 608-266-9912
E-mail: sec.exec@dot.wi.gov

DATE: December 16, 2013

TO: Members, Assembly Committee on Urban and Local Affairs
The Honorable Edward Brooks, Chair

FROM: Tom Rhatican, Assistant Deputy Secretary

SUBJECT: Assembly Bill 483 (regulating borrow sites and material disposal sites used for transportation projects)

The Wisconsin Department of Transportation (WisDOT) would like to provide some important background information and commentary to committee members as you consider 2013 Wisconsin Assembly Bill 483 (AB 483). AB 483 relates to local ordinances regulating borrow (excavation) sites and material disposal sites for certain transportation projects. The Department respectfully opposes AB 483.

Under current law, local zoning ordinances are preempted by state law as they pertain to borrow (excavation) sites or material disposal sites operated in connection with a transportation project directed and supervised by WisDOT – but only if all six criteria enumerated in Section 85.193(2), Wis. Stats., are met. For example, the criteria require that the sites be used exclusively for the transportation project (and only during the period of construction) and that all applicable state noise limits are met. Once the Department determines the suitability of the site, the “transportation project contractor” coordinates with owners of the potential borrow/disposal sites and assumes responsibility for the project and compliance with the exemption criteria. A copy of the applicable statute is attached for your convenience.

AB 483 proposes to create two exceptions to the preemption of local ordinances. First, and as applied to any borrow or disposal site, it creates an exception for any town, village, or city with respect to limiting 1) hours of operation, 2) noise, or 3) traffic volume. Second, and as applied to a residential area with 500 residents living within a 1-mile radius of a material disposal site, local governments retain full zoning authority. Lastly, and where preemption still applies, the bill proposes that WisDOT, and not the project contractor, manage the current exemption criteria for each site.

The Federal Highway Administration (FHWA) has consistently advised that the selection and use of borrow sites and material disposal sites be negotiated by the project contractor and the local property owner. We concur. While project contractors are required to notify the Department of the site(s) that they will be using as a borrow site or

material disposal site, WisDOT should simply determine initial suitability and then ensures proper closure of the respective site once the project is completed. The transportation project contractor should manage the entire project, to include negotiating for the necessary borrow and disposal sites.

If AB 483 were enacted, local governments may seek to limit borrow or disposal sites within their jurisdiction by regulating hours of operation, noise, and traffic volume – creating a possible patchwork of local regulations for a project. Project contractors will likely find it difficult to secure the most cost-effective borrow and disposal sites and be forced to transport material over greater distances, thus causing increased delays and costs to any transportation project.

WisDOT continues to be committed to providing the traveling public with the safest and most cost-effective highway system; and through our “good neighbor” policies and practices continues to be responsive to the interests of local governments and citizens affected by transportation projects.

If you have any questions or concerns, please contact me at (608) 266-1114 or at tom.rhatican@dot.wi.gov.

Remarks to the Assembly Committee on Urban and Local Affairs
Mayor Steven Ponto, City of Brookfield
December 17, 2013

Good morning. I appreciate the opportunity to address you briefly in support of Assembly Bill 483.

The provisions of Assembly Bill 483 are particularly important to the City of Brookfield. We have an 85 acre parcel of land on our east side which is now referred to as the "Sileno Property." For 57 years, from 1921 to 1978, it was used as a sand and gravel pit. During that time, 6.7 million cubic yards of sand and gravel were removed. Operations stopped in 1978 and, for the last 35 years, the property has been idle. Vegetation has grown up but not much else has happened.

In 2011, the State Budget created Statutory Section 85.193. This was a non-fiscal policy matter inserted in the state budget by the Joint Finance Committee. Under Section 85.193, contractors working on WDOT projects do not need to secure local zoning approvals for depositing clean fill in a site if the owner is willing to accept it. The local government has some input under non-zoning laws – but its control is substantially limited. Specifically, the input which the City of Brookfield has under non-zoning laws is that a **Fill and Grading Permit** and a **Storm Water Management Permit** – must be obtained from the City Engineer. Issuing these permits is a ministerial act; with standards that apply across the board. These permits cannot be denied arbitrarily.

The Wisconsin Department of Transportation's Zoo Interchange Project will be conducted in the vicinity of the Sileno Property. We are very concerned that, under Section 85.193, someone could use the Sileno Property as a fill site for WDOT fill, with very little control by the City government to impose reasonable restrictions to protect residents living in the area.

Representative Dale Kooyenga represents the portion of the City of Brookfield which includes the Sileno Property. He has introduced Assembly Bill 483 with our input and we strongly support this bill. As soon as the bill was introduced, I drafted a resolution supporting it and that resolution was unanimously adopted by our Common Council on November 5, 2013. I subsequently e-mailed a copy of the resolution to each of you on this Committee.

We support AB 483 because it would negate the preemption of our local zoning ordinances under Section 85.193 under the bill's provision that there are more than 500 residents living within a one-mile radius of a material disposal site. It also provides that Section 85.193 does not limit the authority of a local government to regulate, by ordinance, the hours of operation of, or noise or traffic relating to, any material disposal site.

The area around the Sileno Property is largely a well settled residential area with homes constructed in the late 1950's, 1960's and 1970's. If fill from WDOT projects were to be deposited in the Sileno Property, we very much want to be in a position to reasonably control the hours of operation; dust generated by the operation; the noise of the operation; and other factors. We believe that AB 483 serves our goal of reasonably protecting the interests of our residents. We appreciate your favorable consideration of this bill. As the Zoo Interchange Project is getting underway, we encourage you to act favorably on AB 483 as soon as possible.

Thank you for your consideration.

City of Brookfield, Wisconsin

RESOLUTION OF THE COUNCIL AS A WHOLE		
Council As A Whole Date: November 5, 2013	Council As A Whole Action: Carried 14-0	
Resolution of support for the proposed amendment of Wisconsin Statute 85.193 as set forth in Assembly Bill 483.		
Resolution No. 8684-13	Date Introduced: November 5, 2013	Council Action: Adopted

WHEREAS, Assembly Bill 483 (hereinafter the "Proposed Legislation") has been introduced in the Wisconsin Assembly, by Representatives Kooyenga, Loudenbeck, Hutton, Nass and Bernier, and has been referred to the Committee on Urban and Local Affairs for review, consideration and recommendation to the full Assembly; and

WHEREAS, Wisconsin Statute 85.193 provides that, under specified circumstances, contractors working on Wisconsin Department of Transportation projects do not need to secure local zoning approvals for depositing clean fill in a site if the owner is willing to accept it, thereby preempting the application of local zoning ordinances; and

WHEREAS, the Proposed Legislation would provide that this preemption would not apply if there are more than 500 residents living within a one-mile radius of any point of disposal on a material disposal site; and

WHEREAS, the Proposed Legislation also provides that the above described preemption does not limit a municipality's authority to regulate, by ordinance, the hours of operation of, or noise or traffic volume relating to any material disposal site; and

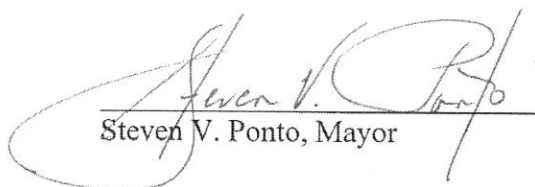
WHEREAS, the Proposed Legislation, if enacted, would restore important elements of local control which would enable the City of Brookfield, and other municipalities, to reasonably protect residents from some negative effects of certain fill operations;

NOW, THEREFORE, BE IT RESOLVED, that the Common Council of the City of Brookfield, Wisconsin, by enactment and adoption of this resolution, expresses its support for the proposed amendment of Wisconsin Statute 85.193 as set forth in Assembly Bill 483, and hereby urges the Wisconsin State Legislature to pass Assembly Bill 483, and the Governor to sign it into law.

ADOPTED AND APPROVED ON NOVEMBER 5TH, 2013.



Kelly Michaels, City Clerk



Steven V. Ponto, Mayor



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E-mail: league@lwm-info.org
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To: Assembly Committee on Urban and Local Affairs
From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities
Date: December 17, 2013
Re: AB 483, Restoring to Municipalities Limited Control Over the Location and Operation of Borrow and Waste Disposal Sites

The League of Wisconsin Municipalities strongly supports AB 483, restoring some local control to regulating the location and operation of borrow and material disposal sites for state transportation projects.

The state law provision exempting state highway project borrow sites from local zoning was scheduled to sunset on July 1, 2011. Instead, the 2011-2013 budget bill greatly expanded the provision to include all state transportation project borrow sites, not just state highway projects. It also applied the preemption to material disposal sites. In addition, the 2011-2013 budget preempted local noise regulations and landscaping requirements applicable to borrow and material disposal sites.

AB 483 would restore some local control lost in the 2011-2013 state budget. Under the bill, preemption of local zoning would not occur with respect to any residential area that has more than 500 residents living within a one-mile radius of a material disposal site. We think it makes sense to treat areas with denser population different than rural, less populous areas. The bill also specifies that a municipality is not preempted from exercising any authority to regulate, by ordinance, the hours of operation of, or noise or traffic volume relating to, any borrow site or material disposal site. Finally, the bill specifies that DOT makes the determination as to whether criteria are satisfied that give rise to the preemption of zoning ordinances as applied to borrow sites and material disposal sites.

We urge you to recommend passage of AB 483 as a reasonable adjustment to the expansive preemption of local control over borrow and disposal sites that occurred in the 2011-2013 state budget.

Thanks for considering our comments.

Testimony of Jim Hoffman
President, Hoffman Construction Company
Opposition to Assembly Bill 483
Assembly Committee on Urban & Local Affairs
December 17, 2013

Good morning, Chairman Brooks and Committee members, and thank you for holding this hearing today! I am Jim Hoffman, President of Hoffman Construction Company, located in the wonderful community of Black River Falls!

As a 4th generation road builder here in Wisconsin I have been blessed to grow up in a family business that values using Wisconsin materials to build a product that saves lives, promoting economic growth, adding value to our communities, and creating good-paying, family-supporting jobs. I'm happy to report that over 250 of those jobs are at Hoffman Construction ... with many more subcontractor and vendor jobs.

The history of our company can be traced to 1905, when my great-grandfather went broke growing hops in Jackson County. He wasn't much of a farmer but a good horseman so he and his wife moved to town and started a drayage line and opened a Standard Oil distributorship ... and then started building roads in 1915.

My dad has always said that in the road building business the companies that survive make the fewest mistakes. The reason we are still around almost a century later is because we are continually fine-tuning our operations and covering our risk in order to succeed in a very competitive industry. We perform public work for public benefit ... and WisDOT awards projects to the lowest responsible bidder.

To compete in that environment, we must figure out the least expensive way to build a project while meeting state construction specifications, safety regulations and complying with DNR environmental standards.

For the earthmoving industry, securing borrow and waste disposal sites is a critical part of that success. **And that is why I am here today testifying in opposition to Assembly Bill 483.**

I can't emphasize enough how difficult it is to put a bid together – particularly in today's competitive climate for Wisconsin's earthmoving industry – with the uncertainty of not knowing whether the local municipality is going to grant a permit for what is effectively my largest cost driver. This is a huge transfer of risk and is not always in the overall public interest.

For example, we had a project in the Town of Paris in Kenosha County in which our bid assumed we would have access to fill from a borrow pit that was directly adjacent to the DOT right-of-way. This way, we could use our off road equipment which lowered our bid to the state. However, the town denied the permit at the last minute and we had to scramble to truck in fill from a borrow site in an adjacent township over 5 miles from the project.

Here were some of the consequences:

- Negotiating with a new landowner for fill when you have little or no bargaining power is a bad business plan ... and we ended up paying more for the fill than our bid anticipated.
- We trucked the fill longer distances – burning more fuel, emitting more truck exhaust, exposing more roadway to heavy truck traffic, and inconveniencing a lot more homeowners in the process.
- And, with increasingly tight deadlines attached to WisDOT projects, the additional transportation forced us to choose between paying our workers overtime or paying the state liquidated damages because we wouldn't be able to finish the project on time.

I know the term “Regulatory Certainty” has been used around here a lot in the past few months, but this is a real example of how decisions that you as legislators make can have a real chilling effect on how we run our businesses.

All we ask is tell us exactly what the rules are ... and Hoffman Construction Company will find a way to live within those rules, build a quality product at a competitive price, and put people to work at a decent wage. However, tell us the rules are subject to change every time we cross the border into a new political jurisdiction, and you've just created the kind of uncertainty that will increase costs, stifle business growth and job development, and move the state away from the focus on “Jobs and the Economy” that this legislative session was supposed to be all about.

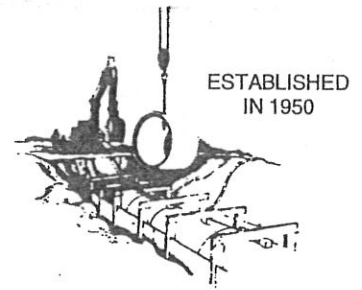
Assembly Bill 483 begins to move us in the wrong direction by injecting the first of what could be many exceptions to this borrow and waste site language that has resulted in lower project costs and created uniform statewide standards for our industry. That is why I hope this committee rejects AB 483.

Thank you for this opportunity and I hope you have a Merry Christmas and Happy New Year!



AN EQUAL OPPORTUNITY EMPLOYER

SUPER EXCAVATORS, INC.



Testimony of Peter Schraufnagel, Super Excavators Inc.
Assembly Committee on Urban & Local Affairs
Assembly Bill 483
December 17, 2013

Chairman Brooks and members of the committee, thank you for this opportunity to testify in opposition to Assembly Bill 483. I am Peter Schraufnagel, 3rd generation owner of Super Excavators Inc. based in Menomonee Falls.

My company had been working cooperatively with the City of Brookfield to fill a portion of the Sileno property and convert this abandoned quarry into a park with biking and walking trails, parking and public access, and land for new development. This was the City's preferred use for the property, as identified in its long-range plans.

Here is a brief history of our work on this project:

In February 2013, Super Excavators, Inc. entered into a contract to purchase the Brookfield Quarry with "The Quarry Group" managed by Sileno Properties. Initial meetings were held with the City of Brookfield staff to get a gauge of interest in development. There was a tremendous amount of momentum for the project even after the first public information meeting. The city staff, alderman, and the Mayor were pressing for this project to move forward. Several closed sessions occurred to discuss project scope. After the first informational meeting the most common complaint was the duration of trucking. Originally we were seeking a 10 year fill period to place 2 million cubic yards. Prior to going into the PIM, we made an agreement with the City to reduce it to 7 years and 1.8 million cubic yards. As time moved on more public pressure was put on the Mayor and Alderman. They continually heard about Dust, Noise, and Duration of the fill operation. The City and Super Excavators came upon a solution that would reduce the timing to 5 years and quantity of fill to 1 million cubic yards of fill (half of our original proposal).

Then the Mayor requested that we hold a public hearing, which by their ordinances, wasn't even required. He wanted everything to be in the public light so residents couldn't say this deal happened behind closed doors. Even though operating agreements are traditionally negotiated out of the public eye. Super Excavators and the City of Brookfield communicated all of our plans on our respective websites to educate the public.

The public hearing was a launch pad for the opposition to get in the face of the politicians. The opposition succeeded that night in making the Mayor and his people very nervous to the point where the Mayor pulled his support for the project. A few days later, the Mayor changed his mind. The Mayor requested that we put some final plans together and get the wetland permits done for submittal. Meanwhile, the City's and our counsel were to finalize the operating agreement. A few days later the opposition secured enough signatures to force legislation upon the City. The Mayor

buckled under the pressure due to his upcoming election in April. The City's elected officials chose to save their jobs over what was ultimately best for the community.

Our efforts to date on the project total 9 months of work and over \$125,000 in consulting fees.

This all in an effort to secure a site that could have saved the WDOT millions of dollars in project cost and the environment the impact of trucking 2-3 times longer distances from the Zoo interchange.

The need for an operating agreement with the City is obvious. The current State Statute does not reach far enough. Fill/Borrow sites need certainty of completion for contractors to get return on our investments. Communities are using Police Powers to shut sites down. The bid process forces us to be as efficient as possible to get work. This means we have to seek out borrow/fill sites that will be required to compete for the work. This isn't possible for us if we don't have certainty of the rules and laws to work by.

We are opposed to Assembly Bill 483, which would remove the exemption from local zoning for construction borrow and waste sites if more than 500 residents live within a 1-mile radius of the site. We are opposed for the following reasons:

1. **Increased costs** – Contractors bidding for work on WisDOT projects are chosen based on the lowest responsible bid, creating an incentive for our industry to be as efficient and innovative as possible. For earthmoving companies like ours, a significant part of that competitive edge is the ability to secure borrow and waste disposal sites as close to the projects as possible to minimize trucking costs.

The current Chapter 85 statutory exemption from local zoning ordinances include reasonable criteria for eligible borrow and waste sites, and subject contractors to standards pertaining to noise, erosion and site restoration at the completion of the project.

Eliminating this site as a place for us to dispose of clean fill from the Zoo Interchange and other WisDOT projects is forcing us to truck the material longer distances – resulting in increased fuel use, more diesel emissions, and wear and tear on our equipment. This increases overall project costs at a time the state's Transportation Fund is short on revenues to meet its infrastructure needs. These local decisions that drive up the cost of the Zoo Interchange divert money from other needed projects elsewhere in the state.

We should be finding ways to reduce the cost of WisDOT projects, which was the goal of the statutory exemption for borrow and waste sites.

2. **Regulatory Certainty** -- Contractors need to know the ground rules for doing business ... and have some degree of certainty that those rules won't change mid-stream during a project. The alternative presents an unacceptable risk to contractors, endangering our companies and the jobs of our workers.

We have to know when we are putting together our bids whether certain borrow and waste sites are going to be available. In this particular instance, my company did not intend to invoke the statutory exemption from local zoning for this site because we planned to also dispose of

clean fill from private jobs we were conducting in the area. The statutory exemption applies only to WisDOT projects, not private projects.

Nevertheless, it would not have been a sound business decision for us to spend more than \$1 million to purchase the Sileno property given the uncertainty of us being able to use the site for material disposal ... either because of this proposed change to state law, or a new local ordinance, or some other restriction under the guise of local police powers.

If the Legislature wants to promote Wisconsin as a good place to do business, you need to provide some degree of regulatory certainty. Government by "petition or referendum" is a recipe for chaos and is a hurdle for business and job growth.

3. **Respecting Local Goals** – Finally, I would like to emphasize that it was never our intent to use the statutory exemption from local zoning ordinances to do anything contrary to what we believed were the wishes of the community. As I said, we are headquartered right next door in Menomonee Falls and these are our friends, neighbors and communities.

Up until very recently, we thought we had a "Win-Win" with the City of Brookfield. We needed a place to cost-effectively dispose of clean fill and, in the process, the city was going to turn an unstable and unsafe quarry into the park it had envisioned in its long-range plans.

We worked together on hours of operation, truck routes to minimize impacts on neighbors, dust and noise control, improvements to Burleigh Road to protect the traveling public, keeping surface streets clean, working with the DNR on converting the quarry to parkland. In response to neighborhood concerns, we significantly scaled back our plans for the property.

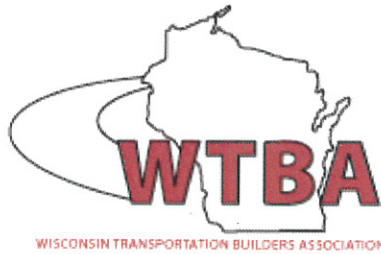
In fact, just over two months ago, the Mayor of Brookfield penned a column titled "Plans for Quarry Represent Best Efforts for Best Long-Term Results." Suddenly, that's all changed and the city has scrapped plans for the park because of opposition from a vocal minority.

I'm sorry, but you're not going to be able to turn an abandoned quarry into a park with public access and stable, developable land without some truck traffic and minor inconveniences.

Please, do not pass Assembly Bill 483 into law. It will increase transportation project costs, create yet more uncertainty for Wisconsin businesses, and harm our ability to work with local officials on potential solutions that benefit our communities.

Thank you for your time.

A handwritten signature in black ink, appearing to be "R. D. P.", written in a cursive style.



Memorandum

To: Members of the Assembly Committee on Urban & Local Affairs

From: Patrick Goss, Executive Director

Subject: WTBA Opposition to AB483

Date: December 17, 2013

The Wisconsin Transportation Builders Association (WTBA) is opposed to Assembly Bill 483, which would remove the exemption from local zoning for construction borrow and waste sites if more than 500 residents live within a 1-mile radius of the site.

This proposed legislation would raise the costs for contractors and, ultimately, taxpayers. The Wisconsin Department of Transportation (WisDOT) awards work to contractors on a lowest responsible bidder basis. This requires contractors to be efficient and innovative in order to be successful. For the earthmoving industry in particular, their ability to compete lies in their ability to secure borrow and waste disposal sites as close to the projects as possible to minimize trucking costs.

The current Chapter 85 statutory exemption from local zoning ordinances include reasonable criteria for eligible borrow and waste sites, and subject contractors to standards pertaining to noise, erosion and site restoration at the completion of the project. This legislation would force contractors to truck material from projects longer distances. As a result, fuel use and diesel emissions would increase. This increased cost will be passed on in the form of higher bid prices for state transportation construction projects. This will further exacerbate our state's current problem of insufficient transportation revenue to meet infrastructure needs. In addition, this legislation gives locals significant say in when and where trucks can operate. This has the potential to put the contractor right in the middle between the desires of the locals and the requirements of the state and federal government. As an example of this, the locals could say that the contractor may not run trucks at night. However, the schedule for the project, like the Zoo Interchange, may specifically call for work to be done at night in order to have minimal impacts on the travelling public. This contradiction has the potential to cause delays and increase costs and risk for the contractor.

We need to be working to reduce the cost of transportation construction projects, not increase them through duplicative and unnecessary government regulation.

In addition, when contractors are putting together their bids for state projects, they need some certainty that borrow and waste sites are going to be available. This legislation would take away that certainty and would instead bring in greater risk and cost.

The irony of this legislation is that it derived from a proposed waste site in Brookfield for the Zoo Interchange project. However, the contractor for that project never intended to use the statutory exemption because in addition to the clean fill from the Zoo Interchange project, they also intended to bring clean fill from some private-sector projects in the area. Since the statutory exemption applies only to WisDOT projects, not private projects, the contractor did not use the exemption and instead had lengthy and direct negotiations with the City of Brookfield.

Assembly Bill 483 will increase transportation project costs by creating even more uncertainty and risk for contractors bidding on state work. Much has been done in this legislative session to better our economy and eliminate unnecessary government regulation so businesses can thrive, grow and create the jobs we need in this state. This legislation would be a step in the opposite direction.

Patrick Goss, Executive Director
608-256-6891 (office)
pgoss@wtba.org



* Distributed at the public hearing in the Assembly

WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director
Laura D. Rose, Deputy Director*

TO: REPRESENTATIVE DALE KOOYENGA

FROM: Anna Henning, Staff Attorney

RE: Options for Municipal Regulation Relating to a Proposal for the Placement of Department of Transportation Project Fill in a Quarry Located in the City of Brookfield

DATE: July 17, 2013

This memorandum responds to your request for a discussion of options available to the City of Brookfield to regulate a proposed project for the disposal of transportation project material in a quarry located within the city. In brief, application of the city's zoning ordinances may be limited as applied to the proposed placement of project fill, but the city might be able to enact an ordinance pursuant to its general police powers. The memorandum provides general information and should not be construed as legal advice.

PROPOSED PROJECT IN THE CITY OF BROOKFIELD

According to a "frequently asked questions" document prepared by the City of Brookfield, a site located south of Burleigh Road and east of Lilly Road in the City of Brookfield is proposed to be used to deposit soil and other material from Department of Transportation (DOT) highway projects (i.e., "clean fill"). The site includes a water body left from a closed quarry. The fill would be deposited in shallower portions of the water body and in areas surrounding the water body. Following an estimated period of up to seven years, the fill would be graded to allow for the development of a housing development and city park. The site is currently zoned "M-1" (multiple-family residential), "R-2" (single-family residential) and "NSW" (non-shoreland wetland).¹

¹ The frequently asked questions document is available at the following link: <http://www.ci.brookfield.wi.us/DocumentCenter/View/7161>.

LIMITED APPLICABILITY OF ZONING ORDINANCES TO THE PROPOSED PROJECT

Zoning ordinances are ordinances adopted to promote the public health, safety, and welfare by regulating land use, including the regulation of the types of activities that may be conducted in a given geographical area. Several general and specific limitations may limit the enactment or applicability of the City of Brookfield's zoning ordinances as applied to the proposed placement of project fill.

First, various general requirements and procedures govern the enactment of zoning ordinances in Wisconsin. Under state law, zoning ordinances generally must be consistent with a comprehensive plan, and their enactment must follow certain procedures.² [s. 66.1001 (3), Stats.] In addition, zoning ordinances generally may not be applied retroactively. [ss. 60.61 (5) and 62.23 (7) (h), Stats.] Thus, the city's ability to modify its zoning code may be limited after permits have been issued or rights in the project have otherwise vested such that a zoning change would be considered retroactive.

Second, s. 85.193, Stats., enacted as part of 2011 Wisconsin Act 32, the 2011-13 Biennial Budget Bill, makes municipal zoning ordinances inapplicable to certain sites while they are used for the excavation or disposal of material for state transportation projects. One of the types of sites that is exempted from municipal zoning ordinances under the statute is a "material disposal site," defined to mean a site used for the lawful disposal of surplus materials from a DOT project. Under the statute, no municipal zoning ordinance applies to such a site if all of the following criteria are satisfied:

- The owner of the property consents to the establishment of a site on his or her property.
- The DOT determines that the site is not a commercial establishment that has a fixed place of business from which the establishment regularly supplies processed or manufactured materials or products.
- The transportation project contractor assumes sole responsibility for the operation of the site.
- The site is used solely for the specified transportation project and solely during the period of construction of the specified transportation project.
- The transportation project contractor complies with applicable noise limit standards and restoration requirements for construction site erosion control.


[s. 85.193 (2), Stats.]

It appears that the statute would limit the application of any city zoning ordinance that would otherwise restrict the placement of fill material on the site of the proposed project.

² For more information about comprehensive planning, see Legislative Council Information Memorandum 2011-02, *Comprehensive Planning*, available at the following link: http://legis.wisconsin.gov/lc/publications/im/IM2011_02.pdf.

However, s. 85.193, Stats., would not limit the application of city zoning ordinances to other aspects of the proposed project, such as the proposed housing development.

ORDINANCES ENACTED PURSUANT TO THE CITY'S POLICE POWER

 The city may alternatively be able to regulate the placement of project fill by enacting a general (i.e., non-zoning) ordinance adopted pursuant to its police powers. Municipal governments exercise police powers to regulate public health, safety and welfare, other than by means of zoning ordinances.

Municipal Police Powers

Cities and villages (and, in some cases, towns) have home rule powers, and may adopt police power regulations on any appropriate subject of local concern. Wisconsin Constitution, Article XI, Section 3, provides that cities and villages "may determine their local affairs and government, subject only to [other provisions of the Wisconsin] Constitution and such enactments of the Legislature of statewide concern as with uniformity shall affect every city or every village." The statutory expression of cities' police power is found in s. 62.11 (5), Stats.:

Except as elsewhere in the statutes specifically provided, the [city council or village board] shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

Zwiefelhofer v. Town of Cooks Valley

In Zwiefelhofer v. Town of Cooks Valley, 2012 WI 7, the Wisconsin Supreme Court reviewed a town ordinance that required a mine operator to obtain a "conditional use" permit from the town before beginning a sand or gravel mining operation. Despite the town's characterization of the ordinance as a general police powers ordinance, the ordinance was challenged as being a zoning ordinance that did not follow procedures required by state law for the enactment of a zoning ordinance.

The Wisconsin Supreme Court ruled in favor of the town. The court held that the ordinance lacked many of the traditional characteristics shared by zoning ordinances. The court specifically mentioned the following factors shared by traditional zoning ordinances and not applicable to the town's "conditional use" permit:

- The division of a geographic area into multiple zones or districts.
- The allowance and disallowance of certain uses by landowners within established districts or zones.
- A purpose of directly controlling where, rather than how, a use takes place.
- The classification of uses in general terms and the attempt to comprehensively address all possible uses in a geographic area.
- A fixed, forward-looking determination about what uses will be permitted as opposed to a case-by-case, ad hoc determination of what the landowner will be allowed to use.
- The allowance by certain landowners to maintain their use of the land even though such use is not in conformance with the ordinance because the landowners' use of their land was legal prior to the adoption of the zoning ordinance.

[*Zwiefelhofer*, ¶¶36, 38-42.]

The court emphasized that the review of any particular ordinance is fact-specific. In future cases, an ordinance that has several of the characteristics of a traditional zoning ordinance may be struck down under *Zwiefelhofer*, assuming that the ordinance was not a properly adopted zoning ordinance. That result occurred in *Town of Bradford v. Merriam*, 2012 WI App 97, in which the Fourth District Wisconsin Court of Appeals applied *Zwiefelhofer* to hold that an ordinance establishing setback requirements and other parameters for mobile homes was a zoning ordinance and was therefore subject to limitations applicable to zoning, including a limitation on the regulation of non-conforming uses.

CONCLUSION

Under s. 85.193, Stats., it appears that the city's zoning ordinances would be inapplicable to the portion of the proposed project that involves the placement of transportation project fill. The city's zoning ordinances would apply to other aspects of the project.

Under *Zwiefelhofer*, the city might alternatively enact an ordinance pursuant to general police powers to regulate the placement of project fill at the quarry site. However, to be upheld by Wisconsin courts, any such ordinance must not have a significant number of characteristics that make it appear like a zoning ordinance.

With respect to either regulatory approach, changes made to ordinances after rights in the project have vested may not be enforceable against the project.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

AH:jal