

LOCAL GOVERNMENT REGULATION of Oil Pipelines in Wisconsin*

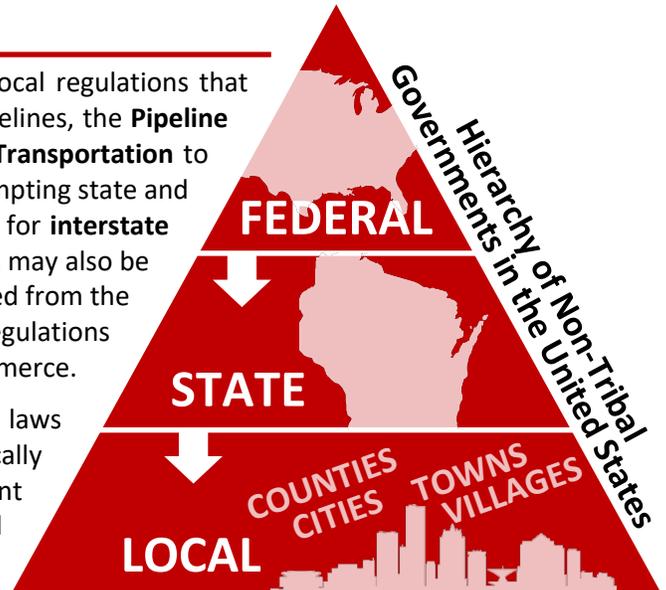
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Although local governments in Wisconsin have broad authority to regulate activities within their communities through zoning, licenses, and more, that authority is limited when it comes to regulating the location, construction, and operation of oil pipelines and related infrastructure. To regulate oil pipelines, local governments must act within the general bounds of the authority given to them under state law and ensure their regulations do not conflict with federal and state laws that regulate different aspects of oil pipelines.

Conflicts with Federal & State Law

Federal **preemption** is a legal doctrine that prohibits state or local regulations that conflict with federal law. The main federal law regulating oil pipelines, the **Pipeline Safety Act (PSA)**, which authorizes the federal **Department of Transportation** to establish safety standards, even has a provision specifically preempting state and local governments from establishing their own safety standards for **interstate** oil pipelines. State and local regulations of interstate oil pipelines may also be prohibited under the **Dormant Commerce Clause**, which is derived from the **Interstate Commerce Clause** of the U.S. Constitution, if those regulations discriminate against or place an undue burden on interstate commerce.

Similar to federal preemption, state preemption prohibits local laws that conflict with state law. Like the PSA, state laws may specifically limit the authority of local governments to act. An important example of a specific prohibition in state law is that local governments cannot regulate certain types of wetlands, which may have to be filled for pipeline construction. Even without a specific prohibition in federal or state law, local laws may still be preempted if they authorize an activity that is prohibited under federal or state law, or prohibit an activity that is authorized under federal or state law. Before regulating oil pipelines, local governments should review applicable federal and state laws to ensure there is no conflict. For more information on several of those laws, go to <https://midwestadvocates.org/resources/Permits-Approvals-Guide.pdf>.



Local Zoning Authority

Zoning is a tool that local governments use to divide their communities into zoning **districts**. Within those zoning districts, local governments may choose to permit certain **land uses** and regulate the size and placement of buildings or other structures. Cities, villages, and counties in Wisconsin have the authority to adopt zoning ordinances by default, but towns may only do so if the county in which they are located has not adopted a countywide ordinance or if they have granted themselves the same powers as villages and have not opted into countywide zoning. Local governments may regulate the location of oil pipelines through zoning ordinances as long as they are not enacted for safety reasons and do not unduly burden interstate commerce.

Examples of permissible zoning ordinances that are not enacted for safety reasons and likely do not unduly burden interstate commerce include requiring above-ground infrastructure such as pumping stations to be constructed a certain distance from residences or other buildings, surrounded by a security fence, and/or enclosed in a noise reducing building for the purpose of protecting neighborhood aesthetics. Local governments may also enact zoning ordinances that limit where pipelines can be constructed to promote residential and recreational development, or to protect property values.

Locating pipelines near drinking water sources, parks and recreation areas, congregation areas such as schools, places of worship, and senior centers, may also be prohibited in certain circumstances.

Once an oil pipeline is built, local governments cannot change zoning ordinances to prohibit the continued operation of that pipeline. When changes are made, the operation of the pipeline simply becomes a grandfathered in, **non-conforming use**. The continued operation of a non-conforming oil pipeline can only be prohibited if that use expands or is discontinued for a period of 12 months. In most cases, expansion occurs when the cost of alterations, additions, or repairs to a structure exceeds 50 percent of its assessed value. Simply changing the volume, intensity, or frequency of a non-conforming use does not invalidate that use. Incorporating modern technology into a non-conforming use is also not prohibited. Finally, non-conforming uses may result when **vested rights** are obtained.

Vested Rights

In Wisconsin, vested rights give applicants for local permits and approvals the right to use property consistent with the zoning ordinance in place at the time a complete application is filed. Even if the zoning ordinance changes after the application is filed, the project identified in the application has a right to go forward, but may result in a nonconforming structure or use. The vested rights doctrine provides property owners and developers with regulatory certainty.

Conditional Use Permitting & Licensing Ordinances

Conditional use permitting and licensing are similar but distinct powers of Wisconsin local governments to regulate land uses within their communities. Local governments use their zoning authority to adopt conditional use permitting schemes, which regulate *where* particular land uses may be conducted if certain conditions are met. Local governments use their broad grants of authority to adopt licensing ordinances, which regulate *how* a particular land use may be conducted. The ability to adopt licensing ordinances is particularly important for towns that may be prevented from enacting conditional use permitting schemes due to countywide zoning.

The Wisconsin Legislature recently placed restrictions on the ability of local governments to use their zoning authority to adopt conditional use permitting schemes. Under the new law, applications for conditional use permits must be granted if applicants agree to meet all the requirements and conditions specified in the applicable ordinance. Furthermore, any permit conditions must be based on substantial evidence, which is defined as fact and information, other than merely personal preferences or speculation, that reasonable persons would accept. Finally, permit conditions must be reasonable, and if possible, measurable.

Despite these restrictions, conditional use permitting schemes and licensing ordinances can be extremely useful and can result in substantial involvement from local governments and members of the community. Regulations enacted pursuant to conditional use permitting schemes and licensing ordinances may require an analysis of alternative routes that takes into account existing and planned local land uses; establish processes that call for **public notice** and **comment** periods, as well as **public hearings**; and even involve safety personnel like fire departments in oil pipeline location decisions.

Road Use Regulation

Oil pipelines often have to cross roads under the jurisdiction of local governments, which have the authority to impose permitting requirements for construction in the **right-of-way** of those roads. Local governments also have significant authority to impose weight limits on roads under their jurisdiction to protect against damage from the transportation of heavy equipment and materials to multiple job sites for construction and maintenance. To operate a vehicle that exceeds weight limits, an overweight permit must be obtained. The **Wisconsin Department of Transportation** establishes minimum standards for overweight permits, but local governments may enact more stringent permitting requirements. Local governments can also change the designation of highways from Class "A" to Class "B", which reduces applicable weight limits by 40 percent. Special or seasonal weight limits can also be imposed. Finally, even when weight limits are not exceeded, local governments can prohibit the operation of vehicles on roads under their jurisdiction without a **road use agreement**. These agreements grant access to the roads, but also allow local governments to impose conditions, such as inspections before and after roads are used and compensation for any damage.

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