



Dane County Board of Adjustment

Decision of the Dane County Board of Adjustment

Administrative Appeal: Appeal 3708. Administrative appeal by Krueger Quarry LLC, Dale Krueger, and R.G. Huston Company, Inc. (Michael Lawton, Boardman & Clark LLP, agent) appealing a decision of the Zoning Administrator related to a stop work order for a non-metallic mineral extraction operation (Krueger Quarry) located east of 2298 Rinden Rd being a tract of land in the SW ¼ of the SE ¼ Section 3, Town of Pleasant Springs.

FINDINGS OF FACT

In following the Rules and Procedures for an appeal of an administrative determination of the Zoning Administrator, having considered the evidence presented, the Board determines the facts of this case to be:

Filing Date: January 15, 2021.

Meeting notice published: September 30 and October 7, 2021, Wisconsin State Journal. Affidavit of publication/posting is on file.

Hearing Date: October 14, 2021

Appellant: Krueger Quarry LLC, Dale Krueger, and R.G. Huston Company, Inc. (Michael Lawton, Boardman & Clark LLP, agent)

1. On January 17, 2019, the Dane County Board of Supervisors adopted 2018-OA-20, which comprehensively revised the Dane County Zoning Ordinance.
2. The town of Pleasant Springs adopted the Dane County Zoning Ordinance on December 4, 2019.
3. Under section 10.102(7)(b), registered nonconforming mineral extraction sites are subject to the provisions of the zoning ordinance.
4. On December 5, 2019, Dane County Planning prepared and sent out a letter to the listed property owner indicating the adoption of the new zoning ordinance and that the registered mineral extraction site would have to adhere to the new requirements for existing nonconforming sites.
5. Dane County staff (Everson) prepared the Deed Notice as part of the new ordinance requirements recognizing parcel 061103395003 as having non-conforming status with a map. The Deed Notice was to be signed and notarized.

6. The 2020 aerial imagery showed mineral extraction operations expanded onto parcel 061103490767.
7. The Zoning Administrator issued a stop work order via e-mail to the operator, Dennis Richardson with RG Huston.
8. Staff originally indicated that the SE ¼ SW ¼ Section 3, approximately 40 acres was identified as non-conforming and mapped this way for approximately 50 years. The original registration of the site by Oliver Kaupanger on behalf of Harold Krueger (landowner) indicated 2 acres.
9. Timeline History
1955 – Evidence from aerial photo of a 1.2 acre mineral extraction site.

1968 - Evidence from aerial photo of a 5 acre mineral extraction site.

1969 – A 2 acre site was registered with the county by Oliver Kaupanger on the SE ¼ SW ¼ Section 3, Town of Pleasant Springs on behalf of Harold Krueger (landowner).

1969/1970 – Registration status report by the county accepted the SE ¼ SW ¼ Section 3 and rejected the NE ¼ SW ¼ as having evidence of mineral extraction activity. County mapping records indicate the subject ¼ ¼ as a non-conforming registered site for the next 50 years with no request for determination or intent of expansion.

2018 Warranty Deed recorded between Susan Bush (daughter of farm) grantor and Krueger Quarry LLC grantee as a tenant in common, an undivided 1/8 interest in the real estate, parcels 061103390008, 061103385005, 061103380000, 061103395003 and 061103490767. Approximately 144 acres.

10. Dane County Planning and Development has recognized that the 40 acre parcel has non-conforming status for 50 years.
11. Non-conforming status of the subject site has never been contested for 50 years by the property owner and the current operator and previous operators.

CONCLUSIONS OF LAW

Based on the above findings of fact the Board concludes that:

1. The Wisconsin Court of Appeals in the Sturgis case (Cited in Appellant's Brief.) stated on page 152 of that case: "The relevant inquiry is 4X Corporation's intent and ownership of the property coupled with the unique use of extraction." The extent of a nonconforming use for mineral extraction as an intended use by the owner at the time that vested right was being created is important. That owner had the right to intend all their property could eventually be used for mineral extraction. On the other hand, that owner also had the right to intend mineral extraction eventually extend to just a limited part of their property and the remainder be put to other uses. Here, Appellant has shown that in 1969 Harold Krueger and his agent included two quarter quarter sections, SE¼ of the SW¼ and NE¼ of the SW ¼ of section 3 in the Town of Pleasant Springs, in the registration document, but has failed to show any other substantial

evidence, in particular original leases, that showed the original owner intended to eventually extract minerals from anything beyond those 80 acres.

2. Appellant argues on page three of his brief that “The diminishing assets rule, however, requires that the Krueger’s entire contiguous mineral-bearing property be recognized as a legal non-conforming use.” We find Schroeder instructs that the diminishing asset rule is not without limits. In Schroeder, the Wisconsin Court of Appeals, having concluded in that case that the plain language of the ordinance requires registration and approval of the existing mineral extraction operation, addresses the zoning administrator’s concern that this “... thwarts the purposes of regulating non-conforming uses.” The Court stated:
“The diminishing asset rule is a gloss on the definition of ‘existing use’ for mineral extraction operations whereby all land which constitutes an integral part of the operation, notwithstanding the fact that it was not under actual excavation, is considered ‘in use.’ See Sturgis, 141 Wis. 2d at 154, 413 N. W. 2d at 644. However, this is not an unlimited definition and does not automatically permit expansion of a mineral extraction operation to every portion of every contiguous parcel owned by the operator. ‘The relevant inquiry is [the owner’s] intent and ownership of the property coupled with the unique use of extraction.’ Id. At 152, 413 N. W.2d at 643”

We conclude the Appellant failed to show the original owner’s intent to extract minerals on any acres beyond the 80 entered into the registry document even though Appellants did show all 144 acres were owned and contiguous as well as they contain the desired mineral deposits. To extract those minerals on any acres other than the 80 registered in 1969 requires they obtain a conditional use permit.

3. Appellant argues they should have been able to rely on email exchanged with Assistant Zoning Administrator Everson which they interpreted to mean the entire 144 acre farm had a non-conforming use for mineral extraction. (Appellant’s Exhibits 19 and 20.)
We find Everson’s testimony settled that matter. He, admitting his response was embarrassingly vague, pointed out that: interpretations of the intent of the original owner in establishing non-conforming use status for mineral extraction are the responsibility of the zoning administrator; that those interpretations are not handled in a simple email exchange but by a fairly lengthy written response to application materials submitted on behalf of the landowner or operator; that the map he sent was generated not as indication of actual acres of non-conforming use, but as a tool for adjacent property owners so they might be made aware that a nonconforming use existed on those acres and had the potential to expand beyond any currently open mining area; and that he as Assistant Zoning Administrator did not have the authority to waive the department’s decision-making process under the ordinance or case law. We find it would not be reasonable for Appellant to rely on Everson’s email when placed in this context.
4. Assistant Zoning Administrator Everson argues that there was “zero evidence” that Harold Krueger wanted to mine the entire farm and that it had been mapped by the zoning administrator as just one forty acre non-conforming use site for over 50 years without being challenged. He may be right as concerns the entire acreage, but we find the zoning administrator’s designation that only 40 acres of the 80 acres Harold Krueger entered on the registration document in 1969 is unreasonable.

The Wisconsin Supreme Court in Smart decided a case factually similar to this one where the zoning administrator refused to accept one of two forties that an original owner attempted to register, by determining it had no evidence of mining activity on it. That decision was challenged in 1989 and was changed by then Zoning Administrator William Fleck to include both forties in light of the Sturgis decision’s concern that the unique nature of mineral extraction activities requires recognition that a diminishing asset may include reserve areas not yet under actual

excavation. Here a similar determination has been made where an assessment of field evidence lead to one of Krueger's contiguous forties being rejected as an intended non-conforming use. Accordingly, we determine both forties Harold Krueger submitted on his registration submission, SE¼ of the SW¼ and NE¼ of the SW ¼ of section 3 in the Town of Pleasant Springs, are non-conforming uses for non-metallic mineral extraction.

On the basis of the above findings of fact and conclusions of law the Board determines that the non-conforming status of an active mineral extraction operation applies to the SE ¼ of the SW ¼ and NE ¼ of the SW ¼, section 3, Town of Pleasant Springs. Further the Board upholds the determination of the Zoning Administrator related to a stop work order located east of the SE ¼ of the SW ¼, section 3, Town of Pleasant Springs.

Appeals. This decision may be appealed by a person aggrieved by this decision or by any officer, department, board or bureau of the municipality by filing an action in certiorari in the circuit court for this county within 30 days after the date of filing of this decision. The municipality assumes no liability for and makes no warranty as to reliance on this decision if construction is commenced prior to expiration of this 30-day period.

Written Decision prepared by: Hans Hilbert, Assistant Zoning Administrator.

I certify that this is the decision of the Dane County Board of Adjustment:

Al Long, Chairman Sign: _____ Date: _____

Filed with the Dane County Planning and Development Department, Zoning Division:

Todd Violante, Director Sign: _____ Date: _____