RE APPEAL 3721

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DANE COUNTY BOARD OF ADJUSTMENT

BRIEF APPEALING
THE ZLR COMMITTEE DECISION ON CUP APPLICATION 2563

On July 12, 2022, the ZLR Committee approved a conditional use permit ("CUP") for non-metallic mineral extraction 1,000' south of 439 Center Rd in the Town of Rutland. The Committee's action implied that the application met all 8 standards plus those for farmland preservation needed for approval of a CUP in Dane County Ordinances s. 10.101(7)(d). The Committee omitted to file a written record of its findings explaining its conclusion nor explain why irregularities in the application, or a body of evidence offered in opposition, did not rise to a rejection of the application.

FINDINGS OF FACT

I offer the following findings of fact which are not in dispute:

1. Kevin Hahn owns an ~8-acre nonconforming quarry in the Town of Rutland that has been in operation under various ownerships since the 1930s.

2. Since 1988 Henry Spelter owned the 46.4-acre field adjoining this quarry.

3. The legacy Hahn quarry has been largely excavated from fence to fence, to a depth of about 50 feet and is near the end of its economic life as a source of aggregate.

4. Around 2017, Kevin Hahn bought an adjacent 36.7-acre farm field.

5. In 2020 Kevin Hahn filed an application for a conditional use permit (CUP) to mine this field.

6. On October 5, 2020, the Rutland Planning Commission rejected the application.

7. Two years later, on March 1, 2022, an essentially identical application to the one denied in 2020 was filed.

8. After holding hearings on April 28, 2022, the Rutland Plan Commission and Board declined to either approve or deny the CUP.

9. On May 10, 2022, Zoning and Land Regulation committee (ZLR) issued its notice of public hearing.

10. An "application supplement" was submitted on May 18, 2022, 8 days after the first notice date.

11. The application's legal description of the CUP area and in its operation plan were inconsistent.

12. The ZLR held its public hearing on May 24, 2022.

13. Substantial unrebutted evidence was submitted to the ZLR documenting the CUP's impairment of the use, value and orderly development potential of adjacent bare land.

14. Substantial unrebutted evidence was submitted on the CUP's impairment of the value of an adjacent residence.

15. Data provided on the applicant's behalf on residential property values did not correspond to the characteristics of the adjacent residence.

16. Substantial unrebutted evidence was submitted on the CUP's incompatibility with the Town's long term comprehensive land use plan.

17. Following the public hearing, the ZLR Committee nevertheless approved the CUP.

18. The ZLR Committee failed to provide a written explanation of its findings.

19. This appeal was filed on August 11, 2022.

AGGRIEVEMENT

I am aggrieved by the decision of the ZLR Committee to approve the CUP as this impairs the future value, use, and enjoyment of property. The grant of the CUP was made in an opaque manner without filing a required written explanation of its findings. The increased traffic on narrow, residential roads that will result from this CUP is concerning and disruptive to the community. The indefinite extension of an incompatible land use that involves noise, dust, and blasting will lower for generations life quality, values, and development of properties in the neighborhood and infringes on the property rights of existing neighboring landholders.

ARGUMENT

The ZLR Committee's decision to grant CUP 2563 1) Failed to provide a written record of its decision that the CUP met all eight standards as required in the Dane County ordinance; 2) It overlooked the late filing of an amended CUP application; 3) It allowed inconsistency between the application's legal description of the CUP's area and the application's site plan; and 4) It failed to set effective conditions that addressed the deleterious impacts of noise, blasting and other side effects that this mining operation will impose on the neighborhood.

I-Failure to meet all standards

To qualify for a CUP an applicant must demonstrate that a use meets all eight standards specified in Dane County ordinances 10.101(7)(d)1.

This appeal is based on the application's failure to meet standard 2 (That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired); Standard 3 (That the establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property); and standard 7 (That the conditional use is consistent with the adopted town and county comprehensive plans).

Evidence presented in CUP cases must follow the standard laid out in Wisconsin Statute 67 which requires:

> "facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion."

I and neighbors offered substantial evidence on the long-term adverse impacts of the proposed mine on the area's tranquil character (Spelter Statement of Objection). This included information and data measurements on the effects of blasting (pgs. 3-5), noise (pages 6-7); noise on health (pg. 8); dust (pg. 10); property values (pgs. 12-17); and the operation of heavy machinery and equipment (Mary Knutson letter of opposition).

The applicant also placed into the record information supporting his application.

In deciding between opposing evidence, boards must be guided by the substantial evidence test which states that it is:

> "Evidence of such convincing power that reasonable persons could reach the same decision as the local governmental entity, even if there is also substantial evidence to support the opposite decision". Sills v. Walworth Cty. Land Mgt., 2002 WI App 111, ¶¶10-11, 254 Wis.2d538, 648 N.W.2d 878.

The ZLR Board voted to approve the CUP but failed to make appropriate findings despite evidence in the record that showed the opposite finding should have been made. This oversight was underscored by the absence of a written findings of fact explaining how the applicant's information was of "such convincing power" that it negated "substantial evidence to support the opposite decision".

An explicit Dane County Ordinance directive states that:

> "**Prior** to granting or denying a conditional use, the zoning committee **shall** make written findings of fact based on evidence presented and issue a determination whether the proposed conditional use, with any recommended conditions, meets all of the following standards" (emphasis added) DC Ordinances 10.101(7)c 2 (e).

The ZLR committee skipped this obligation based on pg. 13 of its RULES AND PROCEDURES:

> "Unless otherwise indicated, a motion to approve a Conditional Use Permit, shall mean that the Committee has made affirmative findings of fact for the standards enumerated in §10.101(7)(d), and, if applicable, the relevant standards for particular uses in §10.103, and/or the standards applicable to conditional uses in a farmland preservation zoning district in §10.220(1)(a).

Without a written record of how those findings were arrived at, there remains an information void that hinders understanding of the decision. Moreover, nowhere do the ZLR's RULES AND PROCEDURES indicate supremacy over County Ordinances, absolving them from the duty implied in "shall" to "make written findings of fact"[1]. Without knowing the ZLR's supporting rationale, the ability of appellants to challenge a decision is hamstrung.

This omission further disregards WI supreme Court ruling that "For certiorari review to be meaningful, a board must give the reviewing court something to review." Lamar Central Outdoor, v. Board of Zoning Appeals. 205 2019 WI 117.

[1] . Whenever any conflict exists between these rules and the laws of the State or County, State laws and County ordinances shall prevail in that order. (Dane County BOA Rules & Procedures)

Appellants of ZLR decisions are further handicapped by "the presumption of correctness and validity" that government boards are accorded. Allenergy Corp. v. Trempealeau Cnty. Env't & Land Use Comm. 375 Wis 2d 368 895 N.W. 368.

Accordingly, it would be hard to challenge all the questionable elements of the CUP. Instead, I focus on a limited set of facts that are unambiguous, uncontroverted, and unrebutted.

As a starting point I contend that the daily and continuous generation of high decibel noise, high pitched beeps, dust, heavy machinery operation and occasional ground waves from blasting disrupt a neighborhood's peace and quiet in a far more persistent and intrusive way than normal, sporadic, agricultural field operations which is the norm in this semi-rural setting and which the applicant equates his use to. (Buck Sweeney letter re responses to concerns). That is the reason why this class of use is permitted only subject to conditions.

Applicant's further assertion, that the sounds generated by his activity are "similar in sound and intensity to other noises routinely generated by traffic and nearby agricultural equipment" (CUP 2563 App, pg. 17), is stated without back up data and misses the point that his sound generation is continuous and repetitive while traffic and agricultural noises are seasonal and intermittent.

As such, this use rises to a higher level of disruption that demonstrably impairs the "uses, values and enjoyment" of property in the neighborhood (Standard 2). Further, they also "impede the normal and orderly development and improvement" of nearby property by making sites unattractive for upgrading to higher valued use such as residences (Standard 3).

These external disturbances, especially noise and blasts, are perceived subjectively[2] but their aggregate impact is wrapped up in, and can be objectively measured by, what people willingly pay to obtain, use, and live on properties near mines. More commonly put, the extent of these impacts is demonstrable through depressed property values.

[2] For example, expectations of quiet are different in a city center as compared to a rural setting.

Neighbors presented substantial evidence on property value impacts on a) bare land and b) residences.

Bare land. Appellant put into the record the selling prices of two undeveloped fields that shared borders with the existing quarry and, using accepted, standard economic methods[3], their equilibrated current valuations. These were compared to prices of two similarly sized bare parcels farther (approximately 1/2 mile) removed from, and not sharing a common boundary with, the existing quarry. The resulting comparison indicated that "the average discount due to proximity to the quarry is thus $6,942 (per acre) or 45%." (Spelter supra pg. 13).

Nowhere in the record has the applicant provided contradictory evidence on bare land values. To the contrary, an offer from Kevin Hahn to buy the adjacent Spelter field for a price even lower than the estimated quarry-impacted price supports the claim that quarries significantly depress adjoining land values and inhibit their upgrading to higher value residential use (Spelter pg. 16).

Along these lines, evidence was put into the record in the form of an email from builder Wick Homes that stated:

> "Building in such close proximity to a blasting operation there is a real chance that your drywall is going to be disturbed by the work. We simply cannot, nor am I aware of a building company who can, guarantee that the blasting won't have some adverse impact on both your foundation and interior finishes" (Spelter pg. 3).

Applicant did not place any contradictory evidence into the record on this either.

[3] Government statisticians collect data on the dollar ($) value of transactions to compute the economy's Gross Domestic Product (GDP). They also collect prices of a basket of goods and services which they combine into a weighted index. The GDP number is divided by this index to arrive at "real" GD from which the illusory effects of price inflation are netted out.

Thus, the negative impact on adjoining bare land values is unrebutted and provides uncontradicted, substantial evidence that the operation of a quarry, the indefinite prolongation of which this CUP's effect is[4], fails to meet DC standards 2 and 3.

Residences. There is one home adjoining the quarry about 600' removed.

A modest starter home was built on the site around 1974 when the existing quarry was dormant.

Around 1990 the residents moved and the new owners, "put several hundreds of thousands of dollars' worth of improvements" to upgrade the home. (Joanna Kessenich letter of opposition).

In 2008 they put the property up for sale at $649K. It was removed months later after "it failed to attract a single offer." (Spelter pg. 12).

In 2021 they put it on the market once more for $750K but again no offers materialized, leaving "the only option … was to sell our house and property to Kevin Hahn (for $575K). If the gravel pit had stayed dormant, (we) could have sold our house for an estimated $300K more." (Joanna Kessenich letter of opposition, Bill Boerigter letter of opposition).

Data on home values on behalf of the applicant was put into the record by real estate appraiser Scott McWilliams. This consisted of 23 homes "proximate" to quarries across eastern Dane County. (CUP App Supplement, pgs. 19-49)

The definition of the term "proximate" is central to evaluating the relevance of this data. According to Websters New Collegiate Dictionary, "proximate" is the superlative of near, meaning nearest, next to.

An examination of the 23 "comparables" revealed that 22 did not in fact share a common border with quarries but were buffered from same by at least 1,000 feet and up to a mile and a half. These "comparables" are not germane to the Kessenich residence evidence[5].

[4] As compared to the existing, nonconforming pit which is close to exhausting its economic rock supply and is nearing closure, abandonment, or reclamation (Report by Rutland Residents).

[5] Dane County Comprehensive Land Use Plan specifies a 1,000' as the minimum distance that should be stipulated to build near potential quarries.

Only one comparable residence was “proximate” to a quarry (2236 US Hwy12&18) and it experienced the following sale history (as compared to the average of the other 22):

Distance from quarry: 800’ (2976’)
Days on Market: 147 (62)
Selling to list price discount: -2% (-1%)
Sale price: $244K ($432K)

Both its Days on Market and its price discount were worse than those of its peers and, most notably, the value of the home was about half the average of the sample. That indicates the owner recognized the limitations of the location and matched the home to fit the constraints of the site.

This sole comparable to the Kessenich case fails to offer substantial evidence that a home “proximate” to a quarry suffers no significant value loss. To the contrary, it bolsters the claim that it inhibits “the normal and orderly development and improvement”, by holding back development of parcels to their full potential and thereby fails DC standard 3.

Plan incompatibility with Town Plan. The Rutland Comprehensive Plan’s Vision Statement says: “Residents value the quiet and sense of community this rural character offers.” One of the standards CUPs must meet is Standard 7, that the use be consistent with the town and county comprehensive plans.

The Town of Rutland Comprehensive Plan’s overarching goal embodied in Goal 7 is “to create a pattern of development that fosters the rural character and agricultural land preservation and that minimizes potential conflicts between incompatible land uses.”

As part of that it prioritizes road safety and encourages opportunities for bikes and pedestrians. Goal 2 in the Plan calls to “Reduce the amount of non-local traffic passing through residential areas” while Goal 10 requires local businesses to have access to a state or county highway.

The proposed pit cannot meet either of these goals. Access to County Hwy A and US Hwy 14 and 51 requires trucks to first pass through residential Town roads. (Simpson letter of opposition). This CUP increases rather than "reduces" future non-local traffic.

Applicant stated, "Scheduled loads can range from zero to 50 loads per average day; more or less may be needed for local or specialized projects" (CUP 2564 App).

Neighbors, however, documented dump truck traffic from the proposed CUP site[6] at "one per minute…or roughly 450 trucks over an eight-hour day" (Jodi Igl letter of opposition pg. 6).

The applicant countered this evidence by stating that "It must be noted that comments relating to traffic at the April 28th public hearing appear to stem from a different quarry, and not the Center Road Quarry operated by Nelson Excavating and Son" (CUP 2563 App Supplement, pg. 9). This assertion is incorrect as the data were collected on 8/19/2021 on Old Stage road starting at 9:24 am at a time when the only truck traffic observed were those that were ferrying material to and from the Hahn "borrow" site and the Hwy 14 roundabout project.

As stated in the application, traffic will primarily use Center Road, with additional routes using Old Stage and Old Stone Roads. On the Comp Plan Map 6-3, all Old Stone Road, most of Center Road and sections of Old Stage Road are designated as Future Rustic Roads, as well as future designated bike routes. Rustic Road designation is incompatible with the level of anticipated periodic dump truck traffic.

The Town roads in the vicinity of the CUP are rolling, curved, and have many hidden driveways, blind spots, and low hanging trees. The owner of Northwest Stone quarry, located a half mile from the Center Road pit, testified at a town meeting (9/8/2020) that the Town's roads

[6] Applicant got a contract to deliver sand for a roundabout project on Hwy 14 near the village of Brooklyn. For Department of Transportation projects, mining does not require a CUP, subject only to the site being restored to its original contours at the conclusion of the project.

are not safe for gravel truck traffic. On Center Road alone there are 21 driveways and 9 blind spots. (Simpson Ibid).

An indication of the incompatibility of the projected and documented traffic that this CUP will generate was a serious gravel truck accident at the corner of Center Road and County A in 2019 ((Simpson documentation of truck traffic). Further, a pedestrian was struck and killed on Center Road in a blind spot before trucks from the existing pit were even running (Simpson Ibid).

The activity from the expanded pit is incompatible with several other expressed goals of the Town's Plan: Goal 7 "Require(s) buffers between incompatible land uses to minimize potential negative effects" as well as Goal 10 to "Provide a buffer between the commercial use and any adjacent non-commercial use."

Contrary to the application's claim that "the existing quarry is surrounded by agricultural land", there was one residential property next to the current quarry while this CUP adjoins two other existing residences, eliminating their current substantial (over 1,000') buffers, a separation explicitly stipulated in Dane County's Land Use Plan. (pg. 40, comp-plan-Vol1-Final 2016opt.pdf)

Further, Goal 12 addresses Historic Preservation and specifically includes a Policy to "Support efforts to maintain the Graves Cemetery".

The historic Graves cemetery is buffered from blasts by over a thousand feet of field. As the pit expands, the intensity of transmitted waves will increase, exposing headstones to damage as other cemeteries have experienced (e.g. St Paul's Liberty Lutheran Church, Town of Deerfield).

Rutland also has 4 properties listed on the National Register of Historic Places located within a mile of the gravel pit (Pam Marr-Laundrie letter of opposition). The CUP leaves a similarly insufficient buffer for one of those landmarks, a 170-year-old house with stone foundations and walls. A contemporary home built around 1990 will also lose its separation upon sharing a border with the quarry should the CUP remain.

Against this abundance of contradictions with the stated goals of the Town Plan, the application stated:

> "The operation of the quarry is consistent with the adopted Town of Rutland Comprehensive (2007), and Dane County Zoning, FP-35 (General Farmland Preservation) which seeks to limit the density of residential development." (CUP 2563 app. pg. 73)

The applicant's attorney carried this superficial rationale further:

> "Some have summarily stated that the CUP is inconsistent with the Town and County Comprehensive Plans. The plans already seek to limit the density of residential development, and this involves no residential development." (Buck Sweeney supra pg. 4)

It would be hard to argue against the proposition that this CUP deters "the density of residential development" but beyond that the rationale alone ignores the failure to align with the many other goals listed in the Town Plan. I ask the Board to look at the totality of the evidence in the record and consider whether the ZLR made a mistake in justifying conformance with Standard 7 based on this sole "consistency" with the Town's Plan.

II- Application incomplete[7]

As a matter of Law, the ZLR Committee is barred from approving an application that is not complete on the date of the first notice of public hearing. The sequence was as follows:

May 10, 2022, first notice of public hearing for CUP 2563

May 18, 2022, Date of "application supplement" for CUP 2563

May 24, 2022, Public hearing for CUP 2563

From the UW-Madison Division of Extension Land Use and Training Resources page for conditional use permits:

> The application for a conditional use permit must be complete by the first time that notice is given for the final public hearing on the matter, unless an ordinance expressly allows for later submission. https://fyi.extension.wisc.edu/landusetraining/conditional-uses-pc/

This statement includes a citation to *Weber v. Town of Saukville* 209 Wis. 2d 214, 562 N.W. 412 (1997) which states:

> ¶ 43 Initially, we conclude that unless a zoning ordinance provides to the contrary, a court should measure the sufficiency of a conditional use application at the time that notice of the final public hearing is first given (emphasis added). Such a rule ensures that interested individuals will have a meaningful opportunity to express informed opinions at the public hearings. Indeed, a contrary rule would create a damaging incentive for a conditional use permit seeker to withhold all controversial information from its application until during or after the public hearing. Such a perverse incentive would be diminished only slightly by requiring a complete application at the time of the public hearing, for even our ablest citizens would be hard pressed to digest and discuss in a single public hearing all of the debatable proposals in a given conditional use application. Requiring a complete application at the time that the last public hearing is noticed places no significant burden on conditional use applicants, and provides ample opportunity for interested citizens to inform themselves in preparation for the hearing.

Footnote 12 of the Court's opinion underscores the importance of the public hearing:

> 12. We reject Payne & Dolan's view that the information contained in a conditional use permit application is important only to the Town Plan Commission

[7] This section and the next (III) are based on CUP 2563 - 6-22-22 Mathies Procedural Questions

> and Board, and may therefore be provided at any time prior to the issuance of the permit. We cannot accept such a view because we do not believe that the ordinance anticipates a public hearing at which citizens participate as mere passive spectators. If such were the case, there would be no need for public hearings.
>
> Finally:
>
> ¶ 47 We have determined that an application must be complete at the time that notice is given of the last public hearing, unless an ordinance expressly permits a later submission of information. Here, the conditional use application was incomplete because it did not contain information regarding the quantity of water to be used in the quarrying operation or the proposed depth of the quarry. There being no ordinance provision authorizing subsequent submission of either type of information, we conclude that the application was insufficient.
>
> ¶ 48 … because the Town failed to substantially comply with the zoning ordinance's notice provisions, and because Payne & Dolan's conditional use application was incomplete at the time that notice of the public hearing was first given, we conclude that the Town improperly granted the conditional use permit. Accordingly, we affirm on other grounds the court of appeals' invalidation of the conditional use permit. as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Lamar Central Outdoor* v. *Div. of Hearing & Appeals*, 2019 WI 109, ¶ 36 n.19, 389 Wis. 2d 486, 936 N.W.2d 573 (2019); *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (same principle).

The Dane County zoning ordinance requires that conditional use applications be complete at the time of filing § 10.101(7)(b):

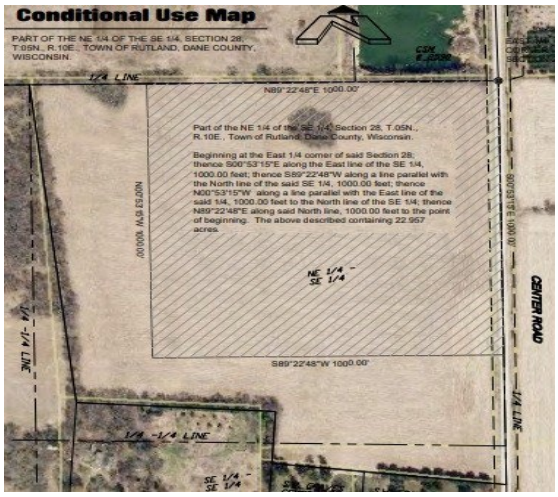
> Application Requirements. An application for a conditional use shall be filed with the zoning administrator on a form prescribed by the zoning administrator. Only complete applications will be accepted. The application shall be accompanied by such plans and other information as required by this section, by requirements for particular uses or as prescribed by the zoning administrator, …

The supplement provided the pivotal real estate valuation data that is one of the central issues to the evaluation of this CUP, and which was missing from the original submission. No provision of the zoning ordinance allows conditional use application information to be submitted after initial notice of the public hearing. The public hearing must be held after receipt of a complete application, § 10.101(7) (c) 1.a.

Upon receipt of a complete and acceptable application, statement, site plan and operational plan, the zoning committee shall hold a public hearing on each application for conditional use.

III-Inconsistent legal descriptions

The legal descriptions of the CUP's area are inconsistent. The application's legal description of the CUP area (page 29) shows a 1,000-foot square area in the northeast corner of parcel 0510-284-8001-0. This area was used in the appraisal of neighboring property values (application supplement pg. 18) and featured in the Dane County staff report for the application:



However, the submitted operation plan (application page 27 and application supplement page 7) shows the operation extending to the western boundary of this parcel:

An approved mineral extraction operation is required to stay within the approved legal boundaries and to follow the approved operation plan. The inconsistency in this application makes it impossible to simultaneously comply with both requirements.

IV-Insufficient conditions

Dane County zoning allows two kinds of uses, those which are permitted outright and those permitted but only subject to "conditions". Open pit mines fall into the latter.

Dane County Ordinances require that:

"The town board and zoning committee shall impose, at a minimum, the following [standard] conditions on any approved conditional use permit." 10.101-(7)(d)2.

The Ordinance goes on to say:

"At their own initiative or at the applicant's request, the town board and zoning committee may set further reasonable restrictions on a mineral extraction operation." 10.103(15)(b)15.

Further:

"[e]ach application [for a non-metallic mining permit] shall be judged on its own merits." Allenergy Corp. v. Trempealeau Cty. Env't & Land Comm. 370 Wis. 2d 261, 881 N.W. 358.

This CUP, due to its proximity to residences and sensitive historical sites, prompted considerable evidence and testimony regarding its detrimental impacts on its surroundings (Spelter supra, Mary Knutson supra). These should have been mitigated through appropriate conditions if the application was otherwise deemed to have met the required standards. Yet only three conditions were tailored to this site with the rest being generic conditions pulled from DC ordinances.

Among the measures specified in DC ordinances are:

"Noise limits, set to a decibel [db(a)] level **appropriate** for the particular **use** and **location**, as provided in s. 10.102(6)." (emphasis added) S 10.101(7)(d)2.b.

And

"Noise levels shall be set to the db(a) decibel scale and should be appropriate to the **background** noise level of the surrounding area, and to the nature, duration and **repetition** of the proposed use." (emphasis added) S 10.102(6)

Evidence offered showed that at a distance of 375' from the fence line the sound level from the quarry floor on that given day under prevailing environmental conditions, measured at ground level at the receiving device, was essentially at ambient or "background" level[8] (Spelter pg. 7 Supra). Thus, a setback of 375' might mitigate the excessive noise.

Evidence of setbacks in Dane County was cited from the Village of Windsor's ordinance that "a buffer zone of 300' feet width is required" (Spelter pg. 4).

Town of Rutland PC Chair Travis Leeser recommended that:

"Back up sirens to "XYZ" decibels" be set (Town Travis Leeser letter of potential conditions and support).

At the same ZLR hearing conducted for CUP 2563, CUP 2567 was approved by the Committee with the condition that:

"Noise levels from the asphalt plant processing and site operations shall not exceed 75 decibels (dBa scale), as measured from the property line." (2567 Staff Memo 7_12_22).

Notwithstanding the evidence of excessive noise, ways to mitigate those, a recommendation from a Town official, and even its own action in a different CUP, the Committee, inexplicably and without explanation, failed to place an objective, measurable limit on noise.

One condition related to noise stipulated that "Whenever possible, the operator shall utilize alternatives to standard back-up beeps, for instance, those making a sweeping sound." (CUP 2563 Staff Report pg. 3). The first two words, however, neutralized the directive "shall", rendering it unenforceable and without effect.

Berms and vegetative cover thereon are further means to dampen sound, as well as shroud blight from an incompatible industrial activity. None of the conditions the ZLR put on the application specified berm height or its plant cover despite evidence presented that a berm height of 20' dampens sound intensity by 8 decibels (Spelter pg. 7 supra)

[8] Intensity of sound transmission varies with weather (i.e wind direction and speed, humidity etc.) and the type of activity (i,e, crushing, banging tailgates, backup equipment beeping etc.). Measurements over different conditions should have been required of the applicant to determine limits appropriate to the site.

Overall, of the 35 conditions that were set only three were tailored to this "location" with the rest copied verbatim from Ordinances. This in contrast to the injunction that "each application shall be judged on its own merits".

Even the three that were not boiler plate were mere modifications of the statutory language. Among them was the "hours of operation" which were set at "7:00 a.m. to 7:00 p.m. Monday through Friday, and 8:00 a.m. to 1:00 p.m. on Saturday."

By contrast, "if there are residences nearby", the ordinance suggests "hours may be more limited (e.g., start at 7:00 a.m. with no Saturday hours". (10.103(15)(b)9). The Committee's condition ignored that ameliorating Saturday condition.

Travis Leeser's letter further recommended "Limited hours of operation specifically for crushing, loading/hauling, general maintenance, and blasting." The committee took no action on this recommendation.

In summary, the ZLR committee did not exercise its obligation to "set further reasonable restrictions" on this use that is tailored to its "location". Should the standards be deemed to have been met, then these should be revised to provide effective and enforceable relief for the surrounding community.

CONCLUSIONS OF LAW

The ZLR Committee erred in its decision to grant CUP 2563 for the following reasons:

- Uncontroverted and unrebutted substantial evidence was presented that the activity being applied for diminished the use, value, enjoyment and orderly development of neighboring properties. Therefore, based on failure to meet relevant Standards 2 and 3 of Dane County ordinances 10.101(7)(d)1, the application must be denied.
- Uncontroverted and unrebutted substantial evidence was presented that the activity being applied for was inconsistent with the Town Comprehensive Land Use Plan. Therefore, based on the failure to meet the relevant Standard 7 of Dane County ordinances 10.101(7)(d)1, the application must be denied.
- The Application was incomplete on the date of the first notice of public hearing. Therefore, based on *Weber v. Town of Saukville*, the committee should not have approved the CUP and the Board should deny it.
- The legal descriptions of the CUP's area depicted in the Application and in its Operation Plan are inconsistent, making it impossible to comply with the dual requirement that an approved mineral extraction operation both stay within its approved legal boundaries and follow the approved operation plan. Therefore, based on inconsistency, the application may not be approved.

CONCLUSION

I humbly request the Board of Adjustments to review the record in the case of CUP 2563 and the incontrovertible evidence that at least three standards were unmet. I ask it to consider that this location had over 8 decades of mining at the existing 8-acre pit which will now extend to an area of land that is at least three times as big. This will alter the character of the neighborhood for many decades to the detriment of existing neighbors and additional properties that will become neighbors to this extended operation. The evidence presented suggests that the ZLR erred in its decision, justifying reversing its grant of the CUP.

Dated this 2nd day of October 2022.

Henry Spelter

Electronically signed by Henry Spelter