

June 22, 2022

To the Zoning & Land Regulation Committee,

Please consider two procedural questions regarding the application for conditional use permit #2563 for a non-metallic mineral extraction operation in the Town of Rutland:

1. As a matter of law, is the ZLR Committee barred from approving this application since the application was not complete on the date of the first notice of the public hearing?
2. Can the ZLR Committee deny this application because the application does not meet the requirements of the zoning ordinance?

Please see below for explanations. I am not commenting on the merits of such an operation at that location.

I raise these questions because approval of this application could set precedents for my town and for other towns that have chosen to participate in Dane County zoning.

These comments are my own and I have not discussed them with anyone.

Sincerely,

Tom Mathies
Town of Verona Supervisor

As a matter of law, is the ZLR Committee barred from approving this application since the application was not complete on the date of the first notice of the public hearing?

Please note these dates:

- 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

This question is based on information 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 later submission of information.

<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.2d 412 (1997).

From the Wisconsin Supreme Court opinion in *Weber v. Town of Saukville*:

¶ 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. 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.

<https://caselaw.findlaw.com/wi-supreme-court/1112877.html>

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 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.

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, and shall include, at a minimum, the following:

...

No provision of the zoning ordinance allows conditional use application information to be submitted subsequent to 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.

Can the ZLR Committee deny this application because the application does not meet the requirements of the zoning ordinance?

As mentioned above, the zoning ordinance lists requirements for conditional use permit applications. Requirements for all CUP applications are in § 10.101(7)(b). Additional requirements for mineral extraction applications are in § 10.103(15)(a).

The application appears to be missing numerous required elements. For example, § 10.103(15)(a)6 says the application must include:

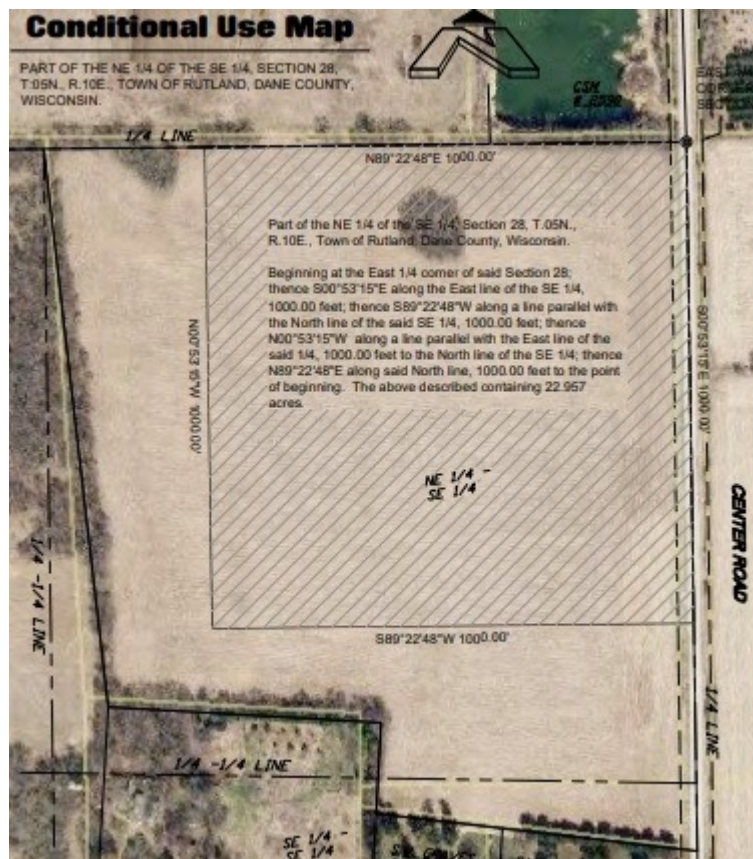
A reclamation plan prepared in accordance with this ordinance, Chapter 74, Dane County Code and Chapter NR 135, Wisconsin Administrative Code.

However, the application (page 17) is specifically contrary to zoning ordinance:

A reclamation plan for the property will be submitted to Dane County upon approval of a conditional use permit for the site.

As another example, perhaps of greater concern, is the inconsistency between the application's legal description of the CUP area and the application's site plan.

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 page 18). This is also the area shown 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 is required to follow the approved operation plan. The inconsistency in this application appears to make it impossible to comply simultaneously with both of these requirements.