boardman & clark llp
LAW FIRM

Michael J. Lawton, Attorney

1 SOUTH PINCKNEY STREET, STE. 410, P.O. BOX 927, MADISON, WI 53701-0927
Telephone 608-286-7236
Facsimile 608-283-1709
mlawton@boardmanclark.com

February 5, 2015

Dane County Board of Adjustment
c/o Mr. Hans Hilbert
Assistant Dane County Zoning Administrator
And Agent For Board
Dane County City-County Building
210 Martin Luther King Blvd., Room 116
Madison, WI 53703-3342

RE: Appeal No. 3665 By Yahara Materials, Inc.

Dear Mr. Hilbert:

Enclosed please find an original and ten copies of Brief In Support Of The Appeal Of Yahara Materials, Inc., And Buckeye Quarry, LLC. Please let me know if you have any questions.

Sincerely,

BOARDMAN & CLARK LLP

Michael J. Lawton

MJL/nr

Enclosure

BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

In the Matter of the Appeal of:

YAHARA MATERIALS, INC.,
a Wisconsin corporation, and
BUCKEYE QUARRY, LLC,
a Wisconsin limited liability company,

Appeal No. 3665

Appellants.

BRIEF IN SUPPORT OF THE APPEAL OF YAHARA MATERIALS, INC. AND BUCKEYE QUARRY, LLC

I. INTRODUCTION.

Yahara Materials, Inc., and Buckeye Quarry, LLC, collectively referred to hereinafter as "Yahara" have appealed a Stop Work Order by the Dane County Zoning Administrator related to mineral extraction at Buckeye Quarry, 4315 E. Buckeye Road, located in the Town of Blooming Grove. This appeal presents two primary issues that the Dane County Board of Adjustment, hereinafter referred to as "Board of Adjustment," must determine: (1) Is Yahara in violation of Dane Co. Ord. §§ 10.191 and 10.21, relating to procedure and standards of operation for mineral extraction operations and non-conforming uses; and (2) if Yahara is in violation of Dane County Ordinances, do equitable considerations warrant that the Board of Adjustment exercise its discretion to not grant an injunction in the form of the Stop Work Order imposed upon by the Zoning Administrator. In this appeal, Yahara denies any violation of Dane County Ordinances relating to mineral extraction. Equitable considerations, moreover, do not justify the Stop Work Order imposed by the Zoning Administrator.

Yahara Materials, Inc., a Wisconsin corporation, is the owner of the real property that is the subject of this appeal and described as tax parcels 0710-142-1701-4, 0710-142-9840-0 and

0710-144-0097-4, and the operator of all of such tax parcels, along with tax parcel 0710-144-0099-0. Buckeye Quarry, LLC, a Wisconsin limited liability company, is the owner of the real property that is the subject of this appeal and described as tax parcel 0710-144-0099-0, for which parcel Yahara Materials is also the operator.

The Dane County Zoning Administrator has ordered that all non-metallic mineral extraction work and operations on the real property which is the subject of this appeal, and which is owned and operated by Yahara and Buckeye, must cease immediately. The Zoning Administrator contends that the real property subject to this appeal does not qualify as a non-conforming mineral extraction site under Dane County Ordinances §§ 10.191(6), and 10.21(1)(c) and (d), because the site was allegedly not used or intended to be used for mineral extraction purposes prior to 1969, or was not registered in 1969 as a non-conforming mineral extraction site under the Dane County Ordinances.

Yahara Materials and Buckeye are affiliates of each other, and such entities are under common ownership, control and management. Yahara Materials uses the Subject Property for non-metallic mineral extraction operations, including mining, crushing, screening and stockpiling.

II. NATURE OF YAHARA'S BUSINESS, AND PAST AND INTENDED USE OF SUBJECT PROPERTY.

Yahara Materials is in the business of operating non-metallic mineral extraction sites and selling rock, stone, sand and other non-metallic materials to state and local governments, farmers, and other private individuals and businesses in Dane County, Wisconsin, and in other parts of Wisconsin. Yahara Materials strategically locates sites around Dane County, such as the Subject Property, in order to provide such non-metallic extracted material without the need to incur excessive transportation costs which must be passed on to governments, agencies, farmers,

businesses and consumers. Yahara Materials both owns real property and leases real property to conduct such mineral extraction activities thereon.

Yahara Materials has used the Subject Property for mineral extraction operations, including mining, crushing, screening and stockpiling of extracted material continuously, knowingly and without objection from Dane County or the Town of Blooming Grove, since 1987, a period of approximately twenty-seven (27) years. Yahara Materials desires to continue to operate at Buckeye Quarry until the deposit of material on the Subject Property is exhausted, at which time the Subject Property will be reclaimed by Yahara Materials as required by the approved reclamation plan for the Subject Property on file with the Dane County Zoning Department.

Yahara Materials also owns and uses the abutting and larger mineral extraction site located to the east of the Subject Property, in the Town of Blooming Grove, on parcel no. 0710-141-9000-7. Yahara Materials has operated this site continuously for mineral extraction activities since 1982. Prior to Yahara Materials' ownership and use of the lands to the east for mineral extraction activities, the lands to the east were owned and used by Madison Stone Company and its affiliates for mineral extraction activities on a continuous basis since at least the 1950's. The operations of Yahara Materials on the contiguous lands to the east and on the Subject Property are a seamless integrated mineral extraction operation under common ownership and management.

Yahara is significantly impacted and aggrieved by the Order which is the subject of this Appeal. The Order has the effect of depriving Yahara of the value of the Subject Property and the non-metallic minerals and the income therefrom. Yahara estimates that the Order will deprive it of approximately one-half of the anticipated life of the integrated mineral extraction

operation on the Subject Property and the adjoining lands in the Town of Blooming Grove and the City of Madison.

Yahara has stopped mineral extraction activities on the Subject Property as a result of the Zoning Administrator's Order. Yahara, however, desires and intends to resume continuous mineral extraction activities on the Subject Property as soon as legally permitted to do so, which mineral extraction operations at the Subject Property will generate substantial benefit to Yahara Materials and local communities.

III. ANTICIPATED EVIDENCE AT HEARING.

Sections 10.191(6), and 10.21(1)(c) and (d), Dane Co. Ord., provide that mineral extraction operations which existed prior to 1969, and which were registered with and approved by the Dane County Zoning Administrator, shall be considered non-conforming uses that may continue thereafter without limitation as to time.

The Subject Property was registered with the Dane County Zoning Department by Madison Stone Company, Incorporated, on or about March 14, 1969, and was approved by the Dane County Zoning Administrator as a legal non-conforming mineral extraction site under Section 10.191(6) and 10.21 (1)(c) and (d), Dane Co. Ord. The registration by Madison Stone Company included section 14 in the Town of Blooming Grove, which included the Subject Property. The Dane County Zoning Department accordingly has designated all or part of the Subject Property as a legal, non-conforming mineral extraction site on a continuous basis from 1969 until now, including designation on non-conforming (NC) mineral extraction maps in such office. At all times the Department has treated the Subject Property as a legal non-conforming mineral extraction site under sections 10.191(6) and 10.21(1)(c) and (d), Dane Co. Ord. Since at least 2001, moreover, the Dane County Zoning Department has annually inspected the Subject

Property and designated the zoning status of the Subject Property as a legal non-conforming mineral extraction site.

The Subject Property abutts the non-conforming mineral extraction operation of Madison Stone Company located to the east, and is a natural and logical extension of the mineral extraction operations on such contiguous lands. The Madison Stone Company mineral extraction operation to the east of the Subject Property commenced in the 1950's, and continued until such land to the east was purchased by Yahara Materials on August 9, 1982, at which time Yahara Materials has continued the Madison Stone Company operations continuously from 1982 to date on the abutting land to the east of the Subject Property.

Yahara and Buckeye purchased, and commenced operations within, the Subject Property as an extension of Yahara's operations on the adjoining land to the east purchased from Madison Stone Company. Yahara and Buckeye acted pursuant to and in reliance on the registration by Madison Stone Company and the Dane County Zoning Department's designation of the Subject Property as a non-conforming mineral extraction site, including its classification in whole or in part on NC classification maps as a legal non-conforming mineral extraction site. Yahara, moreover, has continuously operated a mineral extraction site on the Subject Property from such times of acquisition to the time of the Order, for a period of approximately 27 years, without objection from the Town of Blooming Grove or from Dane County, and despite full knowledge by the County and Town of such operation.

Yahara acted in reliance on Dane County's recognition of the Subject Property as a legal non-conforming mineral extraction site when it purchased the Subject Property, and with respect to its continuing operation of the Subject Property. Subsequently, Yahara has operated a mineral extraction operation on the Subject Property in full reliance on the classification of the Subject

Property by Dane County as a non-conforming site, investing substantial money and resources into the development of the Subject Property, which will be forfeited by the Order of the Zoning Administrator. There has never been any objection from the Town of Blooming Grove or Dane County to the operation of the Subject Property as a mineral extraction site until the issuance of the Order.

Since 2001, Yahara has routinely filed annual reclamation plans with the Dane County Zoning Department concerning the Subject Property, which forms include a reference to the zoning on the Subject Property. Further, Yahara has an approved erosion control plan and stormwater management plan on file with Dane County for the mineral extraction operations on the Subject Property, which have been on file continuously since 2001. Annual physical inspections of the Subject Property also have been conducted by the Dane County Zoning Department since at least 2001, and the Dane County Zoning Department notes on their inspection reports, which are provided to Yahara, that the Subject Property is "NC" or legal non-conforming. Dane County itself was the first customer of the mineral extraction operation on the Subject Property, with clay extracted from the Subject Property being used at the Dane County landfill. At no time has any question ever been raised regarding the zoning of the Subject Property for mineral extraction use by anyone at Dane County or the Town of Blooming Grove in response to the filing of the aforementioned documents by Yahara with Dane County.

The actions by Yahara in reliance on the legal non-conforming status of the Subject Property have been taken in good faith and were reasonable. Yahara has been in full compliance with the law in all respects regarding the Subject Property. At all the times that Dane County has treated the Subject Property as a legal non-conforming mineral extraction property. Moreover, Dane County had full knowledge of the intended use of the Subject Property. Yahara, for its part,

used due diligence prior to purchasing and using the Subject Property for mineral extraction purposes.

Dane County and the Zoning Administrator have unreasonably delayed in taking action with respect to the Subject Property, to the injury and prejudice of Yahara. Given the complete knowledge of Dane County concerning the existence of the mineral extraction operation for approximately 27 years and the enormous loss of value and income from the Subject Property that will be suffered by Yahara which has acted in full and reasonable reliance on Dane County's designation of the Subject Property as a legal non-conforming mineral extraction site, all reasonable and equitable considerations weigh in favor of Yahara's continued use of the Buckeye Quarry site.

IV. YAHARA IS NOT VIOLATING DANE COUNTY ORDINANCES RELATING TO MINERAL EXTRACTION ACTIVITIES.

The threshold issue in this appeal is whether Yahara's mineral extraction operation at the Buckeye Quarry is a legal non-conforming use that may continue without limitation as to time, pursuant to §§ 10.191(6) and 10.21(1)(c) and (d), Dane Co. Ord. The relevant Dane County Ordinance provisions state as follows:

> **"10.191 PROCEDURE AND STANDARDS OF OPERATION FOR MINERAL EXTRACTION OPERATIONS . . .**
>
> > **(6)** Mineral extraction operations which existed prior to 1969 and were registered with and approved by the Dane County Zoning Administrator shall be considered nonconforming uses in accordance with s. 10.21."
>
> **"10.21 NONCONFORMING USES. (1) . . .**
>
> > **(c)** Mineral extraction operations which existed prior to 1969 and were registered with and approved by the Dane County Zoning Administrator shall be considered nonconforming uses.
> >
> > **(d)** Mineral extraction sites that were registered as nonconforming sites as provided by this ordinance shall not be considered

> abandoned or discontinued if the site is inactive for more than one year. . . ."

Here, the Subject Property was registered with the Dane County Zoning Department by Madison Stone Company, Inc., on or about March 14, 1969, and was approved by the Dane County Zoning Administrator as a legal non-conforming mineral extraction site under §§ 10.191(6) and 10.21(1)(c) and (d), Dane Co. Ord. The approved site, moreover, has been operating continuously for mineral extraction activities, including by Yahara, since August 9, 1982, at which point Yahara Materials purchased the Madison Stone Company property and continued mineral extraction operations from 1982 to date on the contiguous land to the east of the Subject Property. The Dane County Zoning Department, for its part, has listed all or part of the Subject Property as a legal, non-conforming mineral extraction site on a continuous basis from 1969 until the Department issued its recent Stop Work Order to Yahara.

The "diminishing asset rule" has particular relevance to the Board of Adjustment's assessment of whether Yahara Materials' Buckeye Quarry operation is in violation of Dane County Ordinances. In *Smart v. Dane County Board of Adjustments*, 177 Wis. 2d 445, 453-54, 501 N.W.2d 782 (1993), the Wisconsin Supreme Court explicitly adopted the diminishing asset rule, as previously recognized by the Wisconsin Court of Appeals in *Sturgis v. Winnebago County Board of Adjustment*, 141 Wis. 2d 149, 413 N.W.2d 642 (Ct. App. 1987). In *Sturgis*, the Court of Appeals held that when mineral excavation operations are in existence on part of contiguous parcels, all land constituting an integral part of the operation is deemed to be "in use," and therefore, allowed as a legal non-conforming mineral extraction operation.

The Supreme Court, in *Smart*, applied the diminishing asset rule to the provisions of the Dane County Ordinance at issue in the present case. The Court described the diminishing asset rule as follows:

> This is not the usual case of a business conducted within buildings, nor is the land held merely as a site or location whereon the enterprise can be conducted indefinitely with existing facilities. In a quarrying business the land itself is a mineral or resource. It constitutes a diminishing asset and is consumed in the very process of use. Under such facts the ordinary concept of use, as applied in determining the existence of a nonconforming use, must yield to the realities of the business in question and the nature of its operations. We think that in cases of a diminishing asset the enterprise is "using" all that land which contains the particular asset and which constitutes an integral part of the operation, notwithstanding the fact that a particular portion may not yet be under actual excavation. It is in the very nature of such business that reserve areas be maintained which are left vacant or devoted to incidental uses until they are needed. Obviously, it cannot operate over an entire tract at once.

Smart, 177 Wis. 2d at 454.

In *Smart*, when Wingra Stone submitted a written registration of its existing operations upon passage of Dane County Ordinances § 10.191(6), it included the description of an 80-acre parcel, but the Zoning Department "accepted" only 40 acres for registration. Twenty-one years later, Wingra asked the Zoning Administrator for a review of the status of the 80-acre parcel in view of the Court of Appeals decision in *Sturgis*. The Zoning Administrator then determined that Wingra was entitled to non-conforming mineral extraction status for all 80-acres, as to which a neighboring residential property owner sought review by writ of certiorari. The Supreme Court ultimately affirmed the Zoning Administrator's decision, concluding that the Dane County Board of Adjustment had proceeded upon a correct legal theory, including the holding in *Sturgis*. The Court concluded that the plain language of the Dane County Ordinance only requires registration and approval of an existing mineral extraction operation, but not the area of intended use.

In *Schroeder v. Dane County Board of Adjustment,* 282 Wis. 2d 324, 596 N.W.2d 472 (Ct. App. 1999), the Wisconsin Court of Appeals again considered the mineral extraction

provisions of the Dane County Ordinances. In *Schroeder*, the Dane County Zoning Administrator argued that the Dane County Ordinance requires a landowner to register and the Zoning Administrator to approve only the specified areas that a landowner intends to use in its mineral extraction operations, and that such identified area is the limit of any lawful non-conforming use. The Zoning Administrator, in other words, contended that the diminishing asset rule permits expansion only within the area of indicated intended use, but not beyond.

The Court of Appeals first noted in its decision in *Schroeder* that the language of §§ 10.191(6) and 10.21(1)(c) establishes three requirements for a mineral extraction non-conforming use. The mineral extraction operation must: (1) Have existed prior to 1969; (2) be registered with the Dane County Zoning Administrator; and (3) be approved by the Zoning Administrator. The Court further noted that neither § 10.191(6) nor § 10.21(1)(c) make any reference to the intended area of expansion of the operation, whether it must be registered, or how it is to be determined and approved by the County. "The Ordinance sections do not refer to registration of 'area' at all, but only to registration of 'operations.'" *Id.* at 335.

The Court of Appeals then concluded in *Schroeder* that the intent of the Dane County Ordinance is not to limit the expansion of mineral extraction operations to only that area designated in the registration. The Court stated that "we conclude that the plain language of the ordinance requires registration and approval of the existing mineral extraction operation, but not the area of intended use. We do not agree that this is an absurd and illogical interpretation or that it thwarts the purposes of regulating non-conforming uses." *Id.* at 339.

Based on the applicable law, and the facts that will be made of record, Yahara's subject property is a legal non-conforming mineral extraction site under the Dane County Ordinances.

Yahara, therefore, is entitled to continue to use the Subject Property as a legal non-conforming mineral extraction site indefinitely until the deposit is exhausted.

V. EQUITABLE CONSIDERATIONS DO NOT JUSTIFY A DECISION BY THE BOARD OF ADJUSTMENT TO CONTINUE AN INJUNCTION PROHIBITING FURTHER MINERAL EXTRACTION OPERATIONS AT THE BUCKEYE QUARRY.

The Wisconsin Supreme Court held in *Village of Hobart v. Brown County*, 281 Wis. 2d 628, 698 N.W.2d 83 (2005), that in reviewing a zoning matter, the decision-maker should first determine whether an ordinance violation has occurred, and if a violation is found, the decision-maker should then weigh equitable considerations to determine whether to issue an injunction. In *Hobart*, the Village asked for a permanent injunction against the operation of a transfer station, which constituted a request for enforcement of claimed applicable ordinances. The Supreme Court in its decision then addressed the proper procedure to apply if there is found to be a violation of a zoning ordinance. The Court, in particular, concluded that the decision-maker should exercise its discretion in deciding whether, and in what form, to grant injunctive relief - - and in exercising its discretion, the decision-maker should consider all equitable factors:

> This court has established that when a party seeks to enforce an ordinance by pursuing an injunction, or other such relief, the circuit court can exercise its discretion in deciding whether, and in what form, to grant the injunctive relief. *See Forest County v. Goode*, 219 Wis. 2d at 670. Specifically, we have determined that "[i]njunctive relief is not ordered as a matter of course, but instead rests on the sound discretion of the court, to be used in accordance with well-settled equitable principles and in light of all the facts and circumstances of the case." Id.; see *McKinnon v. Benedict*, 38 Wis. 2d 607, 616, 157 N.W.2d 665 (1968). Thus, in this case, the circuit court must determine if its equitable power to deny an injunction, or any other enforcement mechanisms, is appropriate under the totality of the circumstances presented.
>
> For guidance, we look to our decision in *Forest County v. Goode*. In *Goode*, the county brought an action against the owner of lakefront property, seeking to enforce its zoning ordinance. The zoning administrator met with Goode and, together, they measured and staked a

> distance of 50 feet from the ordinary high water mark to the location of his new house, as required under the county zoning ordinance. Goode then obtained a building permit to construct his new house 50 feet from the ordinary high water mark. Upon later determining that the distance did not meet the minimum setback requirement, the county sought to enforce the zoning ordinance. Goode responded that the violation was unintentional. In *Goode*, we determined that a circuit court retains its equitable power to deny injunctive relief, even if the plaintiff has proven a prima facie case of zoning ordinance violation. *See Goode*, 219 Wis. 2d at 669.
>
> In doing so, we provided guidance on how to apply equitable considerations:
>
> > [T]he circuit court should take evidence and weigh any applicable equitable considerations including the substantial interest of the citizens of Wisconsin ... the extent of the violation, the good faith of other parties, any available equitable defenses such as laches, estoppel or unclean hands, the degree of hardship compliance will create, and the role, if any, the government played in contributing to the violation.

Id. at 645-645.

The Supreme Court specifically recognized in *Hobart* that equitable defenses, such as laches and estoppel, should be considered, as well as "the role, if any, that the government played in contributing to the violation." These considerations, as well as consideration of the "diminishing asset" realities, are particularly compelling in the present case.

The test for equitable estoppel consists of four elements: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, and (4) which is to his or her detriment. *Id.* at 647. In the present case, the doctrine of equitable estoppel, as well as laches, resonates with particular relevance. Here, Yahara has operated the Buckeye Quarry mineral extraction site with full knowledge of the Dane County Zoning Department for 27 years, including annual inspections by the Department. The Zoning Department also has explicitly and publically designated the Buckeye Quarry site as a legal non-

conforming mineral extraction operation, on which designation Yahara has relied. In these circumstances, the principles of equitable estoppel weigh strongly against enjoining Yahara's operation. Principles of laches also weigh in favor of Yahara's appeal because Dane County and the Zoning Administrator knowingly engaged in unreasonable delay in taking any action with respect to the Subject Property, to the injury and prejudice of Yahara, and only acted apparently in response to interested constituencies.

The Supreme Court recognized in *Smart*, moreover, that the role of government officials in contributing to a violation is a wholly appropriate factor to consider by the Board of Adjustment. Similarly, in *Accent Developers, LLC v. City of Menomonie Board of Zoning Appeals*, 300 Wis. 2d 561, 566, 730 N.W.2d 194 (Ct. App. 2007), the Court held that it was appropriate for a board to consider the role that its own officials played when, for example, evaluating unnecessary hardship in respect to deciding whether to grant a variance. Accent Developers argued in that case that a board should not consider official responsibility in contributing to a zoning violation. The Court of Appeals rejected this argument in no uncertain terms: "These cases [cited by Accent] do not hold that a board may not consider the role its officials played in the zoning violation, when deciding whether to grant a variance. Therefore, we hold the board appropriately considered the role its official played in Timber Ridge's zoning violation." *Id.*

The equities in the present case are much as they were in *State ex. rel. Lake Drive Baptist Church v. Bayside Village Board,* 12 Wis. 2d 585, 108 N.W.2d 288 (1961). In that case, the Wisconsin Supreme Court held that while a church without a building permit did not acquire a vested right to construct a church on its building site by virtue of favorable intimations of a village board, its prior relationships with a village board, consisting of exchanges of

correspondence in which village officials stated that the board was agreeable to the idea of a church on the mentioned site, "do provide strong equitable considerations for favorable zoning if at all reasonable." *Id.* at 603. *See* also *State ex. rel. Humble Oil and Refining Company v. Wahner,* 25 Wis. 2d 1, 15, 130 N.W.2d 304 (1964).

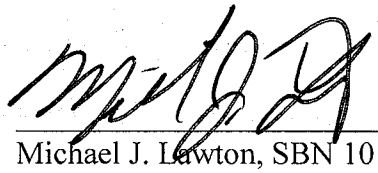
In this case, the Board of Adjustment should also consider the interests of area residents in the community as part of its evaluation - - but such consideration must take account that residents knowingly came to the area of the excavation site. The Wisconsin Supreme Court noted this caveat in *Smart,* 177 Wis. 2d at 459:

> Smart and the other property owners in the residential community cannot reasonably argue that they lacked knowledge that Wingra might attempt to mine on the disputed 40 acres as a nonconforming use. The property owners knew or should have known when they purchased their land and built their homes that Wingra owned the entire adjacent 80 acres and was mining on a portion of it. The only reasonable assumption was that Wingra intended to mine the entire 80 acres.

If the Board of Adjustment concludes in its final analysis that Yahara's operation of the mineral extraction site at Buckeye Quarry constitutes a technical violation of the Dane County Ordinances, then the Board should nonetheless conclude that the equities in this case do not weigh in favor of an injunction against continued operation at the site. As Wisconsin courts have recognized, this conclusion is entirely within the appropriate discretion of the Board. In fact, the Board's own Rules and Procedures, at § 6(b), state that a decision by the Board on appeal "may affirm, reverse, vary or modify the order, requirement, decision, or determination appealed in whole or in part." Here the applicable law, the relevant facts, and pertinent equitable considerations, all compel a decision by the Board reversing the Stop Work Order issued by the Dane County Zoning Administrator.

Respectfully submitted this 5th day of February, 2015.

BOARDMAN & CLARK LLP

By: 

Michael J. Lawton, SBN 1016491
mlawton@boardmanclark.com
One South Pinckney Street, Suite 410
P.O. Box 927 (53701-0927)
Madison, Wisconsin 53703-4256
608-286-7236 || 608-283-1709 fax
Attorneys and Agents for Appellant Yahara Materials, Inc.

f:\docs\wd\52819\4\a2094576.doc