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Memorandum

To: Dane County Zoning and Land Regulation (ZLR) Committee
Cc: Roger Lane, Zoning Administrator
From: Pamela Andros, AICP
Todd Violante, AICP, Director
Date: April 4, 2019
RE: Staff update on CUP 2449

The following memo provides a *summary* of the latest information and issues associated with CUP 2449, and it is intended as a supplement to the full staff report; it is not intended to replace the staff report. If the Zoning and Land Regulation Committee (ZLR) chooses to approve this petition, 36 possible conditions are presented here for consideration.

PUBLIC CONCERNS

Numerous concerns were identified at the February 12, 2019 ZLR Public Hearing. The following summary list is based on issues described in the meeting minutes.

Consistency with Deerfield Comprehensive Plan. There are some general goals and objectives related to identifying and protecting cultural and historic resources in the town, and St. Paul's Liberty Lutheran Church is cited as one of those historic resources. However, there do not appear to be any specific land use polices in the plan designed to protect these resources, and none relating specifically to location in proximity to mineral extraction operations.

Standards of Approval. Opponents contend that the proposal does not meet standards 1, 2, and 3 for approving a conditional use permit as found in the county zoning code.

The first 3 standards for approving a conditional use permit (CUP) are as follows:

1. That the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort or welfare.
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 or diminished by establishment, maintenance or operation of the conditional use.

3. That the establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.

In general, conditions on a CUP are intended to ameliorate secondary impacts from the proposal and ensure that these standards are met, and that is the case with CUP 2449 and the 36 draft conditions included herein for consideration by ZLR.

Impact on Property Values. Differing opinions have been presented regarding property values. The applicant provided a study conducted by Scott MacWilliams, a Wisconsin Certified Appraiser, showing no significant impact on property values. While Ken Frjelich, a town resident living in closer proximity to the quarry, challenged this conclusion, presenting a summary of assessed values and purchase prices showing reduced property values.

Traffic Congestion on Oak Park Road. Because this proposal is a continuation of an existing use, traffic is not anticipated to increase in a significant fashion. In response to traffic concerns, specifically regarding truck trips past the church and school, the applicant's proposal includes relocating the driveway to the east of Oak Park Road to an ingress/egress point significantly south of St. Paul's Liberty Church and much closer to USH 12/18 (please refer to the associated site plan for the quarry).

Blasting Impacts; Damage and Deterioration of Surrounding Structures. Blasting is perhaps the most significant issue associated with this petition. There is a great deal of correspondence, information and documents regarding blasting impacts on the church and other structures, but ultimately it is not certain that the current condition of the church building, cemetery monuments, and other structures, are directly and solely related to this mineral extraction operation. More importantly, it is not clear going forward whether the *proposed* operation will cause damage to surrounding structures. For this CUP application there is a different operator, and in the event that a town blasting license is obtained, a different blaster.

The town of Deerfield has and enforces its own mineral extraction and blasting ordinances. The operator must renew licenses annually. The applicant has applied for and received a permit for mineral extraction. In order for blasting to be part of the operation, the operator also needs a town blasting license. To protect the church, the town ordinance has a section with specific requirements for blasting in proximity of historic structures. The operator will apply for the town blasting license if CUP 2449 is granted. If CUP 2449 is granted, and the operator does not obtain a blasting license from the town, the operation can continue without blasting. Blasting has not taken place at Oak Park Quarry since December 2015.

As required by the town ordinance, the operator must provide seismographic records to the town. The town may suspend or revoke the blasting license. If revocation or suspension occurs, the town and operator have a meeting to determine what action to take (suspension or revocation) and reasons for the proposed action. This provides the opportunity to make changes to address concerns. The town has the right to suspend or revoke the license.

PROCESS

Opponents to Oak Park Quarry expressed concern about the approval process, feeling that a meeting prior to the town hearing was inappropriate (see the letter from Saint Paul's Liberty Church dated March 26, 2019). It is common practice that staff work with the town to develop potential conditions of approval. Most towns generally do not have a great deal of experience with permitting mineral extraction operations, so Planning and Development Department staff regularly work with town officials on analyzing such proposals and crafting possible conditions for the CUP. For CUP 2449, staff met with a representative from the town and the applicant, with the intent of blending the 29 conditions suggested by the county and required under county ordinance with those that could be customized to this specific site and operation for consideration by the town and ZLR.

It is very important to stress that the five conditions specific to CUP 2449 that were discussed and later included in the staff report were and still are ***potential*** conditions of approval. If ZLR chooses to approve the CUP, the committee may omit or amend any of the conditions, as well as add new ones.

CONDITIONS

There are 36 potential conditions outlined below. If the permit is approved, staff recommends that all of them be applied to CUP 2449. The conditions are divided into three sections. The first section is comprised of 13 conditions required of *all* conditional use permits, and the second set of 16 conditions are *standard* for all conditional use permits *for mineral extraction*; both sets of conditions are required under the Dane County Zoning Ordinance. The third and final set of seven (7) recommended conditions are based on the specifics of this site, the proposed operation, concerns expressed at both Town of Deerfield meetings and the ZLR public hearing, and those otherwise submitted in writing over the course of deliberation. These seven conditions blend both staff and town conditions, which are identical except for two exceptions noted below.

Standard CUP Conditions. The town board and zoning committee shall impose, at a minimum, the following conditions on any approved conditional use permit, which are common across all CUPs:

- 1) Any conditions required for specific uses listed under s. 10.103 (see list below).
- 2) The physical development and operation of the conditional use must conform, in all respects, to the approved site plan, operational plan and phasing plan.
- 3) New and existing buildings proposed to house a conditional use must be constructed and maintained to meet the current requirements of the applicable sections of the Wisconsin Commercial Building Code or Uniform Dwelling Code.
- 4) The applicant shall apply for, receive and maintain all other legally required and applicable local, county, state and federal permits. Copies of approved permits or other evidence of compliance will be provided to the zoning administrator upon request.
- 5) Any ongoing business operation must obtain and continue to meet all legally required and applicable local, county, state and federal licensing requirements. Copies of approved licenses or other evidence of compliance will be provided to the zoning administrator upon request.
- 6) Existing onsite wastewater sewage disposal systems, if any, serving the conditional use must be inspected by a licensed plumber to determine its suitability for the proposed or expanded use.

Deficient systems must be brought, at the owner's expense, into full compliance with the current requirements for new development of the state plumbing code and Chapter 46, Dane County Code.

- 7) All vehicles and equipment must access the site only at approved locations identified in the site plan and operations plan.
- 8) Off-street parking must be provided, consistent with s. 10.102(8).
- 9) If the Dane County Highway, Transportation and Public Works Department or the town engineer determine that road intersection improvements are necessary to safely accommodate the conditional use, the cost of such improvements shall be born by the landowner. Costs born by the landowner shall be proportional to the incremental increase in traffic associated with the proposed conditional use.
- 10) The Zoning Administrator or designee may enter the premises of the operation in order to inspect those premises and to ascertain compliance with these conditions or to investigate an alleged violation. Zoning staff conducting inspections or investigations will comply with any applicable workplace safety rules or standards for the site.
- 11) The owner must post, in a prominent public place and in a form approved by the zoning administrator, a placard with the approved Conditional Use Permit number, the nature of the operation, name and contact information for the operator, and contact information for the Dane County Zoning Division.
- 12) The owner or operator must keep a copy of the conditional use permit, including the list of all conditions, on the site, available for inspection to the public during business hours.
- 13) Failure to comply with any imposed conditions, or to pay reasonable county costs of investigation or enforcement of sustained violations, may be grounds for revocation of the conditional use permit. The holder of a conditional use permit shall be given a reasonable opportunity to correct any violations prior to revocation.

Standard Mineral Extraction CUP Conditions. The following are conditions for all mineral extraction conditional use permits. The town board and zoning committee shall impose, at a minimum, the following conditions on any approved conditional use permit for mineral extraction:

- 1) Topsoil, or appropriate topsoil substitute as approved in a reclamation plan under Chapter 74, Dane County Code, from the area of operation shall be saved and stored on site for reclamation of the area. Topsoil or approved topsoil substitute must be returned to the top layer of fill resulting from reclamation.
- 2) The applicant shall submit an erosion control plan under Chapter 14, Dane County Code covering the entire CUP area for the duration of operations, and receive approval of an erosion control permit prior to commencing extraction operations.
- 3) The Town and Committee will set an expiration date for the conditional use permit based on the quantity of material to be removed and the expected duration of mineral extraction activities.
 - a) Extensions. Due to uncertainty in estimating duration for mineral extraction, conditional use permit holders who have operated without violations, may have the duration of their permit extended for a period not to exceed five years, based on an administrative review by the zoning administrator, in consultation with the town board. No more than one such extension shall be granted over the lifespan of the conditional use permit, and all conditions shall remain the same as the original permit. Further extensions or any modifications of conditions shall require re-application and approval of a new conditional use permit.
- 4) Reclamation shall meet all requirements of Chapter 74 of the Dane County Code of Ordinances. In addition, all reclamation plans must meet the following standards:

- a) Final land uses after reclamation must be consistent with any applicable town comprehensive plan, the Dane County Comprehensive Plan and the Dane County Farmland Preservation Plan.
 - b) Final slopes shall not be graded more than 3:1 except in a quarry operation.
 - c) The area shall be covered with topsoil and seeded to prevent erosion.
 - d) The area shall be cleared of all debris and left in a workmanlike condition subject to the approval of Dane County
 - e) Highwalls shall be free from falling debris, be benched at the top, and certified by a civil engineer to be stable.
- 5) The driveway accessing the subject site shall either be paved or covered with crushed asphalt for a minimum distance of 100 feet from the public right-of-way. The operator shall maintain the driveway in a dust free manner in accordance with local, state, and federal regulations, and shall clean any dust or mud tracked onto public roads.
 - 6) The access to the driveway shall have gates securely locked when the extraction site is not in operation. The site shall be signed "no trespassing."
 - 7) All surface and subsurface operations shall be setback a minimum of 20' from any property line that does not abut a public right of way.
 - 8) Excavations below the grade of an abutting public street or highway shall be set back from the street or highway a distance at least equal to the distance that is required for buildings or structures under s. 10.102(9). The committee and town board may require greater setbacks where necessary to avoid subsidence, or for consistency with Chapters 11, 14, 17 or 74, Dane County Code.
 - 9) The Town and Committee will assign hours of operation appropriate to the particular application. No operations of any kind shall take place on Sundays or legal holidays. The committee and town board may approve limited exceptions to normal hours of operations for projects associated with Wisconsin Department of Transportation or municipal road projects requiring night work. [Note: Typical hours of operation are from 6:00 a.m. to 6:00 p.m., Monday through Friday, and 8 a.m. to early afternoon on Saturday. If there are residences nearby, hours may be more limited (e.g., start at 7:00 a.m. with no Saturday hours).] See specifics for this operation below.
 - 10) There shall be a safety fence around the entire extraction area at all times. That safety fence shall be a minimum of 4 feet in height.
 - 11) Except for incidental removal associated with dust spraying or other routine operations under this permit, water shall not be pumped or otherwise removed from the site.
 - 12) The operator shall require all trucks and excavation equipment to have muffler systems that meet or exceed then current industry standards for noise abatement.
 - 13) The operator shall meet DNR standards for particulate emissions as described in NR 415.075 and NR 415.076, Wisconsin Administrative Code.
 - 14) Dane County and the Town shall be listed as additional named insureds on the operator's liability insurance policy, which shall be for a minimum of \$1,000,000 combined single limit coverage per occurrence. The operator shall furnish a copy of a Certificate of Insurance as evidence of coverage before operations commence. The liability insurance policy shall remain in effect until reclamation is complete.
 - 15) 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 , or prohibit any mineral extraction accessory use.
 - 16) Additional conditions for particular circumstances. Where any of the following circumstances apply, the zoning committee and town board shall also impose the following conditions on any approved conditional use permit for mineral extraction:
 - a) Blasting:

- (1) Blasting Schedule. Blasting shall occur between sunrise and sunset, as required by SPS 307. The zoning committee and town board may set further daily limits on hours when blasting may occur, to minimize impact on neighboring properties. Schedules for blasting need not conform to hours of operation for the overall mineral extraction project.
- (2) Notice of Blasting Events. Prior to any blasting event, notice shall be provided to nearby residents as described in SPS 307, Wisconsin Administrative Code. In addition, operators will honor the requests of residents within 500' of the mineral extraction site to either receive or stop receiving such notices at any time.
- (3) Other standards. All blasting on the site must conform with all requirements of SPS 307, Wisconsin Administrative Code, as amended from time to time, or its successor administrative code regulations.
- (4) Fly rock shall be contained within the permitted mineral extraction area.
- b) Fuel storage. All fuel storage must comply with ATCP 93, Wisconsin Administrative Code, including provisions for secondary spill containment.
- c) Mineral extraction at or near groundwater. All excavation equipment, plants, and vehicles shall be fueled, stored, serviced, and repaired on lands at least 3 feet above the highest water table elevation to prevent against groundwater contamination from leaks or spills.
- d) In the event that a mineral extraction operation will destroy an existing Public Land Survey Monument, witness monuments must be established in safe locations and a new Monument Record filed by a Professional Surveyor, prior to excavation and disturbance of the existing monument.

Conditions Unique to CUP 2449. Potential conditions of approval specific to CUP 2449 (again, note that these are *DRAFT* conditions subject to deliberation and modification by the Zoning and Land Regulation Committee):

- 1) Operations shall cease no later than five (5) years from the date of CUP approval.

Staff Comment: CUPs for mineral extraction in Dane County have periods ranging from 5 to 40 years, with most in the 10 to 15 year range. Please NOTE that the town of Deerfield approved 10 years, while St. Paul's Liberty Lutheran Church has proposed one (1) year. Planning and Development Department staff are recommending five (5) years. In light of the proximity to St. Paul's Church, staff felt that a time period shorter than 10 years would be appropriate to prove compatibility between the quarry and the church, while still allowing a sufficient time period on which the operator could base near and mid-term business decisions. The committee may certainly consider a different number of years.

- 2) The haul route will be Oak Park Road South to USH 12.
- 3) Hours of operation shall be from 6:00 a.m. to 6:00 p.m., Monday through Friday, and from 7:00 a.m. to 1:00 p.m. on Saturdays. No operations of any kind shall take place on Sundays or the following holidays: New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day or Christmas Day.
- 4) No blasting can take place until the operator has received a blasting license from the town of Deerfield. A copy of the license and/or approval from the town of Deerfield must be provided to Dane County Zoning.
- 5) The following limits shall not be exceeded during blasting events, as measured by a seismograph placed at St. Paul's Liberty Lutheran Church:
 - PPV of .20 in./sec.;

- PPV of .15 in./sec. when Hz. is less than 14; and
- Air blast of 123 dB(L).

Reports of each blast will be submitted to the Dane County Zoning Administrator within three (3) working days, and the Town will notify the County of any violations therein.

Please NOTE that the town of Deerfield approved a different Condition No. 5, which reads as follows:

- 5) “Specific only to St. Paul’s Liberty Lutheran Church, the following limits shall not be exceeded more than 1 out of 10 consecutive times during blasting events, as measured by a seismograph placed at St. Paul’s Liberty Lutheran Church:
- PPV of .20 in./sec.;
 - PPV of .15 in./sec. when Hz. is less than 14; and
 - Airblast of 123 dB(L).

If any limit is exceeded more than 1 out of 10 consecutive times, blasting may be suspended for up to 30 days. If any limits are exceeded more than 1 out of 10 consecutive times twice within 12 months, blasting may be suspended for up to 60 days. If any limits are exceeded more than 1 out of 10 consecutive times for a third time within 12 months, blasting may be suspended for up to 180 days. After the third suspension within 12 months, the schedule will reset.

The suspensions above will go into effect 10 days after the permittee is provided notice of the violation, unless during that 10-day period the permittee appeals to the zoning committee or Board of Adjustment. The suspension is stayed during the appeal. The zoning committee or Board of Adjustment may specify the exact days of suspension if a violation is found. The option of suspension does not preclude the zoning committee or Board of Adjustment from taking other enforcement action, including revocation.

Reports of each blast will be submitted to the Dane County Zoning Administrator within three (3) working days, and the Town will notify the County of any violations therein.”

Upon further review, Planning and Development Department staff suggested the modification to this Town condition for a couple reasons. First, the three blasting threshold exceedances allowed by the condition could conceivably allow for multiple instances in a given year to blast up to the state of Wisconsin allowed maximum, which would not be acceptable in this context, particularly in light of historical experiences with blasting at this site and potential impacts on St. Paul’s Church. Second, the condition appears to be less lenient than the town’s ordinance, and staff has reservations about the ability of a CUP condition to be more lenient than an adopted ordinance provision.

As noted, blasting is arguably the most challenging aspect of this CUP request, and Condition No. 5 has proven to be the most controversial of the conditions. The explanation offered by the town was that it was to serve as a “back-up” to the town blasting license process. Because Deerfield has its own mineral extraction and blasting permitting processes, any operator needs to meet the requirements of these ordinances as well as the conditions of the County CUP. Condition No. 4 as originally drafted by county staff and included above addresses this dual approval by stating, “No blasting shall take place until the operator has acquired a blasting permit from the town of Deerfield.” If the operator was unable to secure a blasting license from

the town, this would still allow the operation to continue without blasting. Please note that ZLR may consider the town's condition, the recommended staff modification, or even a different condition to address this issue.

Town Conditions. The Town of Deerfield approved CUP 2449 on Monday, March 11, 2019 on a vote of 3 to 1 (with one member abstaining) with the five (5) conditions listed above, with the two noted differences – i.e. 1) the duration of the CUP, and 2) Condition No. 5 pertaining to blasting – adding the following two (2) conditions:

- 6) The seismograph at St. Paul's Liberty Lutheran Church shall be placed by a third party agreed to by the church and the quarry, and will be paid for [by] the quarry. A copy of the agreement will be forwarded to the Town Clerk. In the event that a third party cannot be agreed upon, then the blaster shall place two seismographs at the church.¹
- 7) The operator shall contact St. Paul's Liberty Lutheran Church and the Town Clerk and the cemetery association by email 2 days in advance of blasting to verify that the church and/or cemetery will not be in use for Church services, weddings, or funerals during the proposed blasting date and time. Blasting will not take place during the week-long summer school, and the church will notify the quarry and the Town Clerk when summer school will take place. There will be no blasting on election days.

Last but not least, please note that on April 2, 2019, the county received a letter from Pastor Holly Slater, dated April 1 requesting different and additional conditions for approval. This letter is included in the Dane County Legistar record for CUP 2449. ZLR may consider if and how the conditions proposed by St. Paul's could or should be incorporated into the conditions listed above.

¹ Note that there appears to be a discrepancy between the Town Board Action Report language for Condition No. 6 and the Town Board Minutes for CUP 2449: The minutes from the Town Board meeting additionally include the following as the last sentence of the condition: "The PPV and corresponding frequencies, the seismograph data and maximum air blast in decuples [decibels] to be recorded in a log." The April 1, 2019 communication from St. Paul's includes a similar last sentence, but phrased a little differently: "The seismograph data recorded by the operator will include Peak Particle Velocity (PPV) and the corresponding frequencies and the maximum airblast in decibel (dB)."