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Sent: Thursday, January 19, 2023 8:24 AM
To: Planning & Development <plandev@countyofdane.com>
Subject: RE: CUP 02582 Powerpoint PDF from residents

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Roger, I'm sure you are! I do have one more request for an addition, with apologies for it being late: several of us thought the others had sent this and it looks like no one did, as we too were kind of overwhelmed with trying to organize ourselves. This is the attorney's letter, it's important to us, so if you would add it to the file we would be most grateful.

Thanks Roger.

Gail

Attorney Christa O. Westerberg
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April 21, 2022

VIA EMAIL

Town Clerk
Town of Rutland
4177 Old Stage Rd.
Brooklyn, WI 53521
clerk@town.rutland.wi.us

Re: CUP 2022-02563 by Kevin Hahn for non-metallic mineral extraction

Dear Clerk:

This firm represents Gail Simpson and Henry Spelter, and provides the following comments to the Town Board and Planning Commission in opposition to the Kevin Hahn/Nelson Excavating application for CUP 2022-02563, to commence non-metallic mining on 36.7 acres in the Town of Rutland.

The application is deficient right out of the gate, describing the “proposed conditional use” as “ex[ist]ing quarry expan[s]ion.” (CUP Application, page 2.)¹ It is not: the application is for a new quarry south of Nelson Excavating’s existing site. Indeed, the application later clarifies that it is for the proposed new 36.7 acre quarry, “not existing operations at the Nelson Quarry.” (*Id.* at 3.) All of its impacts would be new.

More fundamentally, the CUP application does not satisfy Dane County’s **seven** standards for CUPs, or the County’s **five** additional standards for non-agricultural operations in farmland preservation areas. Dane County Ord. §§ 10.101(7)(d), 10.220(1). Under 2017 Wisconsin Act 67, Nelson Excavating must show it meets all **twelve** criteria by substantial evidence. Wis. Stat. § 62.23(7)(de)2.a. It cannot: much of the information in its application is speculative or unsupported, or if accepted would allow no limit to the disruption and harm to neighbors the proposed quarry would cause, in violation of

¹ The page numbering in the application refers to the PDF page of the 74-page CUP application available on the Dane County website, <https://dane.legistar.com/View.ashx?M=F&ID=10818503&GUID=C9EC0F65-0A25-4F54-A8FB-017DD096D97A>

the standards. “The town board must deny a conditional use permit if it finds that the standards for approval are not met.” Dane County Ord. § 10.101(7)(c)3.d.

While the application is insufficient under the rules and can be rejected for that reason, Ms. Simpson and Mr. Spelter, and likely many of their neighbors, will present evidence showing that the application will in fact violate the standards.

I. **Nelson Excavating Cannot Satisfy the County’s Eight CUP Standards.**

Standard 1: The proposed land use will not be detrimental to or endanger the neighborhood health, safety, comfort, or general welfare. *Explain how the proposed land use will fit into the neighborhood. If there is going to be lighting, noise, outdoor storage, traffic, or other outside activities, explain how the activities will be limited to a reasonable level.²*

The CUP is for an industrial use in a rural agricultural and residential setting and incompatible with the neighborhood. While this is significant, the application lacks basic information about the operation, such as the planned depth of mining below the ground surface, the amount of land exposed for mining at any given time, and the size and frequency of crushing operations. This information is needed to understand the project’s full impacts and whether any of the few proposed mitigation measures will be effective.

Take, for example, noise. The application minimizes noise concerns as typical for farm equipment. (CUP App. at 16.) It does not even describe sources of noise or projected noise levels, even though quarrying operations generate substantial noise from crushing, blasting, backup beepers, banging truck grates, engine noise, loading and unloading. The application then “compiles” three potential noise reduction measures, two of which describe everyday activities like using mufflers on and maintaining equipment. The third is simply crushing below grade. It does not commit to using any of these measures, and it does not demonstrate how they would be effective in any case.

The application also contains very little information about preserving the health, safety, comfort, or general welfare, essentially only committing to install a four-foot fence and erect no trespassing signs. Lighting is not discussed at all. These generalizations are not enough to satisfy the first standard.

² Information in italics is included on Dane County’s website as the kind of information that should be provided regarding the standards. See <https://plandev.countyofdane.com/documents/pdf/Zoning-Information/Understanding-Conditional-Use-Process.pdf>

Standard 2: The uses, values and enjoyment of other properties in the neighborhood already permitted shall be in no foreseeable manner be substantially impaired or diminished by establishment, maintenance or operation of the proposed conditional use. *Explain how the proposed land use will fit into the neighborhood and what will be done to avoid potential nuisances, such as limiting the hours of operation, noise control measures, paving the parking area, or the screening of outdoor storage.*

In addition to the above deficiencies, the application contains no information about projected quality of life impacts to neighbors or property values. It only describes operations at the other, existing quarry. Based on the information available, the uses, values, and enjoyment of other properties in the neighborhood will certainly be substantially impaired or diminished by this new use, through noise, vibration, traffic, blasting, dust, and other factors. The application does not discuss visual impacts and whether stockpiles will be visible from neighboring properties or roads; it commits to seeding disturbed areas, but it does not commit to maintaining newly-seeded areas to ensure vegetation survives or isn't eroded.

The CUP application also does not commit to set hours of operation. It only states that "in general" hours will be 7 AM to 7 PM Monday through Friday and 7 AM to 5 PM Saturday, but it also says "extended hours" may be needed due to "peak hour project restrictions." (CUP App. at 14-15.) Thus, neighbors will always have to fear that nuisance conditions created by the mining operation could occur at any hour. This will also make it difficult for neighbors to plan the use of their property, whether it be hanging laundry, opening windows, or hosting special events like graduation parties.

Standard 3: 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. *Explain how the proposed land use will not interfere with the development of the surrounding property. It's possible that there may already be limitations on development on the surrounding properties such as being deed restricted to just agriculture.*

The CUP Application does not discuss surrounding property and impact on development, as required by Standard 3. It only discusses the 36.7 acre parcel and the Town's comprehensive plan as it relates to that parcel. Meanwhile, neighboring properties will have to live with disturbance and truck traffic for the 50-year life of the mine. The Applicant has not satisfied this standard.

Standard 4: There are adequate utilities, access roads, drainage, and other necessary improvements to allow the land use, or improvements are planned to provide adequate measures. *Explain what impact the proposed use has on such things as water, septic,*

storm water, electricity, and traffic. Provide information on improvements that may be needed or if additional buildings are needed.

There is alarmingly little information in the application about this factor, especially impacts to groundwater and surface water quality. The application admits that groundwater is close to the ground surface – within 20 to 50 feet (CUP App. at 24) – and that intermittent dewatering will be needed to keep the quarry floor dry (*id.* at 14). Yet it contains no information about the dewatering process, risks to groundwater quality, and measures it will take to protect groundwater quality during quarrying operations.

As for surface water quality, the CUP Application omits information necessary to assess this standard, like an erosion control plan the applicant says will be submitted *after* the CUP is issued. (CUP App. at 12.) The application says stormwater will be routed offsite to the existing quarry, where it appears an underground pipe transmits water to a ditch and eventually Badfish Creek. (*Id.*) The applicant should better explain this system and how it protects surface water.

Standard 5: Adequate measures have been or will be taken to provide adequate ingress/egress to public streets and the proposed conditional use will not present traffic conflicts. *Provide information on vehicle traffic that the proposed use will generate. Include frequency and types of vehicles.*

The CUP application is unhelpful on this point. It states that the new quarry could average “zero to 50” loads per day, and “more or less may be needed for local or specialized projects.” (CUP Application at 14.) This range is so broad and poorly defined that there could be no limit to truck traffic, especially during construction season. Yet truck traffic has a huge quality of life impact, from noise to dust to traffic safety for other drivers. More information is necessary about traffic impacts.

The application’s only discussion of this standard concerns ingress or egress, but it contains no information about traffic counts or any documentation that traffic on Center Road is “light.” (CUP Application at 72.) If the two entrances are open at the same time, this would increase traffic congestion on Center Road. Additionally, there is no information provided in the application as to road damage and how such damage would be addressed, despite the quarry’s location on rural roads and the significant weight of truck loads, at up to 22 tons of crushed stone.

Standard 6: The conditional use shall conform to all applicable regulations of the district in which it is located. *Provide information on any necessary licensing, or regulations*

associated with the proposed land use. Explain any buffering or screening that will be installed as part of the proposed use.

The application does not discuss the applicable regulations of the FP-35 District, such as setbacks and yard size. Non-metallic mineral extraction is only allowed in this district if it complies with Wis. Stat. § 91.46(6) and Dane County Ordinances Section 10.103(15) and Chapter 74. Dane County Ord. § 10.222(3)(c). The application does not discuss these provisions, even though Section 10.103(15) contains a detailed list of application materials and requirements for mineral extraction uses. Chapter 74 requires a reclamation plan, but that too, has not been submitted. The applicant has not demonstrated that it can meet any of these standards.

Standard 7: The conditional use is consistent with the adopted Town and County Comprehensive Plans. *The Town and the County may have specific policies on the development of particular areas of the county. Please provide any specifics that relate to the conditional use.*

The application summarily states that it satisfies the Town and County Comprehensive plans in two short sentences, despite the complexity of these plans. This is not even close to substantial evidence, but is akin to a personal opinion or speculation that is explicitly *not* substantial evidence. Wis. Stat. § 62.23(7)(de)1.b.

Meanwhile, Gail Simpson has thoroughly explained, in comments submitted separately, why the CUP application does not satisfy the Town's comprehensive plan. As for the County's plan, XXX.

II. Nelson Excavating Cannot Satisfy the Five Additional Requirements for Non-Agricultural Uses in Farmland Preservation Areas.

In addition to the above, the CUP must be denied because Nelson Excavating has not shown it can meet the five additional requirements for operating in a farmland preservation area. These requirements are mandated by state law to ensure the State's disappearing farmland is preserved. Non-metallic mines are not permitted as conditional uses in any farmland preservation district unless they strictly comply with these standards. Wis. Stat. § 91.46(6). This mine will not.

Farmland Standard 1: The proposed use is consistent with the purpose of the district.

The CUP Application does not discuss the nine distinct purposes of the FP-35 zoning district, much less even acknowledge those purposes.³ It instead includes three vague sentences about farmland preservation zones generally. (CUP App. at 72.) This is insufficient on its face and the application should be rejected for this reason alone.

The proposed use is not consistent with several purposes of the district in any case: the use is not agricultural or even incidental to agriculture; the application admits that the site's aggregate would be used for "the construction and maintenance of local homes, businesses, and infrastructure, as well as water treatment and erosion," not agriculture. (CUP App. at 3.)

Some or all of the site will be removed from productive agriculture for the project's 50-year life, and it may never be restored to agriculture, since the CUP Application also list recreation as a future use. (CUP App. at 16.) This does not "preserve" farmland as required for the FP-35 District. And, non-metallic mining does not "preserve productive farms by preventing land use conflicts between incompatible uses," and in fact as the Town well knows given the level of controversy associated with this use.

Farmland Standard 2: The proposed use is reasonable and appropriate with alternative locations considered.

³ Under Dane County Zoning Ord. § 10.222(1), those purposes are:

- (a) Provide for a wide range of agriculture and agricultural accessory uses, at various scales. The FP-35 district accommodates as permitted uses all activities typically associated with the primary production and harvesting of crops, livestock, animal products or plant materials. Such uses may involve noise, dust, odors, heavy equipment, use of chemicals and long hours of operation.
- (b) Allow for incidental processing, packaging, storage, transportation, distribution or other activities intended to add value to agricultural products produced on the premises or to ready such products for market. Such uses are conditional as they may have the potential to pose conflicts with agricultural use due to: volumes or speed of vehicular traffic; residential density; proximity to incompatible uses; environmental impacts; or consumption of agriculturally productive lands.
- (c) Allow for other incidental activities, compatible with agricultural use, to supplement farm family income and support the agricultural community.
- (d) Preserve productive agricultural land for food and fiber production.
- (e) Preserve productive farms by preventing land use conflicts between incompatible uses.
- (f) Maintain a viable agricultural base to support agricultural processing and service industries.
- (g) Reduce costs for providing services to scattered non-farm uses.
- (h) Pace and shape urban growth.
- (i) Meet the criteria for certification as a Farmland Preservation Zoning District under s.91.38, Wis. Stats.

There is no indication in the application that *any* alternative sites were *ever* considered. The Applicants claim they are limited by where aggregate occurs naturally, but aggregate is available throughout Dane County. (CUP App. at 73.) The Applicants do not explain why they did not purchase a different site that would have less impact on neighbors and the surrounding community and have not satisfied this standard.

Farmland Standard 3: The proposed use is reasonably designed to minimize the use of agricultural lands.

The CUP Application states that the “site will be developed incrementally” to preserve farmland (CUP App. at 73), but it provides no detail as to what that means. In any case, developing the mine incrementally does not mean farmland will be preserved – it only affects the rate at which it is consumed by mining operations. The land may never be returned to agriculture given the application’s reference to recreational use after reclamation. (Id. at 16.)

Farmland Standard 4: The proposed use does not substantially impair the current or future agricultural use of surrounding parcels.

The application completely fails to discuss current or future agricultural use of surrounding parcels. There is no substantial evidence to support this standard. (CUP App. at 73.)

Farmland Standard 5: Construction damage to remaining lands in agricultural use is minimized and/or repaired.

The application completely fails to discuss repair of damaged agricultural lands. It does not satisfy this standard.

III. The Town Should Disapprove the CUP Application.

For all of the above reasons, and because the applicant has not supplied substantial evidence showing it can meet the 12 applicable standards, the Town should disapprove the CUP Application.

If Nelson Excavating attempts to supplement its application and supplies new information it should have submitted originally at or shortly before the public hearing, the Town should not consider this information, or at least, it should hold another hearing before considering it. That is because the CUP application must be complete at

the time of the last notice of the public hearing. As the Wisconsin Supreme Court has said:

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.

Weber v. Town of Saukville, 209 Wis. 2d 214, 562 N.W.2d 412,

Thank you for your consideration.

Sincerely,

PINES BACH LLP

Christa O. Westerberg

COW:see

cc: Henry Spelter
Gail Simpson
Atty. Allen Reuter