

BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

In the matter of the appeal of

Maier Farms Real Estate, LLC

Regarding the property located at:

7085 Schumacher Rd., Town of Vienna

Tax Parcel Nos. 0909-212-8500-7 & 090-212-8140-7

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ARGUMENT
IN SUPPORT OF APPEAL**

NOW COMES Maier Farms Real Estate, LLC, by its Attorneys, Axley Brynelson, LLP, and hereby submits to the Dane County Board of Adjustment, the following proposed Findings of Fact and Conclusions of Law, and Argument in support of its Appeal:

PROPOSED FINDINGS OF FACT

1. Maier Farm Real Estate, LLC (“Maier”) owns the properties identified as Dane County Parcel ID Nos. 0909-212-8500-7 and 0909-212-8140-7 (the “Property”). Nelson Decl. ¶ 4, Ex. 3. Maier acquired the Property on or about December 27, 2023. *Id.* Ex. 3.

2. As demonstrated by aerial photographs available from various government units, the Property has been cultivated cropland since at least 1937. Kramer Decl. ¶ 10, Ex. 3.

3. Dane County asserts the Property contains a mapped wetland. Nelson Decl. Ex. 1.

4. In 2019, The United States Department of Agriculture’s Natural Resources Conservation Service (“NRCS”) conducted a Highly Erodible Land and Wetland Conservation Determination for the Property, at the request of the Property’s prior owner. Nelson Decl. ¶ 5, Ex.

5. The NRCS determined the Property is classified as Prior-Converted Cropland / Non-Wetland. Nelson Decl. ¶ 5, Ex. 4; Kraemer Decl. ¶ 8.

6. Under NRCS classification, Prior-Converted Cropland is “[a] wetland converted to cropland before December 23, 1985, and as of December 23, 1985, was capable of being cropped and did not meet farmed wetland hydrology criteria.” Nelson Decl. Ex. 4; *see also* Kraemer Decl. ¶ 8. Under NRCS classification, Non-Wetland is “[a]n area that does not contain a wetland [which] also includes wetlands converted before December 23, 1985, but a commodity crop was not produced and the area does not meet wetland criteria.” Nelson Decl. Ex. 4. NRCS classification PC/NW means “[a]n area that contains both [Prior-Converted Cropland] and [Non-Wetland].” *Id.*

7. The classification of the Property as PC/NW by the NRCS is consistent with the past installation and use of a drainage system on the Property. Kraemer Decl. ¶ 9.

8. The classification of the Property as PC/NW by the NRCS is also consistent with the soil found on the Property. The soils on the Property are Sable soils, which develop in wetland conditions. The fact that such Sable soils are present on the Property, which is cultivated cropland, demonstrates any wetland on the Property was previously drained because traditional upland row crops cannot be cultivated in Sable soils without the use of a drainage system. Kramer Decl. ¶ 9; *see also* Maier Decl. ¶ 5.

9. Starting in approximately 2008, the Property began having difficulty draining and surface water began accumulating more frequently in lower elevation areas on the Property. The increasing occasions of surface water accumulation on the Property are depicted in aerial photographs. Kramer Decl. ¶¶ 10, 11, Ex. 3; *see also* Maier Decl. ¶ 6.

10. The increased accumulation of surface water on the Property starting in approximately 2008 is consistent with a failed drain tile system. Kramer Decl. ¶¶ 10-11, Ex. 3; Maier Decl. ¶ 6.

11. Following 2008, the entire Property continued to be cultivated cropland in dry years, such as 2015. Kramer Decl. Ex. 3.

12. Following its acquisition of the Property, Maier wanted to restore the previously established drainage on the Property. To that end, Maier installed a plastic drain tile system on the Property. Maier also installed a pump. The purpose of the replacement drainage system was to allow the entire Property to be farmed. Maier Decl. ¶¶ 7-9, 17.

13. During installation of the replacement drain tile system, Maier uncovered additional evidence of the prior system, including clay drain tiles. Maier Decl. ¶ 7.

14. Clay drain tiles are no longer used for draining agricultural fields and are no longer industry standard. Maier Decl. ¶ 8.

15. The location of the tile system main Maier installed is depicted on Jeffrey Kraemer's field map. Maier Decl. ¶¶ 13-14; Kramer Decl. ¶¶ 4-5, Ex. 1.

16. Following the installation of the drainage system and pump, Maier learned the Wisconsin Department of Natural Resources ("WDNR") objected to the installation of the pump. Maier then proposed to relocate the pump outside of the wetland boundary. Maier Decl. ¶¶ 12, 15; Kraemer Decl. ¶ 6-7, Ex. 2.

17. The WDNR specifically approved Maier's pump relocation plan. Except for the relocation of the pump and reconnection of the drain tile system, the WDNR had no further objection to the installations. Maier Decl. ¶ 15; Kraemer Decl. ¶ 7, Ex. 2.

18. On March 6, 2024, Assistant Dane County Zoning Administrator Hans Hilbert sent Maier a letter alleging that the installation of a replacement drainage system and pump on the Property violated the County’s inland-wetland zoning ordinance. Maier Decl. ¶ 10; Nelson Decl. ¶ 2, Ex. 1.

19. On March 20, 2024, Mr. Hilbert sent Maier another letter stating that the installation of a replacement drainage system on the Property violates the County’s inland-wetland zoning ordinance. Mr. Hilbert instructs Maier to “[e]liminate the prohibited wetland use by removing the drain tiling and pump from the wetland” or “rezone the tiled land out of the wetland zoning district[.]” Nelson Decl. ¶ 3, Ex. 2.

20. The replacement drainage system will restore the established drainage patterns on the Property and allow the Property to remain cultivated cropland. Maier Decl. ¶¶ 5, 9, 17; Kraemer Decl. ¶¶ 9-11, Ex. 3.

21. Maier has not yet relocated the pump outside of the delineated wetland area pending completion of the present appeal. Maier Decl. ¶ 16.

22. In a letter dated October 11, 2024, the United States Army Corps of Engineers (“Army Corps”) determined any wetlands within the Property “are not waters of the United States subject to Army Corps’ jurisdiction.” Kraemer Decl. ¶ 12, Ex. 4.

23. In a letter dated October 15, 2024, WDNR responded to Maier’s request for a nonfederal wetland determination. WDNR determined the Property contains a nonfederal wetland as defined by Wis. Stat. § 281.36(1)(br). Maier Decl. ¶ 18, Ex. 1.

PROPOSED CONCLUSIONS OF LAW

24. Under United States Department of Agriculture (“USDA”) regulations, a “converted wetland” is “a wetland that has been drained, dredged, filled, leveled, or otherwise

manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if: (i) [s]uch production would not have been possible but for such action, and (ii) [b]efore such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland[.]” 7 C.F.R. § 12.2(a) (Nelson Decl. ¶ 7, Ex. 6).

25. Under USDA regulations, “prior-converted cropland” is “a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and did not meet the hydrologic criteria for farmed wetland.” 7 C.F.R. § 12.2(a). (Nelson Decl. ¶ 7, Ex. 6).

26. The Property is Prior-Converted Cropland because it has been classified as such by the NRCS, the Property has been used for the cultivation of crops since at least 1937, the wetland on the Property has been drained and such drainage occurred prior to December 23, 1985.

27. Wisconsin Statutes § 30.01(4m) defines “navigable waters” as “any body of water which is navigable under the laws of this state.”

28. The wetland on the Property does not qualify as a navigable water under Wisconsin law.

29. Under DCO § 11.07(2)(c) “[d]itching, tiling, dredging, excavating or filling done to maintain or repair existing agricultural drainage systems only to the extent necessary to maintain the level of drainage required to continue the existing agricultural use and only as permissible

under section 30.20, Wisconsin Statutes” are uses permitted without a shoreland zoning permit. (Nelson Decl. ¶ 6, Ex. 5).

30. Wisconsin Statutes § 30.20 does not apply to the Property because it regulates the removal of materials from the beds of navigable waters.

31. Under DCO § 11.07(2)(c), the installation of a drainage system in inland-wetland zoned areas is permitted if it is done “to maintain or repair existing agricultural drainage systems” and “only to the extent necessary to maintain the level of drainage required to continue the existing agricultural use.” (Nelson Decl. ¶ 6, Ex. 5).

32. The NRCS’ classification of the Property as Prior-Converted Cropland, the existence of Sable soils on the Property, the fact that broken clay drain tiles were found on the Property, and the fact that drainage of the Property changed after 2008 establish a drainage system existed on the Property prior to Maier’s installation of the replacement drainage system.

33. The replacement of an existing system is consistent with the DCO definition of maintain and repair because persons with existing systems must be allowed to use new technologies and materials as part of the maintenance of existing drainage systems and patterns. County Zoning’s interpretation of DCO § 11.07(2)(c) would not permit farmers to use state of the art materials to maintain existing drainage systems and patterns, which is contrary to best practices and public policy.

34. Maier’s installation of a replacement drainage system on the Property was done to restore the historic drainage patterns on the Property, which is consistent with and permitted by DCO § 11.07(2)(c).

35. Maier’s installation of a replacement drainage system on the Property does not violate any federal or state laws or regulations.

36. Under Wis. Stat. § 281.36(1)(br), a nonfederal wetland is a “wetland that is not subject to federal jurisdiction under 33 USC 1344.”

37. The Army Corps exercises federal jurisdiction over certain wetlands under 33 USC 1344.

38. Due to the Army Corps determination that any wetlands on the Property are not waters of the United States subject to Army Corps jurisdiction, any wetlands on the Property are nonfederal wetlands pursuant to § 281.36(1)(br).

39. Wisconsin law prohibits local governments from regulating nonfederal wetlands by ordinance and states that ordinances that attempt to regulate nonfederal wetlands are without force or effect. Wis. Stat. § 281.36(12m) states in full:

Local regulation of nonfederal or artificial wetlands. A local government may not enact an ordinance or adopt a resolution regulating a matter regulated under sub. (3n) (d) 1. or (3r) (a) (intro.) or (am), with respect to a discharge exempt from permitting requirements under sub. (4n) (b) or (c), or a matter regulated under sub. (4n). If a local government has in effect on March 30, 2018, an ordinance or resolution regulating nonfederal wetlands or artificial wetlands, the ordinance or resolution does not apply and may not be enforced.

Nelson Decl. ¶ 8, Ex. 7.

40. A local ordinance is preempted under state law if “(1) the legislature has clearly and expressly withdrawn the power of municipalities to act; (2) the local regulation logically conflicts with state legislation; (3) the local regulation defeats the purpose of state legislation; or (4) the local regulation violates the spirit of state legislation.” *Am. Transmission Co., LLC v. Dane Cnty.*, 2009 WI App 126, 321 Wis. 2d 138, 772 N.W.2d 731. (citing *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 657, 547 N.W.2d 770 (1996)).

41. DCO §§ 11.06-11.09, as applied to the Property, are expressly preempted by Wis. Stat. § 281.36(12m), which states that local ordinances regulating nonfederal wetlands are not applicable and may not be enforced.

ARGUMENT

I. The Board of Adjustment must overturn the enforcement letter sent to Maier because the County is prohibited from regulating nonfederal wetlands.

Under Wis. Stat. § 281.36(1)(br), a nonfederal wetland is a “wetland that is not subject to federal jurisdiction under 33 USC 1344.” Under 33 USC § 1344, federal jurisdiction is exercised by the Secretary of the Army, acting through the Army Corps of Engineers (“Corps”). In a letter dated October 11, 2024, the Corps determined that any wetlands within the Property are not waters of the United States subject to Corps jurisdiction. Kraemer Decl. Ex. 4. Therefore, the Property contains a nonfederal wetland as defined by Wis. Stat. § 281.36(1)(br). WDNR confirmed the nonfederal status of the wetland on the Property in its nonfederal wetland exemption determination letter dated October 15, 2025. Maier Decl. Ex. 1.

Wis. Stat. § 281.36(12m) states plainly that local government ordinances in effect as of March 30, 2018, that regulate nonfederal wetlands are without force or effect. Section 281.36(12m) states in full:

Local regulation of nonfederal or artificial wetlands. A local government may not enact an ordinance or adopt a resolution regulating a matter regulated under sub. (3n) (d) 1. or (3r) (a) (intro.) or (am), with respect to a discharge exempt from permitting requirements under sub. (4n) (b) or (c), or a matter regulated under sub. (4n). If a local government has in effect on March 30, 2018, an ordinance or resolution regulating nonfederal wetlands or artificial wetlands, the ordinance or resolution does not apply and may not be enforced.

Under § 281.36(12m), Wisconsin local governments are prohibited from regulating discharge permits for nonfederal or artificial wetlands. Furthermore, all regulations of nonfederal wetlands in effect as of March 30, 2018 are unenforceable.

A local ordinance is preempted under state law if “(1) the legislature has clearly and expressly withdrawn the power of municipalities to act; (2) the local regulation logically conflicts with state legislation; (3) the local regulation defeats the purpose of state legislation; or (4) the local regulation violates the spirit of state legislation.” *Am. Transmission Co., LLC v. Dane Cnty.*, 2009 WI App 126, 321 Wis. 2d 138, 772 N.W.2d 731. (citing *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 657, 547 N.W.2d 770 (1996)).

Regarding Wis. Stat. § 281.36(12m), all four preemption elements are present. Through § 281.36(12m), the legislature has expressly stated that any local ordinances or regulations regulating nonfederal wetlands do not apply and may not be enforced. The plain statutory language demonstrates the legislature has withdrawn the power of municipalities to regulate nonfederal wetlands. The County’s attempt to enforce its inland-wetland zoning regulations against the nonfederal wetland on the Maier Property conflicts directly with § 281.36(12m). Further, the County’s attempt to regulate the nonfederal wetland on the Maier Property defeats the purpose and is contrary to the spirit of § 281.36(12m), which exists to simplify the regulatory schemes that apply to nonfederal wetlands. Therefore, the state legislature has preempted local regulation of nonfederal wetlands through § 281.36(12m).

The circumstances of the County’s attempt to regulate the nonfederal wetlands on Maier’s Property are similar to those in *Am. Transmission Co., LLC v. Dane Cnty.*, 2009 WI 126, 321 Wis. 2d 138, 772 N.W.2d 731 (“ATC”). In ATC, although the transmission line company had a certificate approving its proposed lines from the Public Service Commission, the County asserted

the company also required local permits, including a wetland zoning permit under DCO § 11.08. *Id.* ¶¶ 3-4. However, Wis. Stat. § 196.491(3)(i) stated that “[i]f installation or utilization of a facility for which a certificate...has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed.” *Id.* ¶ 2. The Court of Appeals determined the statute expressly preempted the County’s regulations because the statute withdrew the power of municipalities to act once the Public Service Commission had issued a certificate. *Id.* ¶ 19.

The preemption provision articulated in Wis. Stat. § 281.36(12m) operates almost identically to the statutory provision at issue in ATC. As in ATC, the applicable state regulatory agency—here, WDNR—has authority over nonfederal wetlands, and the legislature has foreclosed the County’s ability to regulate such wetlands. Therefore, the Board of Adjustment must uphold Maier’s appeal because the County does not have jurisdiction to regulate nonfederal wetlands such as the wetland on the Property.

II. Alternatively, the Board of Adjustment must overturn the enforcement letter sent to Maier because Maier’s actions are a permitted use under DCO § 11.07.

The action the County Zoning attempts to prohibit in the present case revolves around the interpretation of Dane County Ordinances Section 11.07(2)(c), which articulates that the following uses are permitted in inland-wetland zoned areas and do not require a zoning permit:

Ditching, tiling, dredging, excavating or filling done to maintain or repair existing agricultural drainage systems only to the extent necessary to maintain the level of drainage required to continue the existing agricultural use and only where permissible under section 30.20, Wisconsin Statutes. This includes the minimum filling necessary for disposal of dredged spoil adjacent to the drainage system, provided that the dredged spoil is placed on existing spoil banks where possible and such filling is permissible under chapter 30, Wisconsin Statutes[.]

County Zoning has previously stated that Maier “assumed” there was a “pre-existing” drainage system on the Property and that it produced no evidence of such a system. Nelson Decl. Ex. 2. This is incorrect. As determined by the NRCS and discussed by Mr. Kraemer in his soil analysis, the Property is Prior-Converted Cropland consisting of Sable soils. The fact that the NRCS has classified the Property as PC/NW and that Property has been farmed since at least 1937 demonstrates the Property had an active drainage system because, as Mr. Kramer testified, Sable soils cannot be farmed without drainage. Furthermore, Mr. Maier testified that evidence of the pre-existing drainage system, namely clay tiles, was located on the Property. The fact is the Property simply could not have been farmed for decades without a drainage system in place.

Mr. Maier and Mr. Kraemer testified that in recent years more surface water has been present on the Property because it is not draining to the same degree as it formerly did, which is consistent with a broken or damaged drainage system. To restore the historic drainage pattern on the Property and to ensure that the Property could continue to be farmed, Maier replaced the broken, outdated drainage system with a new system. Maier’s actions are consistent with DCO § 11.07(2)(c), which states ditching, tiling, dredging, excavating, and filling are permitted uses in inland-wetland zoned areas if “done to maintain or repair existing agricultural drainage systems.” County Zoning asserts that the replacement of a broken system does not comply with DCO § 11.07(2)(c). Nelson Decl. Ex. 2. County Zoning apparently does not dispute that Maier’s replacement of the drain tile system was done to restore the previously established drainage on the Property. *Id.* The debate then is a semantic one over the definition of “maintain and repair.”

Under County Zoning’s interpretation, the composition of the drainage system itself appears to matter more than the effect of the drainage system. As stated in Mr. Hilbert’s letter, DCO § 11.07(2)(c) does not permit “the creation of new systems to maintain historical practices.”

In the present case, Maier has not created a new system, but rather updated and replaced an existing broken system to restore the historical drainage pattern and to ensure a long-farmed Property remains viable as a farm. This is the definition of maintenance – the tile system Maier installed replaced a broken existing system to maintain the existing drainage pattern on the Property. Accordingly, Maier’s activities are permitted under DCO § 11.07(2)(c), and the Board of Adjustment must uphold Maier’s appeal because Maier engaged in a permitted use.

CONCLUSION

Maier asks the Board of Adjustment to overturn the violation letters sent to Maier on March 6 and 20, 2024, because (1) County Zoning lacks the authority under state law to regulate nonfederal wetlands and Maier has demonstrated that the wetland at issue on the Property is classified as a nonfederal wetland; and/or (2) the actions in which Maier engaged, namely replacing an broken drainage system on the Property to restore pre-established drainage patterns is a permitted use under DCO § 11.07(2)(c).

Maier reserves the right to supplement its proposed findings of fact, conclusions of law, and argument in accordance with the information adduced in both its case in chief and through cross-examination of any Dane County witnesses at the contested hearing on this matter, in accordance with the procedure articulated in the Dane County Board of Adjustment Rules and Procedures (4)(f) and (5)(e).

Dated this 6th day of February, 2025.

Electronically signed by Christopher T. Nelson

Mitchell R. Olson, SBN 1030756

Christopher T. Nelson, SBN 1113547

Attorneys for Maier Farms, LLC

P.O. Box 1767

Madison, WI 53701-1767

Telephone: (608) 257-5661

Email: molson@axley.com

cnelson@axley.com