

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

YAHARA MATERIALS, INC.  
6117 County Highway K  
Waunakee, WI 53597,

Petitioner,

v.

DANE COUNTY ZONING & LAND  
REGULATION COMMITTEE  
210 Martin Luther King, Jr. Blvd.  
Madison, Wisconsin 53703,

and

ROGER LANE, in his official capacity as the  
Dane County Zoning Administrator  
210 Martin Luther King, Jr. Blvd.  
Madison, Wisconsin 53703,

Respondents.

**FILED**

JUN 11 2015

DANE COUNTY CIRCUIT COURT

Case No. 15CV1542  
Case Code: 30955

THIS IS AN AUTHENTICATED COPY OF THE  
ORIGINAL DOCUMENT FILED WITH THE DANE  
COUNTY CLERK OF CIRCUIT COURT.

CARLO ESQUEDA  
CLERK OF CIRCUIT COURT

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**SUMMONS**

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STATE OF WISCONSIN:

To each person named above as Respondent:

You are hereby notified that the Petitioner named above has filed a lawsuit or other legal action against you. The complaint, captioned Petition for Writ of Certiorari and Declaratory Judgment, is attached and states the nature and basis of the legal action.


Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is Dane County Courthouse, 215 South

Hamilton Street, Madison, Wisconsin 53703, and to Petitioners' attorney, Eric M. McLeod, Whyte Hirschboeck Dudek S.C., P.O. Box 1379, Madison, Wisconsin 53701-1379. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the Court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 11<sup>th</sup> day of June, 2015.

WHYTE HIRSCHBOECK DUDEK S.C.  
*Attorneys for Petitioners Yahara Materials, Inc.*

By: 

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**PETITION FOR WRIT OF CERTIORARI AND DECLARATORY JUDGMENT**

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Petitioner, Yahara Materials, Inc. ("Yahara"), by and through its counsel, and for its  
Petition for Writ of Certiorari and Declaratory Judgment, state and allege as follows.

**INTRODUCTION**

1. This is an action for certiorari review and/or declaratory judgment brought pursuant to Wis. Stat. § 59.694(10) and the common law right of certiorari review codified in Wis. Stat. § 781.01 and/or Wis. Stat. § 806.04. At issue in this case is a May 12, 2015 decision by the Dane County Zoning & Land Regulation Committee ("ZLR"), which purports to unilaterally amend Yahara's Conditional Use Permit No. 1059 for the operation of a batch plant ("CUP") on certain property in the Town of Blooming Grove that is part of the Buckeye Quarry.



2. There is no lawful basis for the ZLR's decision to unilaterally amend Yahara's CUP. The Dane County Zoning Code does not provide for such a decision by ZLR and it is unclear what procedure applies for the appeal of same. Accordingly, this action is brought as a certiorari action within the 30-day certiorari appeal period and also seeks a declaratory judgment declaring the ZLR's decision invalid pursuant to the state declaratory judgment statute.

3. Also, due to the procedural uncertainty created by the ZLR's unlawful decision, Yahara previously filed an appeal with the Dane County Board of Supervisors pursuant to Section 10.255(2)(j) of the Dane County Zoning Code. That appeal was filed on June 1, 2015, and remains pending without any action taken by the Dane County Board.

#### **PARTIES**

4. Petitioner, Yahara Materials, Inc., is a Wisconsin corporation, located at 6117 County Hwy K, Waunakee, Dane County, Wisconsin.

5. Respondent, Dane County Zoning & Land Regulation Committee, is the zoning committee of Dane County, Wisconsin, created pursuant to Wis. Stat. § 59.69 with those duties prescribed by Section 10.255 of the Dane County Zoning Code. The principal office of the ZLR is located at 210 Martin Luther King, Jr. Blvd., Madison, Wisconsin.

6. Respondent Roger Lane is the Dane County Zoning Administrator ("Zoning Administrator") with a principal office at 210 Martin Luther King, Jr. Blvd., Madison, Wisconsin. As the Zoning Administrator, Mr. Lane is responsible for, among other duties, implementing and enforcing the Dane County Zoning Code. Mr. Lane has been added as a party Respondent solely in his official capacity as the Zoning Administrator. Upon information and belief, as Zoning Administrator Mr. Lane intends to enforce the ZLR's unlawful decision to unilaterally amend Yahara's CUP.

## FACTUAL BACKGROUND

7. On May 11, 1993, the then Dane County zoning committee, the Zoning and Natural Resources Committee ("ZNR"), approved a conditional use permit application submitted by Yahara to allow for the operation of a concrete batch plant at the Buckeye Quarry, a legal nonconforming mineral extraction operation located on County Highway AB in the Town of Blooming Grove. Upon approval of that application, CUP No. 1059 was issued to Yahara. The CUP has been in effect continuously since it was approved in 1993.

8. The CUP included a single condition which, according to the ZNR meeting minutes of the meeting at which the CUP was approved, provided that "[t]he Town Board shall review the operation on an annual basis."

9. Since the issuance of the CUP in 1993, Yahara has operated a concrete batch plant pursuant to and in conformance with the CUP. On November 7, 2014, the Dane County Assistant Zoning Administrator conducted a site inspection at the Buckeye Quarry and concluded that the concrete batch plant was located outside what he contended was the approved area.

10. After the Assistant Zoning Administrator's site inspection, Yahara promptly relocated the concrete batch plant from the location where the Assistant Zoning Administrator contended was outside of the approved area under the CUP.

11. Review of the CUP was subsequently placed on the ZLR agenda for a public hearing on February 24, 2015. The stated reason for said review was, according to the Staff Report, "[r]eview and possible revocation of the Conditional Use Permit due to violations and concerns."

12. At its subsequent March 11, 2015 meeting, the ZLR voted to postpone action on the proposed revocation of the CUP until May 12, 2015. According to the ZLR meeting

minutes, “[t]he Committee would like County Staff to obtain input from the Town and obtain documentation from the City of Madison with the regards to specific conditions that they would have with the batch plant. Supervisor Matano expressed again that the conditional use permit should be revoked due to the complaints and the duration of the land use.”

13. At its subsequent May 12, 2015 meeting, the ZLR voted to amend the CUP by adding two new provisions. Those new provisions include a requirement concerning the use of lighting during night operation, and a provision stating that the CUP shall expire on December 31, 2016.

14. The ZLR’s May 12, 2015 decision to amend the CUP was transmitted to the Town of Blooming Grove for its consideration and potential action. It is unknown by what lawful authority the Town may act with respect to the ZLR’s May 12, 2015 decision. Nevertheless, at its meeting of Tuesday, June 9, 2015, the Town Board of Supervisors voted to reject the ZLR’s decision to amend the CUP. In light of the Town Board’s action, the legal status of ZLR’s May 12, 2015 decision is unclear.

#### **CLAIMS FOR RELIEF**

15. For the reasons stated herein, the ZLR’s May 12, 2015 decision amending the CUP is unlawful.

16. There is no provision in the Dane County Zoning Code that allows for the unilateral amendment of a conditional use permit by the ZLR. The Dane County Zoning Code expressly provides procedures and related standards for the granting or denial of a conditional use permit as well as the revocation of a conditional use permit. See Section 10.255(2)(h), (2)(m).



17. An authorized conditional use is a form of permitted use reflecting a right in the lawful use of property. A zoning authority cannot unilaterally change that right in a manner that is inconsistent with the zoning rules in effect when that use was established. Because there is no provision in the Dane County Zoning Code authorizing the ZLR to unilaterally amend the CUP, the ZLR's decision in that regard is accordingly unlawful.

18. Additionally, there are no facts to support the ZLR's unlawful action in this matter.

19. Accordingly, the ZLR's May 12, 2015 decision should be reversed on one or more of the following grounds: a) the ZLR did not keep within its jurisdiction; b) the ZLR proceeded on one or more incorrect theories of law; c) the ZLR's decision was arbitrary, oppressive, and unreasonable and represented its will and not its judgment; d) the ZLR's decision was not based on substantial evidence in the record; and e) the ZLR and one or more of its members evidenced bias and prejudgment in violation of Petitioner's due process rights.

20. In the alternative, Yahara is entitled to a declaratory judgment pursuant to Wis. Stat. § 806.04 declaring that the ZLR's May 12, 2015 decision is invalid and of no legal effect.

WHEREFORE, Yahara respectfully request the following:

- A. That the Court grant a Writ of Certiorari and Order directing Respondents to certify to the Court a transcript of Respondents' records and proceedings as are complained of or pertinent to this action, together with the facts of the case;
- B. That following the certification and transmission of the record by Respondents the Court set this matter for hearing;
- C. That the Court declare the decision of the ZLR void;
- D. That the Court award costs and reasonable attorney fees to Yahara; and

E. That the Court grant such further relief as it deems just and equitable.

Dated this 11<sup>th</sup> day of June, 2015.



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STATE OF WISCONSIN  
COUNTY OF DANE  
BEFORE THE DANE COUNTY BOARD OF SUPERVISORS

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Appeal of the Decision of the Dane County  
Zoning and Land Regulation Committee  
Purporting to Amend Conditional Use Permit  
No. 1059

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**NOTICE OF APPEAL AND APPEAL**

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TO: Dane County Board of Supervisors  
210 Martin Luther King, Jr. Blvd.  
Madison, Wisconsin 53703,

Dane County Zoning and Land Regulation Committee  
210 Martin Luther King, Jr. Blvd.  
Madison, Wisconsin 53703,

Dane County Zoning Administrator  
210 Martin Luther King, Jr. Blvd.  
Madison, Wisconsin 53703,

Town of Blooming Grove Board of Supervisors  
1880 S. Stoughton Road  
Madison, Wisconsin 53716.

**NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Yahara Materials, Inc. ("Yahara"), by its attorneys Whyte Hirschboeck Dudek, S.C., hereby appeals to the Dane County Board of Supervisors, pursuant to Dane County Code of Ordinances, Section 10.255(2)(j), the decision of the Dane County Zoning and Land Regulation Committee ("ZLR") dated May 12, 2015 purporting to amend Conditional Use Permit No. 1059 (the "CUP"), which CUP has been in effect continuously since it was approved on May 11, 1993, by the then Dane County zoning committee, the Zoning and Natural

Resources Committee ("ZNR"). The grounds for this appeal and the reasons why Yahara is aggrieved by the decision are stated herein.

### **APPEAL**

1. Yahara is a Wisconsin corporation, located at 6117 Co Hwy K, Waunakee, Dane County, Wisconsin. Yahara is in the business of operating nonmetallic mineral extraction sites and selling rock, stone, sand and other nonmetallic materials to state and local governments, farmers, and other individuals and businesses in Dane County, as well as other parts of Wisconsin.

2. On May 11, 1993, the ZNR approved a conditional use permit application submitted by Yahara to allow for the operation of a concrete batch plant at the Buckeye Quarry, a legal nonconforming mineral extraction operation located on County Highway AB in the Town of Blooming Grove. Upon approval of that application, CUP No. 1059 was issued to Yahara. A copy of the CUP and other materials related to the approval of the CUP are attached as Exhibit A.

3. The CUP included a single condition which, according to the ZNR meeting minutes, provided that "[t]he Town Board shall review the operation on an annual basis." (Exhibit A).

4. Since the issuance of the CUP in 1993, Yahara has operated a concrete batch plant pursuant to and in conformance with the CUP. On November 7, 2014, the Dane County Assistant Zoning Administrator conducted a site inspection at the Buckeye Quarry and concluded that the concrete batch plant was located outside what he contended was the approved area. A copy of a letter from the Dane County Department of Planning & Development dated February 6, 2015, which memorializes this contention by the Assistant Zoning Administrator is attached as Exhibit B.

5. After the Assistant Zoning Administrator's site inspection, Yahara promptly relocated the concrete batch plant from the location where the Assistant Zoning Administrator contended was outside of the approved area under the CUP.

6. Review of the CUP was subsequently placed on the ZLR agenda for a public hearing on February 24, 2015. The stated reason for said review was, according to the Staff Report, "[r]eview and possible revocation of the Conditional Use Permit due to violations and concerns." A copy of the Staff Report is attached as Exhibit C.

7. At its subsequent March 11, 2015 meeting, the ZLR voted to postpone action on the proposed revocation of the CUP until May 12, 2015. According to the ZLR meeting minutes, "[t]he Committee would like County Staff to obtain input from the Town and obtain documentation from the City of Madison with the regards to specific conditions that they would have with the batch plant. Supervisor Matano expressed again that the conditional use permit should be revoked due to the complaints and the duration of the land use." See Exhibit C.

8. At its subsequent May 12, 2015 meeting, the ZLR voted to amend the CUP by adding two new provisions. Those new provisions include a requirement concerning the use of lighting during night operation, and a provision stating that the CUP shall expire on December 31, 2016. A copy of the ZLR's motion is attached as Exhibit D.

9. Upon information and belief, the ZLR's May 12, 2015 decision to amend the CUP is being transmitted to the Town of Blooming Grove for its consideration and potential action. It is unknown what action the Town may take or may be authorized to take.

10. For the reasons stated herein, the ZLR's May 12, 2015 decision amending the CUP is unlawful. There is no legal basis in the Dane County Zoning Code or otherwise to justify the amendment of the CUP by the County and there is no factual basis to support that action.



## **GROUND FOR APPEAL**

11. Pursuant to Section 10.255(2)(j) of the Dane County Zoning Code, “[a]ny person aggrieved by the grant or denial of a conditional use permit ... may appeal the decision of the town board or the zoning committee to the county board.” It is unclear whether this appeal is necessary or proper pursuant to this provision given that the action of the ZLR was not a “grant or denial of a conditional use permit.” However, in the event that an appeal to the County Board is the proper procedure pursuant to this provision, Yahara is clearly an aggrieved person given that the ZLR’s action purporting to amend the CUP negatively affects Yahara’s interests under the CUP.

12. There is no provision in the Dane County Zoning Code that allows for the unilateral amendment of a conditional use permit by the ZLR. The Dane County Zoning Code expressly provides procedures and related standards for the granting or denial of a conditional use permit as well as the revocation of a conditional use permit. See Section 10.255(2)(h), (2)(m).

13. An authorized conditional use is a form of permitted use reflecting a right in the lawful use of property. A zoning authority cannot unilaterally change that right in a manner that is inconsistent with the zoning rules in effect when that use was established. Because there is no provision in the Dane County Zoning Code authorizing the ZLR to unilaterally amend the CUP, the ZLR’s decision in that regard is accordingly unlawful.

14. Additionally, there are no facts to support the ZLR’s unlawful action in this matter. In further support of this appeal, Yahara attaches and incorporates herein the information contained in its submission to the ZLR as Exhibit E.

15. As noted above, it is unclear if an appeal to the County Board is the required or proper procedure under the Dane County Zoning Code. It is also unclear what the timing of the submission of this appeal should be given that the County is apparently transmitting the ZLR decision at issue to the Town of Blooming Grove for its consideration. However, in order to preserve its rights to maintain an appeal to the ZLR's unlawful action, Yahara submits this appeal to the County Board at this time.

WHEREFORE, Yahara respectfully requests that the Dane County Board of Supervisors reverse the ZLR decision amending the CUP on grounds that a) such decision lacks any legal basis and is not supported by substantial evidence; b) the ZLR did not keep within its jurisdiction; and c) the ZLR applied an incorrect theory of law and acted arbitrarily and unreasonably.

Dated this 1<sup>st</sup> day of June, 2015.



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