

BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

Appeal No. 3705

OWNER: KRUEGER TR, JOHN L & JOSEPHINE A
OPERATOR: YAHARA MATERIALS
LOCATION: TOWN OF MONTROSE, SECTION 32

BRIEF OF DANE COUNTY ZONING ADMINISTRATOR
By: Daniel Everson, AZA

Yahara Materials, Inc., 6117 County Highway K, P.O. Box 277, Waunakee, WI 53597 on behalf of John Krueger is appealing a determination of the zoning administrator of the non-conforming acreage associated with an existing mineral extraction site located in the town of Montrose, Section 32.

Argument of the appeal

On January 17, 2019, the Dane County Board of Supervisors adopted 2018-OA-20, which comprehensively revised the Dane County Zoning Ordinance (Chapter 10, Dane County Code). In addition, the town of Montrose adopted the new Dane County Zoning Ordinance on April 2, 2019.

Under section 10.102(7)(b), registered nonconforming mineral extraction sites are now subject to the provisions of the new zoning ordinance. See attached document.

On April 11, 2019, Dane County Planning prepared and sent out a letter to Mr. Krueger (current landowner) indicating the adoption of the new zoning ordinance and that the registered mineral extraction site would have to adhere to the new requirements for existing non-conforming sites. See attached letter.

Dane County staff (Everson) prepared the Deed Notice as part of the new ordinance requirements recognizing parcel 050832395001 as having non-conforming status with a map. The Deed Notice was to be signed and notarized. Yahara Materials returned the Deed Notice indicating parcel 050832395001 and 050832490005 indicating that both parcels having non-conforming status. See attached.

Yahara Materials and Dane County staff (Lane and Everson) exchanged e-mails with regards to the accuracy of the non-conforming boundary. See attached.

Staff originally indicated that the SE ¼ SW ¼ Section 32, approximately 40 acres was identified as non-conforming and mapped this way for approximately 50 years. Roger Lane in an e-mail notified Yahara Materials that the original registration called out 5 acres as originally submitted and asked Yahara Materials to identify the 5 acre boundary.

Staff determined that the current size of the mineral extraction operations was well over 5 acres in size and sent out a violation letter notifying the landowner of the status of the current operations. See attached.

Timeline History

1955 – Evidence from aerial photo of a 1.6 acre mineral extraction site.

1969 – A 5 acre site was registered with the county by Rein, Schultz and Dahl on the SE ¼ SW ¼ Section 32 on behalf of Gerald Hendrickson (landowner).

1969/1970 – Registration status report by the county accepted the SE ¼ SW ¼ Section 32. County mapping records indicate the subject ¼ ¼ as a non-conforming registered site for the next 50 years with no request for determination or intent of expansion.

1972 Land Contract recorded by Hendrickson to Krueger for approximately 150 acres.

1972 Conveyance recorded from Krueger to Goodman for a 5 acre residential home site with driveway easement on the SE ¼ SE ¼ Section 32, south of state highway.

1981 – County changes non-conforming use for mineral extraction so that existing sites do not terminate when abandoned or cease to operate in a one year timeframe.

2010 – Yahara Materials took over the operations from Wingra Stone and is responsible for reclamation and current operations.

Excerpts from the Dane County Zoning Ordinance

10.004 DEFINITIONS.

(1) Abandoned or discontinued use.

(a) Except as described in (b) below, when the nonconforming use of a property has ceased for twelve months or longer, a use shall be considered abandoned and discontinued.

(b) Mineral extraction uses shall be considered abandoned or discontinued if the use ceases for twelve months

1. Within twelve months or longer, unless the landowner or operator complies with all of the following: of the effective date of this ordinance has submitted a reclamation plan under Chapter 74, Dane County Code;

2. By January 31 of each year after submitting a reclamation plan, submits an annual report that meets all the requirements of s. 74.251, Dane County Code.

3. Within twelve months of the receipt of notice under s. 10.102(7)(b)2., records a deed notice document, that:

(a) indicates the presence of a nonconforming mineral extraction site;

(b) describes the boundaries of the nonconforming mineral extraction site, and;

(c) is signed by the landowner and the zoning administrator.

(4) By January 31 of each year after submitting a reclamation plan, provide to the zoning administrator evidence, subject to inspection, that all of the following conditions are met:

- (a) Verification of property ownership or an active mineral lease, as recorded with the Dane County Register of Deeds, between the landowner and a mineral extraction operator.
 - (b) 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.
 - (c) There shall be a safety fence around the entire extraction area at all times.
 - (d) Driveway access points to the site shall be gated. All gates shall be signed “no trespassing.”
 - (e) The operator shall post clearly visible signage indicating the presence of mineral extraction activity.
- (109) Nonconforming use. A lawfully created use that existed prior to the time this ordinance or relevant amendments took effect, and which does not conform to the current standards of this ordinance.

10.102 GENERAL PROVISIONS APPLICABLE TO ALL USES IN ALL ZONING DISTRICTS.

(7) Nonconforming Uses and Structures.

(b) Nonconforming Uses.

1. Continuation of a Legal, Nonconforming Use. The lawful principal use of a building or premises existing at the time of adoption of this ordinance may be continued as a nonconforming use.
2. Notification of Nonconformity. Within 30 days of the effective date of this ordinance in any town, the zoning administrator will send a notice via certified mail, return receipt requested, to all legally established, nonconforming mineral extraction operations which existed prior to 1969, and were registered with and approved by the Dane County Zoning Administrator at the time. The notice shall inform the landowner that registered nonconforming mineral extraction sites are subject to the provisions of this section.
3. Abandonment or Discontinuation of a Nonconforming Use.
 - a. Any use that is discontinued or abandoned for a period of one (1) year shall be considered terminated and shall lose its nonconforming status. Any future use or reestablishment of a previously nonconforming use on the premises must conform to the provisions of this ordinance, except as specifically exempted below.
 - b. The relocation or expansion of any nonconforming use beyond areas where such use was originally established shall conform to all standards and requirements of this ordinance, except as otherwise provided by law.

Conclusion and Findings:

- Non-conforming status of the subject site has never been contested for 50 years by several operators as well as the previous and current landowner.
- The entire lands owned by Krueger are in common ownership and majority of the parcels are contiguous, excluding parcel 050832380704 on the north side of STH 69.
- No intent has ever been submitted or proved to the county that the original owner, Gerald Hendrickson indicating that 80 plus acres would be intended for mineral extraction purposes.

- When the subject site was registered in 1969, 5 acres was written down by the operator for estimated acreage reserved for deposit.
- Dane County Planning and Development has recognized that the 40 acre parcel has non-conforming status for 50 years.
- Anything beyond the identified 40 acre parcel would require a Conditional Use Permit to allow for mineral extraction uses or a request by the landowner to have the zoning division make a formal determination on the non-conforming area.
- Past department determinations have taken into account case law and have allowed for non-conforming sites to expand, based on certain criteria:
 - Lands owned contiguously by the original owner of the mineral extraction site.
 - Lands that are contiguous to the current mining site location.
 - The area contains the same asset currently mined.
 - Where the original owner of the registered site demonstrates intent to mine that asset.



Dane County Planning & Development

Division of Zoning

April 11, 2019

Attn: KRUEGER TR, JOHN L & JOSEPHINE A

Re: Registered and approved non-conforming - non-metallic mining sites; abandoned uses.

On January 17, 2019, the Dane County Board of Supervisors adopted [2018-OA-20](#), which comprehensively revised the Dane County Zoning Ordinance (Chapter 10, Dane County Code). In addition, the town of Montrose has adopted the new Dane County Zoning Ordinance on April 2, 2019.

What does this mean for you?

The Dane County Zoning division has identified that your property or portions of your property are registered with the county as a non-conforming mineral extraction site or use. This notice is to inform you that registered nonconforming mineral extraction sites are subject to the provisions of the new zoning ordinance under section 10.102(7)(b).

1. Abandonment or Discontinuation of a Nonconforming Use.

- *Any use that is discontinued or abandoned for a period of one (1) year shall be considered terminated and shall lose its nonconforming status. Any future use or reestablishment of a previously nonconforming use on the premises must conform to the provisions of this ordinance, except as specifically exempted below.*
- *The relocation or expansion of any nonconforming use beyond areas where such use was originally established shall conform to all standards and requirements of this ordinance, except as otherwise provided by law.*

This memo serves as notification that in order for any registered non-conforming mineral extraction site to exist and to maintain its non-conformity; the following requirements must be adhered to.

(b) Mineral extraction uses shall be considered abandoned or discontinued if the use ceases for twelve months or longer, unless the landowner or operator complies with all of the following:

- Within twelve months of the effective date of this ordinance has submitted a reclamation plan under Chapter 74, Dane County Code.
- By January 31 of each year after submitting a reclamation plan, submits an annual report that meets all the requirements of s.74.251, Dane County Code and indicates the site was active during the previous year.
- Within twelve months of the receipt of notice under s. 10.102(7)(b)2., records a deed notice document, that:
 - (a) *indicates the presence of a nonconforming mineral extraction site;*
 - (b) *describes the boundaries of the nonconforming mineral extraction site, and;*
 - (c) *is signed by the landowner and the zoning administrator.*

- By January 31 of each year after submitting a reclamation plan, provide to the zoning administrator evidence, subject to inspection, that all of the following conditions are met:
 - (a) Verification of property ownership or an active mineral lease, as recorded with the Dane County Register of Deeds, between the landowner and a mineral extraction operator.*
 - (b) 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.*
 - (c) There shall be a safety fence around the entire extraction area at all times.*
 - (d) Driveway access points to the site shall be gated. All gates shall be signed "no trespassing."*
 - (e) The operator shall post clearly visible signage indicating the presence of mineral extraction activity.*

Please note, that except as described in section (b) above, when the nonconforming use of a property has ceased for twelve months or longer, a use shall be considered abandoned and discontinued. A Conditional Use Permit would then be required to be approved by the town and the county to allow for future mineral extraction uses.

Your attention to this issue is greatly appreciated and you may contact me with any questions with the above referenced language.

Sincerely,

Dan Everson
Assistant Zoning Administrator
608.267.1541

NOTICE

Use black ink

WHEREAS, **DANE COUNTY**, pursuant to Ch. 10.0004(1)(b)3., hereby gives notice that the following described property in the Town of **MONTROSE** indicates the presence of an active nonconforming mineral extraction site.

The described property is as follows:

Recording area

Name and return address:

0508-323-9500-1

PARCEL IDENTIFICATION NUMBER(S)

This Deed Notice provides information regarding the presence of a nonconforming mineral extraction site and its location satisfying one of the requirements of DCCO Ch. 10.004(1)(b)3.

Cancellation of this Notice may be accomplished by filing a **Cancellation of Notice** form with the Dane County Register of Deeds Office. The Cancellation of Notice form is available from the Register of Deeds office and requires the following:

- 1) Signature of the County/Town official listed on the original Notice, or an equivalent office-holder.
- 2) Reference document number of original Notice.
- 3) Legal description of property.
- 4) Explanation of reason for cancellation.

Signature of Landowner

Date

Name printed

Title

STATE OF WISCONSIN, County of _____

This document was drafted by:
(print or type name below)

Dane County Zoning Administrator

Subscribed and sworn to before me on _____ by the above named person(s).

Signature of notary or other person
authorized to administer an oath _____
(as per s. 706.06, 706.07)

Print or type name: _____

Title _____ Date commission expires: _____

*Names of persons signing in any capacity must be typed or printed below their signature.

P&D form 2/20/2001

Signature of County Official

Date

Name printed

Title

STATE OF WISCONSIN, County of _____

Subscribed and sworn to before me on _____ by the above named person(s).

Signature of notary or other person
authorized to administer an oath _____
(as per s. 706.06, 706.07)

Print or type name: _____

Title _____ Date commission expires: _____.





DANE COUNTY PLANNING & DEVELOPMENT

Room 116, City-County Building, Madison, Wisconsin 53703
Fax (608) 267-1540

March 9, 2020

KRUEGER TR, JOHN L & JOSEPHINE A
7367 US HIGHWAY 69/92
BELLEVILLE WI 53508

RE: Nonconforming status of mineral extraction uses
Parcel: 050832395001, Town of Montrose, Section 32

*Housing &
Economic Development*
(608)266-4270, Rm. 362

Planning
(608)266-4251, Rm. 116

Records & Support
(608)266-4251, Rm. 116

Zoning
(608)266-4266, Rm. 116

Dear Mr. Krueger,

It has come to the attention of the Dane County Zoning Department that the mineral extraction activities on your property are not in compliance with the original registration for this specific site. In 1969, the Dane County Zoning Division sent a letter to property owners requesting the registration of existing non-metallic mineral extraction sites. The land use was changing from a permitted use to a conditional use. The information was to be used to establish a non-conforming site and the landowner was required to submit the number of acres claimed for mineral extraction. The original registration to Dane County was submitted by Rein, Schultz and Dahl, dated April 15, 1969 for an existing rock quarry deposit reserved for 5 acres.

On April 2, 2019, the town of Montrose adopted the new Dane County Zoning Ordinance. A letter dated April 11, 2019 was sent to you by certified mail indicating the new ordinance requirements for registered non-conforming mineral extraction sites within the county. However, it has come to the county's attention that the site has expanded past the original 5 acres claimed for the property. The non-conforming site is in violation of section 10.102(7)3.b of the Dane County Code of Ordinances.

In order for the additional acreage to be in compliance and to continue operations, a Conditional Use Permit to allow for the expansion of mineral extraction uses will need to be submitted to the Dane County Zoning department. I would encourage you to set up a day and time where we can sit down and go through this correspondence more in detail. I can be reached at the number listed below. Also, attached with this letter is a copy of the original registration from 1969 and the letter dated April 2, 2019.

Thank you for your consideration and if you have questions, please contact me directly or Zoning Administrator, Roger Lane.

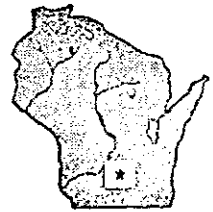
Dan Everson
Assistant Zoning Administrator
267-1541

CC: Town of Montrose



DANE COUNTY ZONING DEPARTMENT

Room 314, City-County Building
Madison, Wisconsin 53709
Telephone 266-4266



Dairy and Recreation
Center of America

APRIL 16, 1969 DEADLINE TO REGISTER OLD GRAVEL PITS AND OTHER MINERAL EXTRACTION OPERATIONS IN DANE COUNTY.

To all concerned:

The enclosed copy of Zoning Ordinance Amendment 1163 should be of interest to all owners of land where gravel pits, quarries and related activities take place, as well as to those who are conducting this kind of business.

Your attention is invited to the very last paragraph, (4), and to the last sentence therein, which reads as follows:

"All existing mineral extraction operations shall be deemed non-conforming uses and may be continued providing that they have been worked prior to the date of adoption of this ordinance and they have been registered with the County Zoning Supervisor within one year of the date of adoption of this ordinance."

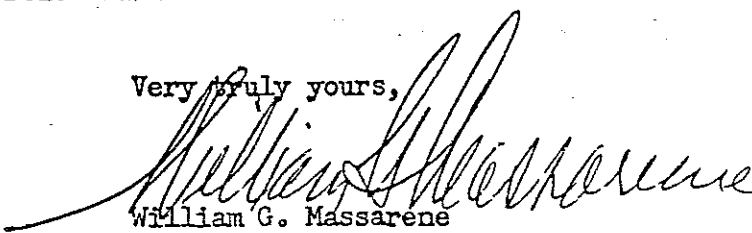
April 16, 1968 is the date this ordinance was adopted. Within Dane County a mineral extraction operation that began before that date may be continued, provided it is registered with the Dane County Zoning Supervisor, Room 314, City-County Building, Madison, Wisconsin 53709 no later than April 16, 1969.

Registration of mineral extraction operations that were worked prior to April 16, 1968 should be in writing, and may be accomplished by letter. The following information should be included:

1. Name of landowner
2. Name of Township
3. Section number and quarter, e. g. "NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 12."
4. Approximate acreage of land claimed for mineral deposits
5. Type of operation, e. g. "quarry"
6. Approximate date operation first worked (must be earlier than April 16, 1968)
7. Signature of owner, or his agent (registration of deposits by parties who contract for their use will be recognized)

We hope that all interested parties will avail themselves of their rights.

Very truly yours,


William G. Massarene
Zoning Supervisor

7

<u>OWNER</u>	<u>LOCATION</u>	<u>TYPE OF DEPOSIT</u>	<u>EST. YEAR DEPOSIT OPENED</u>	<u>EST. ACREAGE RESERVED FOR DEPOSIT</u>
<u>DEERFIELD TOWNSHIP</u>				
✓ HEIMAN, EDWARD H.	N $\frac{1}{2}$ -SW $\frac{1}{4}$, Section 11.	Sand & Gravel	1967	15
✓ SIMONSON, RAY & C.	S $\frac{1}{2}$ -SW $\frac{1}{4}$, SW $\frac{1}{4}$ -SE $\frac{1}{4}$, NE $\frac{1}{4}$ -SW $\frac{1}{4}$, SE $\frac{1}{4}$ -NW $\frac{1}{4}$, Section 27 and N $\frac{1}{2}$ -NW $\frac{1}{4}$, Section 34.	Sand & Gravel	1960	15
<u>DUNKIRK TOWNSHIP</u>				
OK ELLIS, ROBERT	S $\frac{1}{2}$ -NE $\frac{1}{4}$, Section 18.	Sand & Gravel	1960	40
NO WENTLER, DUANE	S $\frac{1}{2}$ -NE $\frac{1}{4}$, Section 35.	Sand & Gravel	1965	10
<u>DUNN TOWNSHIP</u>				
OK ANDERSON, CHARLES	NW $\frac{1}{4}$ -Section 36.	Sand & Gravel	1945	20
NO BARRY, PHILLIP	W $\frac{1}{2}$ -NW $\frac{1}{4}$, Section 30.	Sand & Gravel	1940	10
NO GEARY, GEORGE	W $\frac{1}{2}$ -SW $\frac{1}{4}$, NE $\frac{1}{4}$ -SW $\frac{1}{4}$, Section 30.	Sand & Gravel	1940	20
OK HAWKINSON, LLOYD C.	E $\frac{1}{2}$ -SE $\frac{1}{4}$, Section 34 and Part of W $\frac{1}{2}$ -SW $\frac{1}{4}$, Section 35.	Sand & Gravel	1962	20
<u>FITCHBURG TOWNSHIP</u>				
OK CONNOR, DOT	S $\frac{1}{2}$ -NE $\frac{1}{4}$, NE $\frac{1}{4}$ -NE $\frac{1}{4}$, Section 36.	Sand & Gravel	1950	15
OK HAEN, A. J.	SW $\frac{1}{4}$ -NE $\frac{1}{4}$, Section 7.	Sand & Gravel	1955	10
NO LEASE, JAMES	NE $\frac{1}{4}$ -NE $\frac{1}{4}$, Section 36.	Sand & Gravel	1968	20
<u>MEDINA TOWNSHIP</u>				
NO BARTZ, ROBERT	SE NE $\frac{1}{4}$ -SW $\frac{1}{4}$, Section 24.	Sand & Gravel	1952	5
NO POWELL, FRED	SE $\frac{1}{4}$ -NW $\frac{1}{4}$, SW $\frac{1}{4}$ -NE $\frac{1}{4}$, W $\frac{1}{2}$ - NW $\frac{1}{4}$ -SE $\frac{1}{4}$, Section 24.	Sand & Gravel	1965	5
<u>MIDDLETON TOWNSHIP</u>				
OK ROWELL, R. J.	N $\frac{1}{2}$ -SE $\frac{1}{4}$, SW $\frac{1}{4}$ -NE $\frac{1}{4}$, Section 35.	Sand & Gravel	1958	5
<u>MONTROSE TOWNSHIP</u>				
BALDWIN, FRANK & FRED	NW $\frac{1}{4}$, Section 11.	Sand & Gravel	1960	10
HENDRICKSON, GERALD	SE $\frac{1}{4}$ -SW $\frac{1}{4}$, Section 32.	Rock Quarry	1949	5

MINERAL EXTRACTION REGISTRATION

TOWN _____ SECTION 32

OWNER Gerald Wandersleben

REGISTERED BY Rein Schmitz and Dahl

DESCRIPTION OF LAND REGISTERED SUB. SUB.

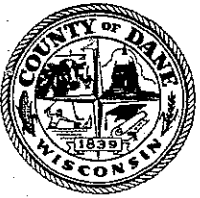
ZONING DISTRICT A-1

ZONING DEPARTMENT VERIFICATION

<u>1/4 1/4</u>	<u>AERIAL PHOTO NO.</u>	<u>PHOTO EVIDENCE</u>	<u>FIELD EVIDENCE</u>	<u>ACCEPTED</u>
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SE₁ SW₁ 3JJ-110 yes - *Yes* ✓

COMMENTS _____



Dane County Planning & Development

Room 116, City-County Building, Madison, Wisconsin 53709

Land Division Review

608/266-9086

Property Listing

608/266-4120

Surveyor

608/266-4252

Zoning

608/266-4266

TO: ALL INTERESTED PARTIES

FROM: JAMES GREGORIUS, DANE COUNTY ZONING ADM.

SUBJECT: NONCONFORMING MINERAL EXTRACTION SITES &
DIMINISHING ASSETS RULE

DATE: JANUARY 22, 2002

Recently several cases have surfaced with respect to contiguous land to nonconforming mineral extraction sites and the issue of nonconforming sites that were not registered prior to the April 16th, 1969 date. This memo is intended to address these issues and the specifics associated with each. These issues have been discussed with the Dane County Corporation Counsel and are included as part of information provided here.

The Schroeder v. Dane County Board of Adjustment (Halverson Case) and the supreme courts prior decisions established that for application of the diminishing asset rule the owner must show that **prior to April 16, 1969** (which was last day to register nonconforming sites with the county) the property to which they wish to expand the nonconforming use was:

- Contiguous to the nonconforming use;
- Under single or common ownership with the property upon which the mineral extraction existed; and
- The owner intended to excavate the land in question.

The court of appeals stated in the aforementioned case that: "The relevant inquiry is [the owner's] intent and ownership of the property coupled with the unique use of the extraction. Therefore the Planning and Development Department would apply the three standards contained in the previous paragraph to address this issue at the staff level. As stated previously staff has worked with the Dane County Corporation Counsel in addressing this issue.

The other issue is that of nonconforming sites that were not registered prior to the April 16th, 1969 date. Historically this issue has surfaced and the interpretation of the Zoning Administrator and the legal opinion of Corporation Counsel is that sites can have nonconforming status even if the site was not registered by April 16th, 1969. These sites will only be considered by staff if the following standards are met:

- The mineral extraction site must have existed prior to April 16th, 1969.

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Mineral extraction memo

- That the mineral extraction use **has not** been discontinued for a period in excess of 1 year since April 16th, 1969.
- Documentation shall be provided by the property owner or operator to substantiate the aforementioned information.

It should be noted that cases will be reviewed only on an individual or a site by site basis. Please feel free to contact me if there are additional questions regarding these two issues that have been addressed in this memo.



Kathleen M. Falk
Dane County Executive

Dane County Planning & Development

Division of Zoning

MEMORANDUM OF INTERPRETATION

TO: PLANNING & ZONING STAFF
FROM: PETER CONRAD, ZONING ADMINISTRATOR
SUBJECT: EXPANSION OF NONCONFORMING MINERAL EXTRACTION SITES
DATE: TUESDAY, NOVEMBER 22, 2005

QUESTION PRESENTED

Under what circumstances can a pre-existing legal nonconforming mineral extraction site expand?

BRIEF ANSWER

Legal nonconforming mineral extraction sites can expand onto: 1) land owned contiguously by the original owner of the mineral extraction site; 2) that is contiguous to current mining; 3) on the area that contains the same asset currently mined; 4) where the original owner demonstrated the intent to mine that asset.

DISCUSSION

A nonconforming use is a use of land for a purpose not permitted in the district which the land is situated. Waukesha County v. Seitz, 140 Wis.2d 111, 114-115 (Wis. Ct. App. 1987). Mineral extraction operations are a conditional use requiring approval from the Dane County Zoning & Land Regulation Committee in the A-1, A-1 EX, A-2, A-3, C-2, and M-1 zoning districts. Dane County Zoning does not allow this use in any other zoning district. A mineral extraction site operating without a conditional use permit, or in a district other than those listed, is a nonconforming use.

Dane County recognizes two types of legal nonconforming mineral extraction sites: 1) unregistered sites; and; 2) registered sites, provided they existed prior to 1969 and were

registered while in operation. The difference between these two is the amount of time an extraction operation can be inactive before it is considered discontinued and abandoned. Nonconforming status for an unregistered site terminates if it is inactive for more than one year. §10.21(1)(a), Dane County Code of Ordinances (DCCO). Nonconforming status for a registered site remains indefinitely, even if the site is inactive for more than one (1) year. §10.191(6) and §10.21(1)(c), DCCO. Both types of legal nonconforming sites can expand under the criteria discussed herein.

While a County cannot prohibit the lawful use of any building or premises for any trade or industry for which such building or premises is used at the time the ordinance takes effect under Wis. Stat. §59.69(10) (2001), there is statutory authority to regulate nonconforming uses. Dane County Board of Adjustment v. Halverson, 228 Wis. 2d 324, 339 (Wis. Ct. App. 1999). This authority includes the ability to enact ordinances that limit the change or extension of a nonconforming use. Id. However, because of the unique nature of mineral extraction, the Court held in Sturgis v. Winnebago County Board of Adjustments, 141 Wis.2d 149 (Wis. Ct. App. 1987) that legal nonconforming mineral extraction sites can expand under the rule of diminishing assets. That rule states:

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.

Sturgis at 153 quoting County of DuPage v. Elmhurst-Chicago Stone Co., 165 N.E.2d 301 (1960).

Application of the rule of diminishing assets is not limited to the property owner at the time the site became nonconforming, e.g. the property owner who successfully brought suit to expand a nonconforming site in Halverson was not the property owner at the time the mineral

extraction site became nonconforming. However, the definition is not unlimited and does not automatically permit expansion to every portion of every contiguous parcel owned by the operator. Schroeder v. Dane County Board of Adjustment, 228 Wis.2d 324, 341 (Wis. Ct. App. 1999). "The relevant inquiry is [the owner's] intent and ownership of the property coupled with the unique use of extraction." Sturgis at 152. Current case law appears silent on an exact methodology to establish intent, particularly regarding successive ownership interests, but there are common situations in which a transfer of property may establish intent, or lack thereof, for the successor in title. Some affirmative examples include lease agreements for extraction, or registration of the mineral resource. Conversely, rezoning the property to a district that prohibits mineral extraction, selling a part of the original nonconforming site to someone who did not mine that property, or selling that part of the original property which included the actively mined area with no activity taking place on the remnant property may demonstrate a lack of intent.

CONCLUSION

Legal nonconforming mineral extraction sites can expand under the rule of diminishing assets. However, the rule does not allow unlimited expansion. The owner or operator must prove: 1) the area in question was in contiguous ownership by the original owner of the mineral extraction site; 2) the area in question is contiguous and immediately adjacent to the area currently mined; 3) the same asset is present in the expanded area; and 4) the owner or operator, or their predecessors in interest, intended to mine that asset at the site at the time it became nonconforming. Dane County Zoning must evaluate each request for determination on a case-by-case basis. Before approving expansion of a nonconforming mineral extraction site, an owner or operator must submit the following for review:

- A legal description of the intended mining area;
- A scaled drawing of the intended mining area showing
 - the boundary of the expanded mining site;
 - the exact size of the area to be mined;

- the location and size of the existing mining operation;
- description of the operation;
- Documentation from a registered geologist identifying the mineral asset in the existing mine and the mineral asset in the proposed area;
- Documentation showing intent to mine the proposed area;
- The deed of the property at the time the mineral extraction operation began.

Dane County will review this information to ensure the owner or operator meets the four (4) criteria listed above. Only if all of the criteria are satisfied, can the owner or operator expand into the proposed area. Once Dane County Zoning makes a decision, any party aggrieved by the decision may appeal through the traditional process.

Reviewed & approved by Corporation Counsel: _____, January _____, 2006

Land Contract Doc. #1327865 dated 6/02/1972

Hendrickson to Krueger

7474

7474

69

STR-SPR-08
7423
DCP/DCPREZ-2020-11549

7367

RR-4
7423
DCPREZ-2019-00014

John Krueger to Goodman with driveway easement
9/13/1972