

BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

In the Matter of the Appeal of:

YAHARA MATERIALS, INC.
6117 County Highway K
P.O. Box 277
Waunakee, WI 53597

Appellant.

**NOTICE OF APPEAL AND APPEAL OF DECISION OF
THE DANE COUNTY ZONING ADMINISTRATOR**

TO: Roger Lane, Zoning Administrator
Dane County Zoning Department
210 Martin Luther King Jr. Blvd.
Room 116
Madison, WI 53703

Steven Schulz, Chair
Dane County Board of Adjustment
210 Martin Luther King Jr. Blvd.
Room 116
Madison, WI 53703

PLEASE TAKE NOTICE, that pursuant to Section 10.101(9) of the Dane County Ordinances, Appellant Yahara Materials, Inc. (“Yahara”), by its attorneys Husch Blackwell LLP, hereby gives notice of appeal and appeals a decision of Roger Lane, Dane County Zoning Administrator (the “Zoning Administrator”), which was dated May 14, 2020 (the “Decision”).

In the Decision, a copy of which is attached hereto as **Exhibit A**, the Zoning Administrator erroneously determined that Tax Parcels 050/0907-064-8500-1, 050/0907-061-9360-2, 050/0907-061-9500-2 and 050/0907-061-8000-9 located in the Town of Roxbury (collectively, the “Carlson Site”) are not considered legally nonconforming for nonmetallic mineral extraction. The property owners of the Carlson Site, John W. Carlson and Dennis J. Carlson (the “Owners”), lease the Carlson Site to Yahara for use in its non-metallic mineral extraction operations. Yahara submits this appeal as an authorized agent for the Owners.

For the reasons set forth herein and based on the evidence to be submitted at a hearing in this matter, the Dane County Board of Adjustment (“BOA”) should conclude that the Zoning Administrator’s Decision is in error and, pursuant to the BOA’s authority contained in Dane Co. Ordinance § 10.101(9)(e), reverse that Decision and determine that the Carlson Site is, in its entirety, legally nonconforming for nonmetallic mineral extraction. Appellant and the Owners are

aggrieved by the Decision, because it deprives them of the full lawful use of the Carlson Site and impairs their ability to generate income therefrom.

INTRODUCTION

In the 1960's, Lloyd Carlson was the owner of the Carlson Site, located in the Town of Roxbury. The borders of the Carlson Site are shown on the map attached hereto as **Exhibit B**. In 1969, a portion of the Carlson Site, specifically the NE ¼ SW ¼ and the NW¼ SE¼ of Section 6 in the Town of Roxbury, was registered as a nonmetallic mineral extraction site with Dane County zoning (the "Registered Parcel"). The remainder of the Carlson Site is contiguous with the Registered Parcel and was commonly owned by Mr. Carlson at the time of registration. Mr. Carlson subsequently transferred ownership of the entire Carlson Site to the Owners. Appellant subsequently began leasing the Carlson Site from Owner for the purpose of continuing nonmetallic mineral extraction operations. On May 28, 2019, the Owners received a notice from Assistant Zoning Administrator Dan Everson ("Adoption Notice"). (See **Exhibit C**). The Adoption Notice informed the Owners that the Town of Roxbury had adopted the new Dane County Zoning Ordinances on May 20, 2019, and, accordingly, the Owners were required to take the following action to preserve the legal nonconforming status of the Carlson Site:

- (1) Submit a reclamation plan under Chapter 74 of the Dane County Ordinances within twelve months (12) of the effective date of the ordinance; and
- (2) Record a deed notice describing the boundaries of the non-conforming mineral extraction site within twelve months (12) of receipt of Adoption Notice.

Yahara, acting on behalf of the Owners, submitted a reclamation plan and deed notice for the Carlson Site on May 14, 2019, thereby timely satisfying both requirements contained in the Adoption Notice. However, immediately following that submission, the Dane County Assistant Zoning Administrator, Dan Everson, responded via email stating in part that,

You will need to discuss this with [Zoning Administrator] Roger Lane. A reclamation permit submitted this late in the game will not be approved by May 28th, the one year in which the town adopted the zoning ordinance. As I see it, this will require a Conditional Use Permit.

(See **Exhibit A**)

Approximately nine minutes after Mr. Everson's email above, the Zoning Administrator responded to Yahara as follows:

Please be informed that proper notice was provided to the landowners in accordance with Dane County Code of Ordinances Section 10.004(1). The site meets the definition of abandoned or discontinued use. The non-conforming status has been abandoned due to the lack of action on the landowners behalf as described under the Dane County Code of Ordinances.

Future land use of the property shall conform to the current Dane County Code of Ordinances, Chapter 10, Dane County Zoning Ordinances. A conditional use permit will need to be obtained for non-metallic mineral extraction operation to occur.

(See **Exhibit A**)

Confused by the Zoning Administrator's determination that the Carlson Site had been deemed abandoned or discontinued—despite the fact that Yahara had submitted all required information several days prior to the deadline—Yahara, through its counsel, sought clarification from Dane County's Assistant Corporation Counsel, David Gault. Mr. Gault, after apparently conferring with the Zoning Administrator, explained that the Zoning Administrator's basis for determining that the Carlson Site had lost its legal nonconforming status (even though the time period to satisfy the Adoption Notice requirements had not yet expired), was because Yahara's deed notice included the entire Carlson Site rather than limiting the notice to the Registered Parcel. For reasons unknown to Yahara, the Zoning Administrator recognized the legal nonconforming status of the Registered Parcel but denied that such rights had been conferred on the remainder of the Carlson Site. (See **Exhibit D**).

The Zoning Administrator then informed Yahara that, if it wished to preserve the nonconforming status for any portion of the Carlson Site, Yahara was required to submit an amended deed notice limiting the nonconforming property to an area that is even less than the entire Registered Parcel and, in particular, only that portion of the Registered Parcel south of highway 188, thereby separating the actual registered property from the balance of the commonly owned contiguous remaining portion of the Carlson Site. At no time has the Zoning Administrator offered any authority for the proposition that the nonconforming status of a parcel properly registered in 1969 can be limited in this manner. Nevertheless, at the direction of the Zoning Administrator, and to preserve the continued legal nonconforming status of at least a portion of the Carlson Site, Yahara submitted a revised deed notice describing only that portion of the Registered Parcel deemed acceptable to the Zoning Administrator. However, Yahara maintains that the Zoning Administrator's Decision as to the balance of the Carlson Site is erroneous. That Decision incorrectly interprets and applies the law of the land in the State of Wisconsin applicable to the nonconforming status of the Carlson Site and it must be reversed.

ARGUMENT

The Subject Parcels must be recognized as legally nonconforming for nonmetallic mineral extraction pursuant to the diminishing asset rule as applied to Dane County's historic mineral site registration system. Under the diminishing asset rule, commonly owned property that is contiguous to a nonconforming mine site is also nonconforming. See Schroeder v. Dane Cnty. Bd. Of Adjustment, 228 Wis. 2d 324, 326, 596 N.W.2d 472 (Ct. App. 1999) (holding that pursuant to the diminishing asset rule, nonmetallic mineral extraction operations on a parcel that is contiguous to and shares common ownership with a registered parcel constitutes a lawful nonconforming use under the Dane County Ordinances); Smart v. Dane Cnty. Bd. Of Adjustments, 177 Wis. 2d 445, 501 N.W.2d 782 (1993) (applying the diminishing asset rule to parcels that were determined to be nonconforming under the Dane County quarry registration process); Sturgis v. Winnebago Cty. Bd. Of Adjustment, 141 Wis. 2d 149, 413 N.W.2d 642 (Ct. App. 1987). Said another way, the

diminishing asset rule provides that a property owner has a vested right to engage in quarry operations on lands that are commonly owned and contiguous to nonconforming mine sites.

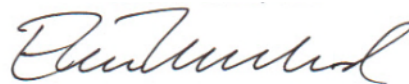
The Carlson Site meets the requirements of the diminishing asset rule. All parcels comprising the Carlson Site were commonly owned by Mr. Carlson when the Registered Parcel was registered as non-metallic mineral extraction sites in 1969 (and remain commonly owned by the Owners), and all other portions of the Carlson Site are contiguous to Registered Parcel. Accordingly, the diminishing asset rule applies to confer legal nonconforming use status on all parcels which comprise the Carlson Site, not just a portion of the Registered Parcel deemed acceptable to the Zoning Administrator. The Zoning Administrator is required to execute the May 14, 2020 Deed Notice so that the Carlson Site can continue to enjoy this status as it is entitled to by law.

CONCLUSION

Appellant respectfully requests that the Dane County Board of Adjustment reverse the Decision in its entirety and enter an Order confirming that the entire Carlson Site is properly classified as legally non-conforming for nonmetallic mineral extraction and requiring the Zoning Administrator to execute the May 14, 2020 Deed Notice.

Dated this 12th day of June, 2020.

HUSCH BLACKWELL LLP
Attorneys for Appellant



By: _____

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