Appeal of the Approval of Conditional Use Permit #2509 by the Zoning & Land Regulation Committee on May 11, 2021

Appellants

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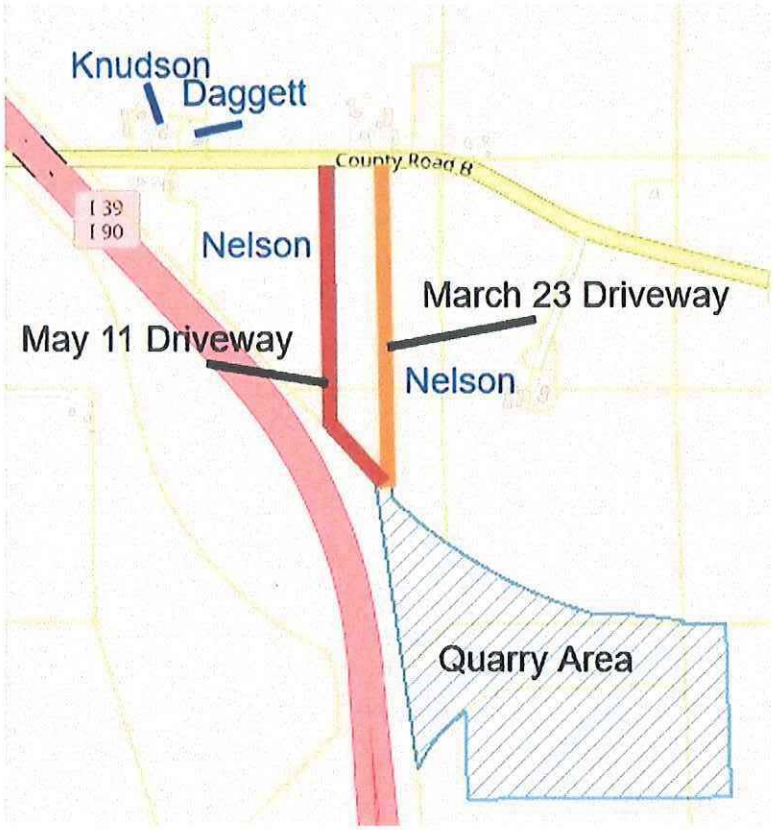
The appellants are aggrieved by the granting of Conditional Use Permit (CUP) #2509 [Exhibit 1] due to the impact on uses, values and enjoyment of their properties and the denial of due process by the Zoning & Land Regulation (ZLR) Committee. The appellants appeal to the Board of Adjustment ("The Board") for relief.

Timeline of CUP #2509 actions of interest:

- 3/23/2021: The ZLR Committee approved the CUP with 20 conditions.
- 4/19/2021: The Dane County Department of Public Works, Highway and Transportation issued a permit for a more westerly driveway location.
- 4/27/2021: The ZLR Committee voted to reconsider the CUP.
- 5/11/2021: The ZLR Committee approved the CUP with the more westerly driveway location and same 20 conditions.

Locations of appellants' properties and the CUP area for non-metallic mineral extraction in the Town of Christiana:



Overview of claims and proposed relief. The Board may grant other relief as appropriate.

1. The ZLR Committee reconsidered an approved CUP without authority to take this action.
   Proposed relief: The Board rescinds the May 11 CUP approval.
2. The ZLR Committee failed to make written findings of fact as required by the Zoning Ordinance.
   Proposed relief: The Board makes written findings of facts and the decides to uphold or reverse the May 11 CUP approval.
3. The ZLR Committee erred by approving the CUP without substantial evidence that uses, values and enjoyment of properties in the neighborhood would not be substantially impaired or diminished by the conditional use.
   Proposed relief: The Board reverses the May 11 CUP approval.
4. The ZLR Committee erred by not imposing standard conditions as required by the Zoning Ordinance.
   Proposed relief: The Board considers imposing the standard conditions.

If relief is granted for the first claim then the Board may decide that the remaining claims are moot. Similarly, if relief is granted for the second claim then the Board may decide that the third claim is moot.

This appeal relies on the evidence and testimony in the record for CUP #2509 [1] and the ZLR Committee meeting recordings [2, 3, 4, 5].

Claim 1. The ZLR Committee reconsidered an approved CUP without authority to take this action.

A. The Zoning Ordinance [6] does not allow modifications of the conditions after approval of CUP #2509, § 10.103(15)(b)3 (emphasis added):

> a. Extensions. Due to uncertainty in estimating duration for mineral extraction, conditional use permit holders who have operated without violations, may have the duration of their permit extended for a period not to exceed five years, based on an administrative review by the zoning administrator, in consultation with the town board. No more than one such extension shall be granted over the lifespan of the conditional use permit, and all conditions shall remain the same as the original permit. Further extensions or **any modifications of conditions shall require re-application and approval of a new conditional use permit**.

Modification of a site plan would be a modification to the standard CUP condition expressed in § 10.101(7)(d)2.a:

> ii. The physical development and operation of the conditional use must conform, in all respects, to the approved site plan, operational plan and phasing plan.

B. In 2015 the Dane County Office of the Corporation Counsel (DCOCC)wrote a letter to the ZLR Committee Chair (attached as Exhibit 2) regarding a different CUP. The letter states in part (emphasis added):

> In my opinion the committee cannot reconsider or rescind the CUP granted to Enbridge for the pumping station at this time. Pursuant to the long standing common law of zoning in Wisconsin, Enbridge has vested rights in the CUP. *See Lake Bluff Housing Partners v. City of South Milwaukee,* 197 Wis. 2d 157 (1995) and *Building Height Cases,* 181 Wis. 519 (1923). Therefore, **the committee has no legal authority to "reconsider" granting the CUP.** ... The Zoning Code has a procedure for revocation of a

CUP DCO §10.255(2)(m) [now §10.103(9)(d)5]. However, grounds do not currently exist to proceed under that provision.

According to the DCOCC letter, reconsideration includes rescission of the approval of the CUP. As in the 2015 situation, for CUP #2509 there was no issue pending before the ZLR Committee and grounds did not exist for revocation.

Wis. Stat. § 59.69(5e) (Exhibit 3) states in part (emphasis added):

> (d) **Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed**, but the county may impose conditions such as the permit's duration, transfer, or renewal, in addition to any other conditions specified in the zoning ordinance or by the county zoning board.

The ZLR Committee did not make a finding that the CUP were not followed and had not authority to revoke the CUP.

C. The ZLR Committee Rules and Procedures [7] do not address the reconsideration of a CUP. There are no standards as to which issues merit consideration. In adddition, for the May 11 CUP approval the ZLR Committee did not follow the Zoning Ordinance requirements for a CUP application including:

- Submission by the applicant of a complete and acceptable site plan, § 10.101(7)(c)1.a
- A public hearing, § 10.101(7)(c)1.a
- Public notice, § 10.101(7)(c)1.b
- Town agreement, § 10.101(7)(c)2.c

If the CUP is allowed to stand then we would be left with an absurdity: the ZLR Committee would be required to follow the Zoning Ordinancef procedures and its Rules and Procedures in approving a CUP but then the ZLR Committee could arbitrarily reconsider and revise any portion of that CUP.

Suggested findings of fact:

1. In reconsidering CUP #2509 the ZLR Committee did not follow the same procedures that are required for considering a CUP:
   a) The record of CUP #2509 does not include a complete and acceptable site plan for the reconsideration of CUP #2509.
   b) The ZLR Committee did not hold a public hearing for the reconsideration of CUP #2509.

c) The ZLR Committee did not receive town agreement for the reconsideration of CUP #2509.

2. The ZLR Committee followed ad hoc procedures for the reconsideration of CUP #2509.

Suggested conclusions of law:

1. After CUP #2509 was granted the ZLR Committee does not have authority to reconsider this CUP.
2. The unauthorized reconsideration of CUP #2509 denied the appellants due process.
3. The lack of procedural standards in the reconsideration of CUP #2509 denied the appellants due process.

Proposed relief:

The Board rescinds the May 11 CUP approval.

Claim 2. The ZLR Committee failed to make written findings of fact as required by the Zoning Ordinance.

The Zoning Ordinance requires written findings of fact prior to approving a CUP, § 10.101(7)(c)2 (emphasis added):

> e. Prior to granting or denying a conditional use, the zoning committee shall **make written findings of fact** based on evidence presented and **issue a determination** whether the proposed conditional use, with any recommended conditions, meets all of the following standards:
> i. General standards for approval of a conditional use under s. 10.101(7)(d);
> ii. Any prescribed standards specific to the applicable zoning district.
> iii. Any prescribed standards specific to the particular use under s. 10.103.

Please note that this requirement has two separate parts: findings of fact and a determination.

The ZLR Committee did not make written findings of fact, relying instead on its Rules and Procedures [7] which state:

> f. In order to shorten discussion, the following general rules of motion making shall apply.

...

3. Conditional Use Permits – Unless otherwise indicated, a motion to approve a Conditional Use Permit, shall mean that the Committee has made affirmative findings of fact for the standards enumerated in §10.101(7)(d), and, if applicable, the relevant standards for particular uses in §10.103, and/or the standards applicable to conditional uses in a farmland preservation zoning district in §10.220(1)(a), Dane County Code of Ordinances.

This rule does not satisfy the Zoning Ordinance requirement for written findings of fact and a separate determination that the enumerated standards have been met.

A recent appeal [8] of a Land Conservation Committee (LCC) decision is informative. The Circuit Court opinion reads in part:

> The Court agrees with Petitioner that the LCC did not adequately state its reasons for upholding the Department's finding that the mulching project caused "land disturbing activity." In *Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of City of Milwaukee,* the Wisconsin Supreme Court held that an administrative body "may not simply grant or deny an application with conclusory statements that the application does or does not satisfy the [requisite] criteria." 2005 WI 117, ¶ 32, 284 Wis. 2d 1, 700 N.W.2d 87. Instead, the body "must provide enough reasoning to allow a court to meaningfully review its decision," either in writing or on the record. *Id.* at ¶¶ 3, 32.

By its rule the ZLR Committee relies on conclusory statements which do not provide for meaningful review.

Suggested finding of fact:

1. The ZLR Committee did not make written findings of fact prior to approving CUP #2509.

Suggested conclusions of law:

1. The ZLR Committee did not follow the procedures required to approve CUP #2509.
2. The failure to make written findings of fact leaves an inadequate record for review by the Board or by a court.
3. This inadequate record constitutes a denial of due process to the appellants.

Proposed relief:

> The Board makes written findings of facts and the decides to uphold or reverse the May 11 CUP approval.

Claim 3. The ZLR Committee erred by approving the CUP without substantial evidence that uses, values and enjoyment of properties in the neighborhood would not be substantially impaired or diminished by the conditional use.

The Zoning Ordinance requires that the conditional use meet the standards in § 10.101(7)(d) including:

> That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by establishment, maintenance or operation of the conditional use;

Wis. Stat. § 59.69(5e) (Exhibit 3) defines "substantial evidence" and states in part (emphasis added):

> The applicant must demonstrate that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. **The county's decision to approve or deny the permit must be supported by substantial evidence.**

The applicant did not provide substantial evidence with respect to the impact on homes in the neighborhood. Instead, the applicant provided a report on homes in the Town of Deerfield and the Town of Cottage Grove [1: "CUP 2509 Property Value Min Extract Report"].

With respect to home values in the neighborhood during the March 23 meeting ZLR Committee member Supervisor Kiefer commented [Exhibit 4], "frankly, there's not that much evidence on either side of this" and "there's actually not all that much evidence going either way." These comments suggest that Supervisor Kiefer did not consider the statutory requirement for "substantial evidence." Taken at face value, Supervisor Kiefer's comments indicate his opinion is that the applicant did not provide substantial evidence with respect to home values in the neighborhood.

The applicant provided no evidence with respect to the impact on agricultural fields in the neighborhood.

Suggested findings of fact:

1. The applicant did not provide substantial evidence with respect to the impact on homes in the neighborhood.
2. The applicant did not provide substantial evidence with respect to the impact on agricultural fields in the neighborhood.

Suggested conclusions of law:

1. The proposed conditional use does not meet the Zoning Ordinance standards in § 10.101(7)(d).
2. The failure to meet these standards puts at risk the appellants' uses, values and enjoyment of their properties in the neighborhood.

Proposed relief:

The Board reverses the May 11 CUP approval.

Claim 4. The ZLR Committee erred by not imposing standard conditions as required by the Zoning Ordinance.

The Zoning Ordinance requires imposition of standard conditions on any approved CUP, § 10.101(7)(d):

> 2. Conditions.
> a. Standard conditions. The town board and zoning committee shall impose, at a minimum, the following conditions on any approved conditional use permit:
> i. Any conditions required for specific uses listed under s. 10.103.
> ii. The physical development and operation of the conditional use must conform, in all respects, to the approved site plan, operational plan and phasing plan.
> ...

Twelve additional standard condtions are listed.

Meeting minutes, meeting videos, and CUP #2509 (attached as Exhibit 1) show that these standard conditions were not imposed by the ZLR Committee.

Suggested finding of fact:

1. The ZLR Committee did not impose the Zoning Ordinance standard conditions found in § 10.101(7)(d).

Suggested conclusions of law:

1. Imposition of the Zoning Ordinance standard conditions is required by § 10.101(7)(d).
2. Wis. Stat. § 59.69(5e) requires the applicant to show that all requirements and conditions established by the county relating to the conditional use are or shall be satisfied.
3. The lack of these standard conditions puts at risk the appellants' uses, values and enjoyment of their properties in the neighborhood.

Proposed relief:

The Board considers imposing the standard conditions.

References

1. Legistar file for CUP 2509

https://dane.legistar.com/LegislationDetail.aspx?ID=4672539&GUID=2CDCE522-BA83-4E58-809B-725E4C05747A

2. January 26, 2021, ZLR Committee meeting. The relevent video is from 7:44 to 50:50.

https://dane.legistar.com/MeetingDetail.aspx?ID=813813&GUID=45FF2A63-666A-4BD2-81F2-AA42568D6BE4

3. March 23, 2021, ZLR Committee meeting. The relevant video is from 1:10:47 to 1:50:14.

https://dane.legistar.com/MeetingDetail.aspx?ID=813824&GUID=9921B7AD-72F1-4BBB-B6A6-4E1174C3DB1D

4. April 27, 2021, ZLR Committee meeting. The relevant video is from 1:31:00 to 1:40:38.

https://dane.legistar.com/MeetingDetail.aspx?ID=813826&GUID=679BB7BB-8DA1-4928-BA70-3CD17CEE32DD

5. May 11, 2021, ZLR Committee meeting. The relevant video is from 3:53 to 37:09.

https://dane.legistar.com/MeetingDetail.aspx?ID=854847&GUID=05E51E30-2D1C-4E82-9F51-9E5468AC4E85

6. Dane County Ordinances

Chapter 10: Zoning

https://countyofdane.com/ordinances

7. ZLR Committee Rules and Procedures

https://plandev.countyofdane.com/Zoning/ZLR

8. *Thompson v. Dane County*

https://dane.legistar.com/View.ashx?M=F&ID=9296646&GUID=6145DBB4-5018-443B-ADD4-D69705B56A41

List of Exhibits

Exhibit 1. May 11, 2021, CUP #2509

https://dane.legistar.com/View.ashx?M=F&ID=9403143&GUID=8A75BB80-6883-422D-B38B-141B2E0F7F9C

Exhibit 2. 2015 Letter from the Dane County Office of the Corporation Counsel

https://dane.legistar.com/LegislationDetail.aspx?ID=2448813&GUID=EFD29E62-2411-4AFA-AE1F-43D253A4B508

Exhibit 3. Wis. Stat. § 59.69(5e)

https://docs.legis.wisconsin.gov/statutes/statutes/59/vii/69/5e

Exhibit 4. Transcript of comments by ZLR Committee member Supervisor Kiefer during the March 23, 2021 meeting [3].

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210 Martin Luther King, Jr., Blvd., Room 116
Madison Wisconsin 53703
(608) 266-4266/266-9083
Fax (608) 267-1540

DANE COUNTY
CONDITIONAL USE PERMIT #2509

THE ZONING AND LAND REGULATION COMMITTEE OF THE DANE COUNTY BOARD PURSUANT TO SECTION 10.101(7) OF THE DANE COUNTY CODE OF ORDINANCES DOES HEREBY:

GRANT Conditional Use Permit # 2509 for a non-metallic mineral extraction operation conditioned upon Dane County Code of Ordinances Section 10.101(7)(d)2. and 10.103(15) and subject to the additional conditions listed below:

EFFECTIVE DATE OF PERMIT: March 24, 2021

Boundary Revised: May 11, 2021

THE CONDITIONAL USE SHALL BE LOCATED ON THE PROPERTY DESCRIBED AS FOLLOWS:

Approximate Location: Northeast ¼ of Section 29 in the Town of Christiana

Legal Description of CUP boundaries: (see map below)
"A", 66 foot access
Part of the SW ¼ of the SE ¼ of Section 20 and part of the NW ¼ of the NE ¼ of Section 29, all in Town 6 North, Range 12 East, Town of Christiana, Dane County, Wisconsin, described as follows: Commencing at the Southwest corner of Section 20; thence S89°57'54"E, 676.30 feet to the point of beginning; thence N00°22'54"E, 1331.49 feet to the North line of the SW ¼ of the SE ¼ and the centerline of County Highway B; thence S89°59'12"E along said line, 66.00 feet; thence S00°22'54"W, 1331.52 feet to the South line of the SW ¼ of the SE 1/4 ; thence S00°53'54"E, 176.02 feet; thence S43°28'23"E, 409.55 feet to the point of curvature of a curve to the left, said curve having a central angle of 0°39'56" and a radius of 2713.53 feet, the long chord of which bears S43°48'13"E, 31.52 feet; thence Southeasterly along the arc of said curve, 31.52 feet; thence S01°05'30"E, 95.41 feet to the Northerly line of Interstate Highway 39/90 and the point of curvature of a curve to the right, said curve having a central angle of 2°06'11" and a radius of 2779.53 feet, the long chord of which bears N44°31'20"W, 102.02 feet; thence Northwesterly along the arc of said curve and Northerly line, 102.03 feet; thence N43°28'23"W along said Northerly line, 435.25 feet;

thence N00°53'54"W, 202.82 feet to the point of beginning. The above described containing 3.046 acres, being subject to a right of way for County Highway B across the Northerly 33 feet thereof.

"B"

A parcel of land located in NW 1/4 of the NE 1/4, the NE 1/4 of the NE 1/4, the SE 1/4 of the NE 1/4 and the SW 1/4 of the NE 1/4 of section 29, T 6 N, R 12 E, Town of Christiana Dane County, Wisconsin. Commencing the Northeast corner of said section 29;Thence S 02°03'11" E, 1314.59 feet, along the East line of said section 29 to point 104 as shown on Transportation Project Plat (TPP) NO: 1007-10-23-4.01, filed as Document #5219192, in the Dane County Register of Deeds Office, also being the point of beginning for said parcel; Thence continuing S 02°03'11" E, 373.75 feet; Thence S 88°59'23" W, 896.78 feet; thence Southwesterly along an arc of a curve to the left 315.21 feet with a radius of 734.00 feet and a chord that bears S 76°41'14" W, 312.79 feet; thence S49°21'10"W, 177.50 feet; thence Southwesterly along the arc of a curve to the left 351.04 feet with a radius of 709.00 feet and a chord that bears S36°12'33"W, 347.46 feet; thence N08°27'17"W, 1671.83 feet; thence Southeasterly along an arc of a curve to the left 1487.93 feet and a chord that bears S58°48'24"E. 1470.24 feet; thence S88°53'58"E, 294.00 feet; thence Southeasterly along an are of a curve to the left 223.72 feet with a radius of 2719.93 feet and a chord that bears S82°29'46"E, 223.66 feet back to point 104 and the point of beginning for said parcel; Said parcel contains 27.29 acres more or less

"C"

Part of the SW ¼ of the NW ¼ of Section 29, Town 6 North, Range 12 East, Town of Christiana, Dane County, Wisconsin, described as follows:
Beginning at the Northwest corner of the SW ¼ of the NW ¼; thence N89°03'30"E along the North line of said ¼ - ¼, 243.00 feet; thence S02°03'11"E, 988.56 feet; thence S89°03'30"W, 243.00 feet to the West line of said ¼ - ¼ ; thence N02°03'11"W, 988.56 feet to the point of beginning. Containing 5.514 acres.

"D"

Part of the SE ¼ of the NE ¼ of Section 29, Town 6 North, Range 12 East, Town of Christiana, Dane County, Wisconsin, described as follows:
Commencing at the East ¼ corner of Section 29; thence N02°08'43"W along the East line of the SE ¼ of the NE ¼, 342.44 feet to the point of beginning; thence S89°15'48"W, 1274.63 feet; thence N02°03'11"W, 500.59 feet; thence N49°21'10"E, 90.71 feet to the point of curvature of a curve to the right, said curve having a central angle of 24°36'18" and a radius of 734.00 feet, the long cord of which bears N76°41'14"E, 312.79 feet; thence Northeasterly along the arc of said curve, 315.21 feet; thence N88°59'23"E, 896.78 feet to the East line of the SE ¼ of the NE ¼; thence S02°03'11"E along said line, 631.21 feet to the point of beginning. Containing 18.067 acres.

CONDITIONS:

1) Topsoil, or appropriate topsoil substitute as approved in a reclamation plan under Chapter74, Dane County Code, from the area of operation shall be saved and stored on site for reclamation of the area. Topsoil or approved topsoil substitute must be returned to the top layer of fill resulting from reclamation.
2) The applicant shall submit an erosion control plan under Chapter 14, Dane County Code covering the entire CUP area for the duration of operations, and receive approval of an

erosion control permit prior to commencing extraction operations.

3) Operations shall cease no later than ten (10) years from the permit effective date.

4) Reclamation shall meet all requirements of Chapter 74 of the Dane County Code of Ordinances. In addition, all reclamation plans must meet the following standards:
   a) Final land uses after reclamation must be consistent with any applicable town comprehensive plan, the Dane County Comprehensive Plan and the Dane County Farmland Preservation Plan.
   b) Final slopes shall not be graded more than 3:1 except in a quarry operation.
   c) The area shall be covered with topsoil and seeded to prevent erosion.
   d) The area shall be cleared of all debris and left in a workmanlike condition subject to the approval of Dane County.

e) Highwalls shall be free from falling debris, be benched at the top, and certified by a civil engineer to be stable.

5) The entire driveway must be blacktopped within two years. Crushed asphalt must be placed on the driveway immediately and watered at least twice weekly during the first year.

6) The operator shall maintain the driveway in a dust free manner in accordance with local, state, and federal regulations, and shall clean any dust or mud tracked onto public roads.

7) The access to the driveway shall have gates securely locked when the extraction site is not in operation. The site shall be signed "no trespassing."

8) All surface and subsurface operations shall be setback a minimum of 20' from any property line that does not abut a public right of way.

9) Excavations below the grade of an abutting public street or highway shall be set back from the street or highway a distance at least equal to the distance that is required for buildings or structures under s. 10.102(9). The committee and town board may require greater setbacks where necessary to avoid subsidence, or for consistency with Chapters 11, 14, 17 or 74, Dane County Code.

10) Hours of operation shall be 6:30 a.m. to 5:30 p.m. Monday through Friday, and 6:30 a.m. to 3:30 p.m. on Saturdays. No operations of any kind shall take place on Sundays or legal holidays. Blasting shall be limited to 8:00 a.m. to 4:00 p.m. on weekdays.

11) A safety fence shall be placed around the perimeter of the extraction area that contains high walls and/or steep slopes.

12) Except for incidental removal associated with dust spraying or other routine operations under this permit, water shall not be pumped or otherwise removed from the site.

13) The operator shall require all trucks and excavation equipment to have muffler systems that meet or exceed then current industry standards for noise abatement.

14) The operator shall meet DNR standards for particulate emissions as described in NR 415.075 and NR 415.076, Wisconsin Administrative Code.

15) Dane County and the Town shall be listed as additional named insureds on the operator's liability insurance policy, which shall be for a minimum of $1,000,000 combined single limit coverage per occurrence. The operator shall furnish a copy of a Certificate of Insurance as evidence of coverage before operations commence. The liability insurance policy shall remain in effect until reclamation is complete.

16) Blasting:
   a) All blasting on the site must conform with all requirements of SPS 307, Wisconsin Administrative Code, as amended from time to time, or its successor administrative code regulations.
   b) Fly rock shall be contained within the permitted mineral extraction area.
   c) A 72-hour notice shall be made prior to blasting to all residences/businesses within a one-half mile radius of the property, as well as to any parties who have requested notification either via mail or email as well as to the Town of Christiana.
   d) The Town of Christiana and up to three neighbors shall receive a report and a seismograph reading from each blast.

17) Fuel storage. All fuel storage must comply with ATCP 93, Wisconsin Administrative Code,

including provisions for secondary spill containment.

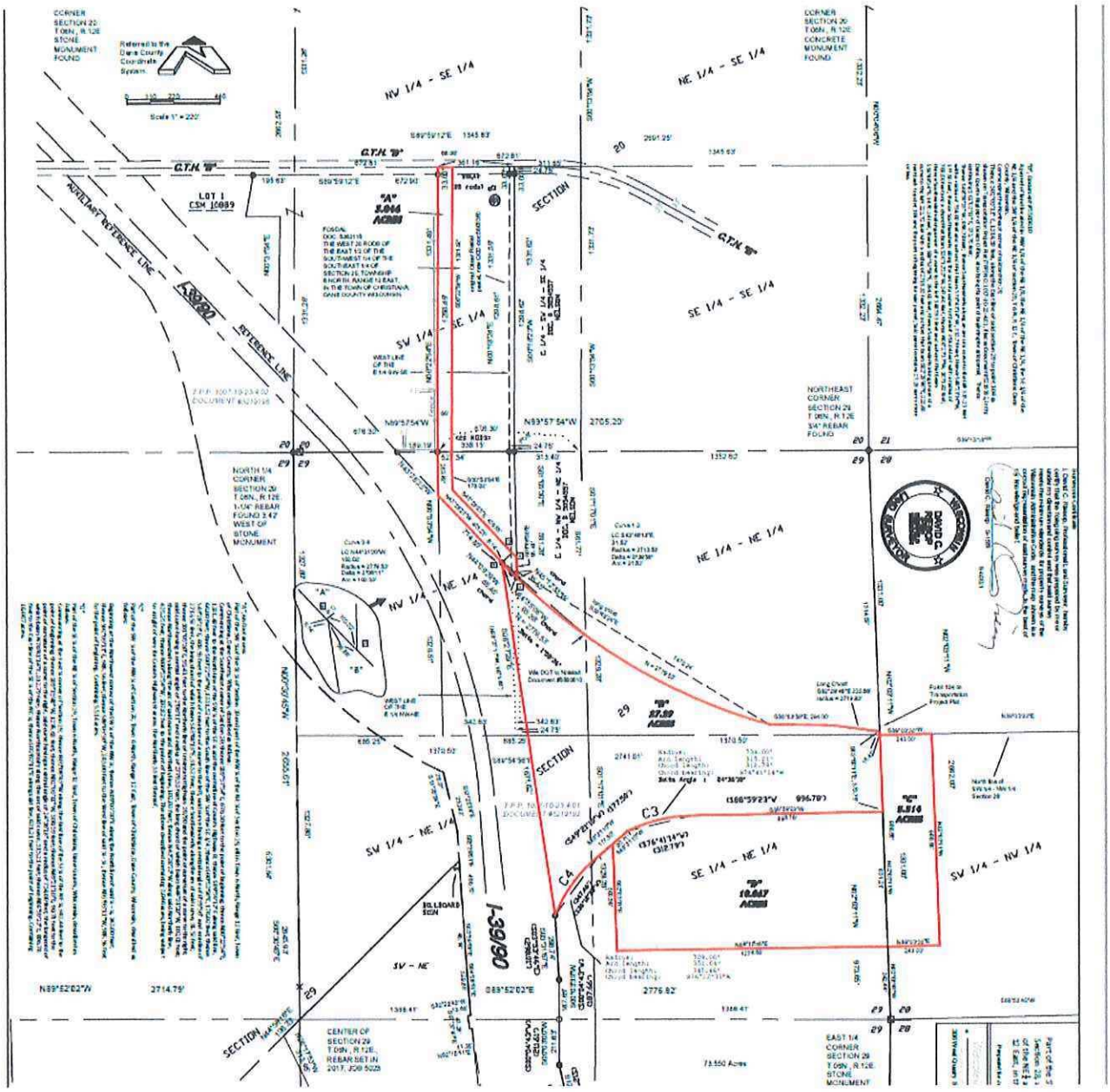
18) Mineral extraction at or near groundwater. All excavation equipment, plants, and vehicles shall be fueled, stored, serviced, and repaired on lands at least 3 feet above the highest water table elevation to prevent against groundwater contamination from leaks or spills.
19) In the event that a mineral extraction operation will destroy an existing Public Land Survey Monument, witness monuments must be established in safe locations and a new Monument Record filed by a Professional Surveyor, prior to excavation and disturbance of the existing monument.
20) This Conditional Use Permit (#2509) for mineral extraction is for the operator Forever Sandfill & Limestone and is not transferable to any other operator.

THE ZONING AND LAND REGULATION COMMITTEE AFTER PUBLIC HEARING AND IN THEIR CONSIDERATION OF THE CONDITIONAL USE PERMIT MADE THE FOLLOWING FINDINGS OF FACT:

1. That the establishment, maintenance and operation of the proposed conditional use will not be detrimental to or endanger the public health, safety, morals comfort or general welfare.
2. That the uses, values, and enjoyment of other property in the neighborhood for purposes already permitted will not be substantially impaired or diminished by the establishment, maintenance, and operation of the proposed conditional use.
3. That the establishment of the proposed conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.
4. That adequate utilities, access roads, drainage and other necessary site improvements will be made.
5. That adequate measures will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets.
6. That the proposed conditional use does conform to all applicable regulations of the district in which it is proposed to be located.
7. The proposed conditional use is consistent with adopted Town and County Comprehensive Plans.
8. If located in the Farmland Preservation (FP) area, the conditional use meets the necessary findings to be located in the district as per Dane County Code of Ordinances Section 10.220 (1).

EXPIRATION OF PERMIT

Upon the allowed land use's cessation or abandonment for a period of one year, this Conditional use permit will be deemed to have been terminated and any future use shall be in conformity with the ordinance. See condition #3.


CORNER SECTION 20 T.09N., R.12E STONE MONUMENT FOUND
Referred to the Dane County Coordinate System
Scale 1" = 220'
NW 1/4 - SE 1/4
NE 1/4 - SE 1/4
CORNER SECTION 20 T.09N., R.12E CONCRETE MONUMENT FOUND
G.T.H. "B"
LOT 1 CSM 10089
AUXILIARY REFERENCE LINE
"A" 3.044 ACRES
SECTION
SE 1/4 - SE 1/4
SW 1/4 - SE 1/4
REFERENCE LINE
NORTHEAST CORNER SECTION 29 T.09N., R.12E 3/4" REBAR FOUND
NORTH 1/4 CORNER SECTION 29 T.09N., R.12E 1-1/4" REBAR FOUND 3.47' WEST OF STONE MONUMENT
NE 1/4 - NE 1/4
NW 1/4 - NE 1/4
"B" 27.59 ACRES
"C" 5.516 ACRES
"D" 10.047 ACRES
SW 1/4 - NE 1/4
SE 1/4 - NE 1/4
SW 1/4 - NW 1/4
I-39/90
SW - NE
CENTER OF SECTION 29 T.09N., R.12E. REBAR SET IN 2017, JOB 5028
EAST 1/4 CORNER SECTION 29 T.09N., R.12E. STONE MONUMENT
73.550 Acres
N89°52'02"W
2714.79'
S89°52'02"E
2776.82'
N89°57'54"W
2705.20'
S89°59'12"E
1345.83'

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August 24, 2015

Supervisor Mary Kolar
Dane County Zoning and Land Regulation Committee
Room 106, City-County Building
Madison, WI 53703

RE: CUP # 2291

Dear Supervisor Kolar:

You have requested an opinion regarding the "petition" submitted by 350- Madison requesting rescission of CUP # 2291 issued to Enbridge Energy Company (Enbridge) and imposition of a new condition requiring a $25 million trust fund in lieu of the unenforceable insurance condition. Specifically, the committee has posed two questions: 1) what are the consequences if the ZLR would rescind the CUP and reapprove it with a condition requiring a $25 million trust fund for spill cleanup? and 2) are there other options to address the guarantees of spill clean up? Although the answer to the first question is multifaceted, the bottom line is that the County is likely to lose the inevitable litigation resulting from such action. My response to the second question is that there are no practical options for the committee or the county to take at this time.

Initially it is important to note that this issue is not currently pending before ZLR. CUP #2291 and a zoning permit have been issued to Enbridge and no further proceedings are pending. On or about August 10, 2015, 350- Madison submitted a "Petition" requesting rescission of the CUP. Procedurally 350-Madison has no standing to petition for rescission of a CUP, and the committee has no legal obligation to consider this petition.

I also note that 350-Madison prefaces their petition upon the claimed retroactive effect of Wis. Stats. §59.70(25). As I stated in my opinion dated July 17, 2015, "There is no issue of retroactive application of the statute. By the express language of the statute, effective July 14, 2015 the county is prohibited from requiring the insurance coverage. When the CUP was approved is irrelevant. The insurance conditions are rendered unenforceable prospectively by the language of §59.70(25)."

In my opinion the committee cannot reconsider or rescind the CUP granted to Enbridge for the pumping station at this time. Pursuant to the long standing common law of zoning in Wisconsin, Enbridge has vested rights in the CUP. *See Lake Bluff Housing Partners v. City of*

South Milwaukee, 197 Wis.2d 157 (1995) and *Building Height Cases*, 181 Wis. 519 (1923). Therefore, the committee has no legal authority to "reconsider" granting the CUP. Madison-350 has asserted that the Legislature's enactment of §59.70(25) authorizes the committee to revoke the permit and cites as authority *Adams v. State Livestock Facilities Siting Review Board*, 327 Wis.2d 676 (Ct. App. 2010). The language quoted by Madison-350 simply is not precedent for the legal proposition asserted. The Zoning Code has a procedure for revocation of a CUP in DCO §10.255(2)(m). However, grounds do not currently exist to proceed under that provision.

Assuming for the sake of argument that the committee could rescind the CUP at this time, imposition of a new condition requiring a $25 million trust fund would first require approval by the Town of Medina. If so approved, the new condition would be subject to appeal to the full county board and subsequent certiorari review by the circuit court.

On certiorari review the court would consider whether the committee's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and whether the evidence was such that the committee could reasonably reach the determination under review. *Snyder v. Waukesha County Zoning Bd. Of* Adjustment, 74 Wis.2d 468, 475 (1976). The findings of the county's consultant provide some factual basis for an argument that a trust fund condition would not meet these standards. On page 4 of the Executive Summary the consultant concludes that "Between the General Liability insurance coverage that Enbridge purchases with its modified Pollution Exclusion, the current liquid assets of Enbridge including profits and the funds available in government sponsored oil spill clean-up funds, there are sufficient liquid assets and other financial resources available in 2015 to fund the remediation of a Maximum Probable Loss (MPL) spill from line 61 in Dane County;.." This appears to state that Enbridge currently has sufficient insurance and assets to clean up the worst case scenario spill. Therefore, the proposed condition purports to require additional assurances of financial responsibility that are not currently needed.

Although many regulated industries have prospective requirements for financial assurance, such requirements are specifically authorized by statute and implementing regulation. As an example, Madison-350 cites the federal authority for requiring financial assurance for closure of solid waste facilities. (40 C.F.R. 258.71, *et seq.)* However, Dane County has no such statutory authority to impose a trust fund requirement on an interstate pipeline. In fact, it could be argued that Wis. Stat. §59.70(25) is a strong indication of legislative intent against such a requirement. Therefore, I believe it is likely that a court reviewing the proposed condition would find it to be unreasonably arbitrary and capricious.

My answer to your first question leads me to the conclusion that there are no other practical or legal options for the county to impose additional financial assurance requirements on Enbridge at this time. If in the future it appears that Enbridge does not have sufficient financial assurance to cover a spill clean up, the committee may be able to use it's authority under §10.255(2)(m) to revoke the CUP if there is evidence to establish that the standards in sub (2)(h)1 and not being complied with.

Please contact me if you have questions regarding this opinion.

Sincerely,

David R. Gault
Assistant Corporation Counsel

Wis. Stat. § 59.69(5e)

(5e) CONDITIONAL USE PERMITS.

(a) In this subsection:

1. "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a county, but does not include a variance.

2. "Substantial evidence" means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.

(b)

1. If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the county ordinance or those imposed by the county zoning board, the county shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.

2. The requirements and conditions described under subd. 1. must be reasonable and, to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal. The applicant must demonstrate that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The county's decision to approve or deny the permit must be supported by substantial evidence.

(c) Upon receipt of a conditional use permit application, and following publication in the county of a class 2 notice under ch. 985, the county shall hold a public hearing on the application.

(d) Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the county may impose conditions such as the permit's duration, transfer, or renewal, in addition to any other conditions specified in the zoning ordinance or by the county zoning board.

(e) If a county denies a person's conditional use permit application, the person may appeal the decision to the circuit court under the procedures contained in s. 59.694 (10).

Transcript of comments by ZLR Committee member Supervisor Kiefer during the March 23, 2021 meeting. Comments begin at the 1:47:02 mark of the video in Legistar.

So, the question before us, we have to consider if the eight standards are met. I'm not going to go through all eight of them but I think the factor that was most discussed tonight it seems to be most at issue is this question of factor 2 which is, among other things, whether the values of other property in the neighborhood shall be in no foreseeable manner substantially impaired by the conditional use.

And I look at the evidence that's been submitted to us, which, frankly, there's not that much evidence on either side of this. We have from the applicant a report which sounds good. But when you look at the report it's actually a report from 2019 about a different quarry. It's not actually about this quarry or about this neighborhood. So I don't think that has a lot of weight.

And then, meanwhile you have the neighbors saying, well, it is going to impede our property values. But that appears to be primarily based just on their own opinions.

So there's actually not all that much evidence going either way. But I don't think when you look at it that it meets the standard that it substantially diminishes the values of the property. I think anything that goes on in any neighborhood would have some possible relationship with the property values. But that's not what this ordinance calls for. It has to be substantially diminishing the property values. And I think that they've shown at least through this report that relates to a different quarry that where there may or may not be some diminishment of the property values, I don't think it would rise to the level of substantially diminishing the value.

So I think they do satisfy factor 2, which is the thing that we seem to be the most discussing tonight, that and the driveway issue. So I am going to vote in favor of it.

But I would caution applicants in the future. If you come in with a report about a different property that really doesn't carry a whole lot of weight. I don't know why they bothered to submit that report. They should get a report about this property if they're going to do a professional report.