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MEMORANDUM

TO: Dane County Board of Adjustment (BOA)

FROM: Todd A. Violante, AICP, Director

DATE: September 2, 2021

RE: Appeal 3713 of CUP 2509

The purpose of this memo is twofold: 1) to provide a summary of the historical timeline for review of Conditional Use Permit (CUP) 2509, the final approval of which by the Dane County Zoning and Land Regulation Committee (ZLR) is being appealed to the Board of Adjustment (BOA) under Appeal 3713; and 2) to specifically address the four claims and bases for appeal submitted by the appellants to the BOA.

Summary of the Historical Timeline.

CUP 2509 was applied for on September 22, 2020 by Forever Sandfill & Limestone to permit a non-metallic mineral extraction operation in Section 29 of the town of Christiana. The full record of CUP 2509 may be found in Dane County's Legistar system using this [hyperlink](#). The document entitled "[CUP 2509 Staff Update.pdf](#)" is the initial staff report on the proposal, which provides a thorough overview of the request. The following summarizes the approval process of CUP 2509:

1. January 26, 2021: ZLR Public Hearing
 - a. This meeting was the official public hearing of the petition, as required to satisfy DCCO 10.101(7)(c)1.a. and Wis. 59.69(5e)(c), which is required of all CUPs. The meeting was published with a Class II notice in the Wisconsin State Journal on January 12 & 19, 2021.

- b. ZLR postponed action at this meeting because of opposition expressed at the hearing, and because the town of Christiana had not yet acted on the petition.
 - i. The ZLR Rules and Procedures require postponement of petitions when there is public opposition at the hearing, and except under extraordinary circumstances, ZLR will not take action on zoning petitions until the respective town has completed action.
 - ii. Opposition expressed at the public hearing mostly pertained to the following subjects: truck traffic and safety on local roadways, impact on property values, blasting notification and monitoring, the permit period, the water table, and dust.
 - iii. Letters of opposition submitted to the Committee are also included in the hyperlinked Legistar record as Items 12, 13, 15, 16, and 17.
- 2. March 9, 2021: Town of Christiana Board Meeting
 - a. The Christiana Town Board unanimously approved CUP 2509 with seven (7) conditions. The document entitled "CUP 2509 Town Action.pdf" in Legistar lists the specific town conditions.
- 3. March 23, 2021: ZLR Meeting
 - a. Testimony from the public is normally limited to the initial public hearing on a CUP, but the committee unanimously moved to allow for additional verbal testimony and written comments to be submitted at this meeting, which were entered into the record (again, see Legistar link).
 - b. Opposition to the petition raised at this meeting pertained more specifically to property values. Both the applicant and the opposition presented information on property value impacts.
 - c. Following discussion, ZLR unanimously approved CUP 2509 with 20 conditions, which incorporated the seven (7) conditions of the town of Christiana.
 - d. Section 10.101(7)(d) of the Dane County Zoning Ordinance requires that eight (8) standards must be met (these standards are listed in the staff report cited above and included in the Legistar record). With the 20 town and county conditions placed on the approval of CUP 2509, ZLR concluded that the eight (8) standards for the granting of a CUP were met.
 - i. The ZLR Rules and Procedures includes the following statement on assessing satisfaction of the standards: *"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 s. 10.101(7)(d), and, if applicable, the relevant standards for particular uses in s. 10.103, and/or the standards applicable to conditional uses in a farmland preservation zoning district in s. 10.220(1)(a), Dane County Code of Ordinances."*

4. April 27, 2021: ZLR Public Hearing

- a. Following ZLR's approval of CUP 2509 on March 23, 2021, the applicant received approval on April 19, 2021 of a highway access permit onto County Trunk Highway B. However, the Dane County Highway and Transportation Department permit, titled "CUP 2509 Hwy Access Approval.pdf" in the Legistar record, was conditioned on the access driveway being moved 300 feet to the west of where the access was originally shown, and outside of the CUP boundary description provided and approved by ZLR. In order to accommodate the driveway location approved by the Highway Department, the CUP boundary needed to include the approved location. It was the opinion of Dane County Corporation Counsel that the ZLR was within their authority to reconsider their previous approval, and a motion was passed at the April 27 ZLR meeting to place reconsideration of CUP 2509 on the May 11, 2021 ZLR work meeting agenda to address the issue of the revised driveway location.
 - i. Note that the standard conditions placed on *all* CUPs by way of Dane County Zoning Ordinance Section 10.101(7)(d)2.a.iv. require compliance with the terms of all other necessary permits: "*The applicant shall apply for, receive and maintain all other legally required and applicable local, county, state and federal permits. Copies of approved permits or other evidence of compliance will be provided to the zoning administrator upon request.*" So, the granting of the required CTH B access permit was conditioned on the driveway moving 300 ft. to the west, and consistency with the conditions of approval for CUP 2509 required consistency with this other county permit requirement modification.

5. May 11, 2021: ZLR Work Meeting

- a. The Committee reconsidered the matter and approved CUP 2509 with a modified CUP boundary to include the approved driveway location, along with the original 20 conditions of approval. A map of this modification and the final conditions of approval is included in the Legistar record as "CUP #2509 w revised boundary."
 - i. The access point onto CTH B, the location of the associated access drive and the commensurate boundary adjustment were the only elements of the original proposal to change; all remaining aspects of the proposal were left unchanged.
 - ii. After a successful motion to reconsider a matter, the item of business is before the body as if the previous final action had not occurred, but all discussion and other actions leading up to the final action had, and in the case of CUP 2509, this included the official public hearing of January 26, 2021.

Responses to the Appellants Claims

The appellants made four claims as the basis of their appeal. Each claim is cited below, with a response to each.

1. Appellant claim: "The ZLR Committee reconsidered an approved CUP without authority to take this action."
 - a. Response: In consultation with and at the recommendation of Dane County Corporation Counsel, following the April 19, 2021 approval of the Dane County Highways permit requiring the 300 ft. westerly move of the CTH B access point, an agenda item was placed on the next available ZLR meeting agenda for April 27, 2021 to discuss reconsideration of CUP 2509. The committee discussed and then passed a motion to place reconsideration of CUP 2509 on the next available ZLR meeting agenda, May 11, 2021, to allow for appropriate public notice in advance of the meeting. Reconsideration was a legitimate option for the Committee, and it was evaluated and initiated by ZLR in consultation with and at the recommendation of Dane County Corporation Counsel.
2. Appellant claim: "The ZLR Committee failed to make written findings of fact as required by the Zoning Ordinance."
 - a. Response: As noted above, the ZLR Rules and Procedures include the following statement on assessing satisfaction of the standards: "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." Furthermore, the primary basis for the 20 town and county conditions uniquely placed on CUP 2509, along with all of the standard conditions applied by ordinance, are to sufficiently ameliorate the potential secondary impacts of the proposal and in turn satisfy the required standards for CUPs. These conditions written into the record establish how the standards are met by keeping the operation of the site within reasonable and enforceable parameters to the benefit of surrounding residents and property owners. The approval, and inherently, the written findings are memorialized in the meeting minutes.
3. Claim: "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."

- a. Response: The argument for this claim primarily focuses on the discussion of impacts on surrounding property values. The claim references the statutory definition of “substantial evidence:” *“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.”*

The statutory language governing conditional use permits was encoded in 2017 by Wisconsin Act 67, which was published on November 28, 2017. In writing about Act 67, Professor and Attorney Brian Ohm of the UW-Madison Department of Planning and Landscape Architecture noted that, “Public comment that provides reasonable facts and information related to the conditions of the permit is accepted under Act 67 as evidence.” Attorneys Andrew Phillips and Bennett Conard from the law firm of von Briesen & Roper also writing about Act 67 on behalf of the Wisconsin Counties Association further commented on the ‘substantial evidence test’ under the *AllEnergy* case:

“In other words, a zoning agency’s determination must be upheld so long as ‘credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision’ supports the decision of a zoning agency. *Id.* As stated above, there may even be substantial evidence supporting a conclusion contrary to the ultimate decision. However, so long as the evidence relied upon in support of a decision is corroborated and more than mere hearsay, and the determination based on that evidence was reasonable, the decision must be upheld.”

In the case of CUP 2509 and ZLR’s action to approve, both the applicant and the opposition, now the appellants, provided information that meets the definition of “substantial evidence,” yet offered conflicting conclusions about the impacts of the proposal on surrounding property values: the document in Legistar entitled “CUP 2509 Property Value Min Extract Report,” was submitted by the applicant, and the one entitled “CUP 2509 Knutson Opposition information.pdf” was submitted by the opposition/appellants. In effect, the substantial evidence provided by each party counterbalanced the other, and was inconclusive in making a clear point about any impact on property values, but substantial evidence was nonetheless provided by both parties on this subject. The appellant provides no proof that the evidence considered by the ZLR was not factual.

As discussed above, again, the approved conditions of CUP 2509 were designed and intended to ensure that the standards of approval are sufficiently met and adverse secondary impacts are minimized. The conditions of approval are enforceable and violation of them can be grounds for revocation of the CUP to

ensure 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.”

4. Claim: “The ZLR Committee erred by not imposing standard conditions as required by the Zoning Ordinance.”
 - a. Response: This claim may be refuted by simple reference to the official approval document, included in the Legistar record as “CUP #2509 w revised boundary.” Note the introductory language that reads, “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) [emphasis added] and subject to the additional conditions listed below.” The underlined clause here in the permit itself cites the standard conditions for all CUPs, s. 10.101(7)(d)2, and the standard conditions for all mineral extraction CUPs, s. 10.103(15), as conditions of approval. These standard conditions are further included and cited on page 4 of the staff report in the preface to the conditions, and they are simply already required and imposed outright by ordinance. These standard conditions were clearly imposed on CUP 2509, and there was no error or omission of them.

Conclusion

The Zoning and Land Regulation Committee followed the County’s standard approval process used for all conditional use permits (CUPs), including the ZLR Rules and Procedures, Dane County Zoning Ordinance, State Statute, Dane County Board Rules, and Roberts Rules of Order in the processing of CUP 2509. ZLR’s review and action on CUP 2509 was thorough and competent. All meetings were appropriately noticed and publicly accessible; ample opportunities were provided for public input; there is a robust, easily accessible record on CUP 2509 in Legistar; and fair and complete consideration was given to both the CUP applicant’s and the appellants’ concerns. With the adoption of the noted conditions, ZLR concluded that secondary impacts would be reasonably mitigated and that the applicable standards would be met, and they approved the CUP. Reconsideration of CUP 2509 was used appropriately in consultation with Dane County Corporation Counsel and applied in response to the Dane County Highways access permit modification, which occurred after the initial approval of CUP 2509. The claims submitted by the appellants are insufficient to warrant overturning the decision of the ZLR, and the Committee’s decision should be sustained.