



Dane County Board of Adjustment

Decision of the Dane County Board of Adjustment

Administrative Appeal: Appeal 3705. Administrative appeal by Yahara Materials Inc. (Eric McLeod, Husch Blackwell, agent) appealing a decision of the Zoning Administrator related to the status of a non-metallic mineral extraction operation (Kreuger Site) located at 66 Quarry Rd being a tract of land in the SE ¼ of the SW ¼, and the SW ¼ of the SE ¼, Section 32, Town of Montrose.

FINDINGS OF FACT

Having heard the testimony and considered the evidence presented, the Board determines the facts of this case to be:

Filing Date: April 13, 2020.

Meeting notice published: August 26 and September 2, 2021, Wisconsin State Journal.
Affidavit of publication/posting is on file.

Hearing Date: September 9, 2021

Appellant: Yahara Materials, Inc. (Attorneys Eric McLeod, agent)

1. 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.
2. Under section 10.102(7)(b), registered nonconforming mineral extraction sites are now subject to the provisions of the new zoning ordinance.
3. 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.
4. 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.

5. Yahara Materials and Dane County staff (Lane and Everson) exchanged e-mails with regards to the accuracy of the non-conforming boundary.
6. 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.
7. 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.
8. Time line 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.

9. 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
- (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.

10. 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.
11. 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.
12. 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.
13. When the subject site was registered in 1969, 5 acres was written down by the operator for estimated acreage reserved for deposit.
14. Dane County Planning and Development has recognized that the 40 acre parcel has non-conforming status for 50 years.
15. The Gilles Trust farm non-conforming mineral extraction site, in Section 4 and 5, Town of Vienna, described originally as 8 acres was registered as an existing aggregate site with Dane County by Melvin Paulson in 1969 under ownership of Elmira Schroeder.
16. The Dane County Zoning mineral extraction map shows the Gilles Trust farm in Sections 4 and 5 in the Town of Vienna as a 124.7 acre non-conforming mineral extraction site.
17. Josephine A Krueger, as trustee for the John L & Josephine A Krueger Trust, signed an unrecorded notice prepared by Yahara Materials, Inc., dated January, 29, 2020, noticing parcels 0508-323-9500-1 and 0508-324-9000-5 indicates the presence of an active nonconforming mineral extraction site.

CONCLUSIONS OF LAW

Based on the above findings of fact the Board concludes that:

1. The Appellant's statement of the Diminishing Asset Rule in Wisconsin is missing a third element. The Wisconsin Court of Appeals in the Sturgis case (Cited in Appellant's Brief.) stated on page 152 of that case: "The relevant inquiry is 4X Corporation's intent and ownership of the property coupled with the unique use of extraction." Appellant failed to include the need to establish the intent of the landowner at the time the ordinance was implemented. To establish a nonconforming use for mineral extraction the intended extent of that use by the owner at the time that vested right was being created is important. That owner had the right to intend all their property could eventually be used for mineral extraction. On the other hand, that owner also had the right to intend mineral extraction eventually extend to just a limited part of their property and the remainder be put to other uses.
2. Appellant argues on page three of his brief under the diminishing asset rule " ...commonly owned and contiguous parcels share the same nonconforming use status as the underlying registered parcel." We find that the diminishing asset rule is not without limits. In his opening statement at the Public Hearing of this Administrative Appeal Appellant refers to Schroeder v. Dane County Board of Adjustment as one of three cases that lay out that rule as it exists in Wisconsin. (Sturgis and Smart being the other two.) In Schroeder the Wisconsin Court of Appeals, having concluded that the plain language of the ordinance requires registration and

approval of the existing mineral extraction operation, addresses the zoning administrator's concern that this "... thwarts the purposes of regulating non-conforming uses." The Court stated:

"The diminishing asset rule is a gloss on the definition of 'existing use' for mineral extraction operations whereby all land which constitutes an integral part of the operation, notwithstanding the fact that it was not under actual excavation, is considered 'in use.' See Sturgis, 141 Wis. 2d at 154, 413 N. W. 2d at 644. However, this is not an unlimited definition and does not automatically permit expansion of a mineral extraction operation to every portion of every contiguous parcel owned by the operator. 'The relevant inquiry is [the owner's] intent and ownership of the property coupled with the unique use of extraction.' Id. At 152, 413 N. W.2d at 643"

We conclude the Appellant must also show the original owner's intent to extract minerals on the acres contended; not just that they were owned and contiguous, and that including them is necessary due to the unique nature of mineral extraction.

3. As per item #14 in the Finding of Facts (above), The County recognizes that the nonconforming status of the Kreuger Site extends beyond the 5 acres listed in the 1969 registration. The appellant presented evidence of similar appeals that have been granted by the County in accordance with the Diminishing Asset Rule (recognized by the Wisconsin Supreme Court), including the early 2020 decision re the Beuthin property in the Town of Mazomanie. Given non-metallic mining on the Beuthin site and others have been allowed to extend beyond the originally indicated acreages, given the similarity of these situations, the BOA finds no reason for the Kreuger property to be treated differently.
4. Appellant cited a Dane County Board of Adjustment decision from September 16th, 1980. We note that the decision of that board predates Wisconsin Court of Appeals and Wisconsin Supreme Court cases that determined and examined the diminishing asset rule as it exists in Wisconsin.
5. The current landowner demonstrated intent by signing an unrecorded notice identifying the presence of existing active nonconforming mineral extraction on both parcels.
6. Parcels 0508-323-9500-1 and 0508-324-9000-5 contain a non-conforming mineral extraction site in their entirety.

On the basis of the above findings of fact, conclusions of law and the record in this matter the Board replaces the decision of the Zoning Administrator and determines the non-conforming status of the mineral extraction site applies to both parcels (0508-323-9500-1 and 0508-324-9000-5).

Appeals. This decision may be appealed by a person aggrieved by this decision or by any officer, department, board or bureau of the municipality by filing an action in certiorari in the circuit court for this county within 30 days after the date of filing of this decision. The municipality assumes no liability for and makes no warranty as to reliance on this decision if development is commenced prior to expiration of this 30-day period.

Written Decision prepared by: Hans Hilbert, Assistant Zoning Administrator.

I certify that this is the decision of the Dane County Board of Adjustment:

Al Long, Chairman Sign: _____ Date: _____

Filed with the Dane County Planning and Development Department, Zoning Division:

Todd Violante, Director Sign: _____ Date: _____