

In Re Appeal of: Conditional Use Permit Issued to
Donald Kinas, Parcel Nos. 004-00787-0000, 786-000

**POSITION STATEMENT OF GREEN LAKE ASSOCIATION,
GREEN LAKE CONSERVANCY, GREEN LAKE SANITARY DISTRICT,
AND ERNIE NEUENFELDT**

This case presents the perfect storm: a uniquely risky proposed use in an extraordinarily sensitive environmental setting. The proposed use, a non-metallic mine, is risky because mining below the groundwater table would likely mobilize sulfide minerals that would in turn contaminate local springs and drinking water supplies. Even if mining occurred above the groundwater table, sulfide minerals in any exposed rock would cause acid mine drainage, and stormwater runoff would eventually discharge onto neighbors' properties. This is even before neighborhood impacts like noise, dust, truck traffic, blasting, and lights are considered. Meanwhile, the mine would be less than a half-mile from two rare surface water resources, Powell Spring and Mitchell Glen, and the area also hosts trout streams that eventually feed Green Lake.

Against this backdrop, the Green County Land Use Planning & Zoning Committee ("LUPZC") approved a conditional use permit ("CUP") for the mine in a rushed process and deferred findings about the mine's environmental impact to a future date. This Board should not make the same mistake. It must determine whether the Applicants Donald Kinas and Kopplin & Kinas ("Applicants") have shown they will satisfy the County's many standards that apply to this mine by substantial evidence. For the reasons stated below, Applicants have not. Moreover, other substantial evidence shows that the standards cannot be met. Appellants

Green Lake Association, Green Lake Conservancy, Green Lake Sanitary District, and Ernie Neuenfeldt (“Appellants”) respectfully request that the Board deny the CUP.

I. FACTUAL BACKGROUND¹

a. The Proposal

On March 30, 2022, landowner Donald E. Kinas and operator Kopplin & Kinas Co., Inc. applied for a CUP to construct and operate a non-metallic mine (“Mine”) on Green Lake County Parcel Nos. 004-00787-0000 and 004-00786-000 (together, “the Site”).² The Site is currently an open agricultural field in the A-1 Farmland Preservation district; 40 of those acres would be disturbed by the project. Applicants propose to mine various forms of limestone aggregate at the Site six days per week, from 5:30a.m.-6:30p.m. Monday through Friday, and 6:00a.m.-3:00p.m. on Saturday. The Site is directly across the road from three residential properties, including Ernie & Ida Neuenfeldt’s, and within ½-mile of 10 more residential properties, two family dairy farms, and two conservation properties with critical water resources, Powell Spring (0.44 mile) and Mitchell Glen (0.32 mile). The Site is higher in elevation than the springs, and groundwater flows northwest from the site, into Green Lake, approximately one mile downgradient.

According to the application, mining would begin on the southern 40-acre parcel and the Applicant would construct a significant drainage swale on the northern 40 acres, emptying into a large sediment basin adjacent to Brooklyn G Road. The topography north and west of

¹ Appellants rely on the CUP application submitted earlier this year, other information before the LUPZC that has been provided to the Board, evidence Appellants anticipate will be offered to the Board, and the reports of their experts that are submitted herewith: Dr. Steve Gaffield of Emmons Olivier Resources (“EOR Report”), Craig Hungerford of Real Estate Dynamics, Inc. (“REMI Report”), and Dr. Seth Schneider of the University of Wisconsin-Milwaukee (UW-Milwaukee Report”). Appellants reserve the right to present additional evidence at hearing and make argument based on evidence presented by others.

² The application was internally inconsistent, depicting the Proposal as concerning only parcel no. 004-00787-000, but also showing that parcel no. 004-00786-0000 is an integral part of the operation.

the Site is significant, with the northern 40 acres of the Site situated at the top of a ridge that sharply descends toward neighboring residential properties. As a result, the existing stormwater drainage patterns travel away from the Site to the north and west, toward the Neuenfeldt and neighboring properties. The application contains no information about water consumption, or how the Mine's substantial water requirements will be met.

b. The Appellants and Their Properties

The **Green Lake Conservancy (GLC)** is a 501(c)(3) all-volunteer, non-profit land trust with a mission to preserve and protect special places throughout and around Green Lake County. GLC owns the scenic, high value 6-acre property known as Powell Spring. The property protects a large cold-water spring, which is highly sensitive to groundwater and surface water disruptions. GLC purchased Powell Spring in 2021 by leveraging existing resources to obtain a \$299,500 loan. In March 2022, GLC secured a Wisconsin Department of Natural Resources ("WDNR") grant to partially fund the purchase. This property is now protected and will remain as conservation land in perpetuity. GLC is currently removing all human developments and restoring the property to a natural state. Any change in water quality or quantity would undermine the public's and GLC's significant investment, and the current fundraising effort to repay the loan secured for the purchase.

The **Green Lake Sanitary District (GLSD)** is a governmental entity organized under Wis. Stat. § 60.71. The GLSD was established in 1964 and includes all existing areas around Green Lake, excluding the City of Green Lake. The GLSD was formed as a means to protect Big Green Lake and its associated resources with respect to sanitation and related land, air, and water quality. The GLSD owns the scenic, high value 11.6-acre property known as Mitchell Glen. Its intent in purchasing Mitchell Glen was to ensure the protection of the origin of Glen

Creek which flows into Dakin Creek, a Class II trout stream and significant tributary into Big Green Lake. According to WDNR partners and local biologists, Mitchell Glen is possibly the most significant natural area in southcentral WI after the Parfrey's Glen State Natural Area near Baraboo, due in part to its 40 to 50 foot waterfall and 100 foot sandstone walls.

The Glen was purchased in 2004 through a mix of public and private funding provided by the WDNR (\$75,000), GLA (\$10,000), GLC (\$7,500), and GLSD (\$7,500). The GLSD began efforts to protect and enhance the property for the future by working closely with the Green Lake County Land Conservation Department to complete a \$27,000 stabilization project to limit erosion. \$16,000 was spent on a raised boardwalk to provide public access, and countless hours were donated by community members to clear invasive species from the edges of the Glen. In recent years, the GLSD has worked with the WDNR to monitor the flow of the springs at Mitchell Glen as they are highly sensitive to groundwater and surface water disruptions.

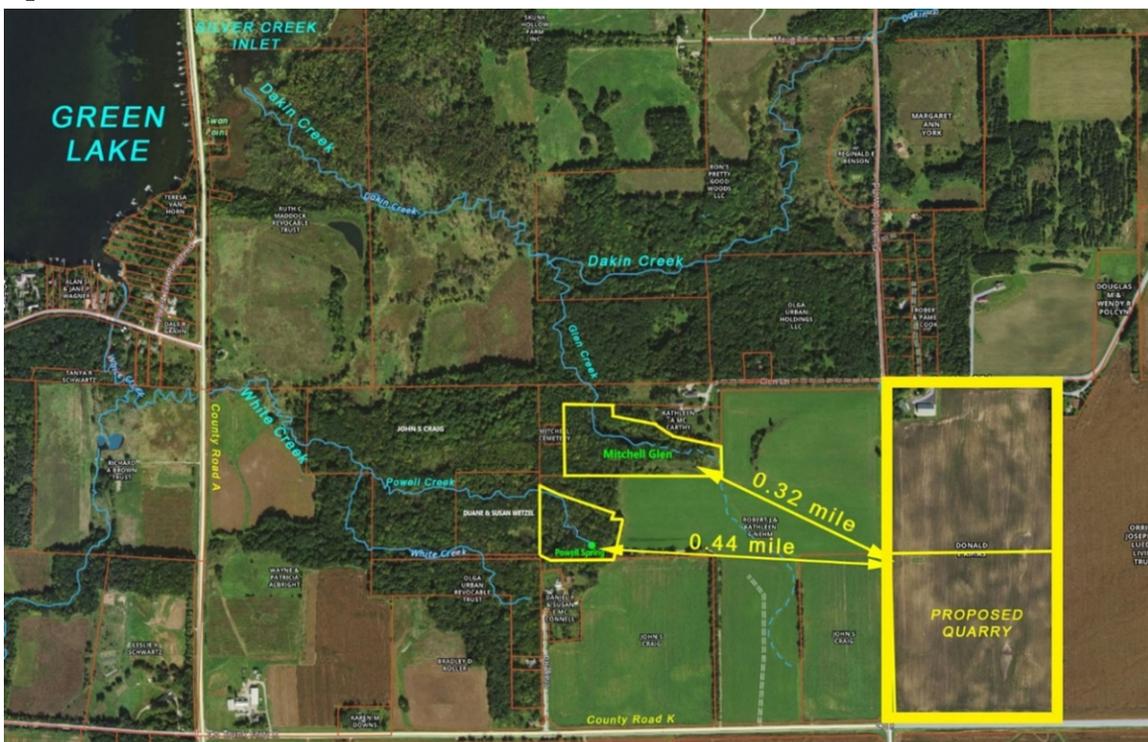


FIGURE 1. Mine proximity to Mitchell Glen and Powell Spring.

The **Green Lake Association (GLA)** is a 501(c)(3) non-profit organization founded in 1951. With 956 members, GLA is dedicated to improving, protecting, and ultimately restoring the water quality in Green Lake, a vital part of life in Green Lake County. GLA does so through education, outreach, research, and projects designed to improve the quality of water in and entering Green Lake.

One of those projects is the “Bring Back the Brookies” initiative, to bring back brook trout to Dakin Creek, a Class II trout stream and a tributary of Green Lake, located 0.75 miles north and downgradient of the Site. GLA has invested more than \$102,000 in the project since 2018 (including \$50,000 in funding from the WDNR) to add trout habitat, restore eroding stream banks, and install a larger culvert on Skunk Hollow Road. The culvert project required the GLA to partner with the Town of Brooklyn, which used tax dollars to fund improvements. The project has been a success, as brook trout have been restored on Dakin Creek after being absent for 70 years, and the WDNR found indications in 2022 that the brook trout are naturally reproducing. This success remains fragile; brook trout are sensitive to temperature and nutrient levels, and need clean, cool water to survive. Dakin Creek would be negatively affected by disrupted ground water and surface water flow to the Creek, and such disruptions would likely reverse the hard-won progress in the brook trout project.

Finally, **Ernie Neuenfeldt** is a property owner residing at N5139 Brooklyn G Road, Ripon, Wisconsin, within 300 feet of the Site. The entrance to the Neuenfeldts’ property is a 620-foot gravel lane descending from Brooklyn G Road, directly across from the Site. Two culverts running underneath Brooklyn Road G from the proposed sediment basin for the Mine will empty directly onto Ernie’s property.

Ernie's wife, Ida Mae, was born and raised on the 76.4-acre property. Ernie and Ida bought the property from Ida's mother in 1985 and raised their three children spending weekends on the property planting trees, clearing brush, hunting deer and turkey, and performing other improvements. They planted two-thirds of the property with a pine forest and other hardwoods, which are now full-grown. Ten acres of the property is old growth hardwood timber that has never been cleared or plowed and is situated where the Mine's culverts will empty onto the property. Over the years, Ernie and Ida spent countless hours installing dikes and diversions to control water flow and prevent erosion from their property to Dakin Creek. They also have two small agricultural fields (13 and 15 acres), which are planted each year to hay and corn by a farmer and neighbor.

In 2012 and 2013, Ernie and Ida built their permanent home and shop on the property. They now depend on the land for most of their sustenance. They tend to two large vegetable gardens and make all of their own wine from fruits they grow on the land and pristine water from their wells. Their three grandchildren, many nieces and nephews, and one great-grandchild visit frequently, and the property holds a special place in the hearts of the entire extended family.

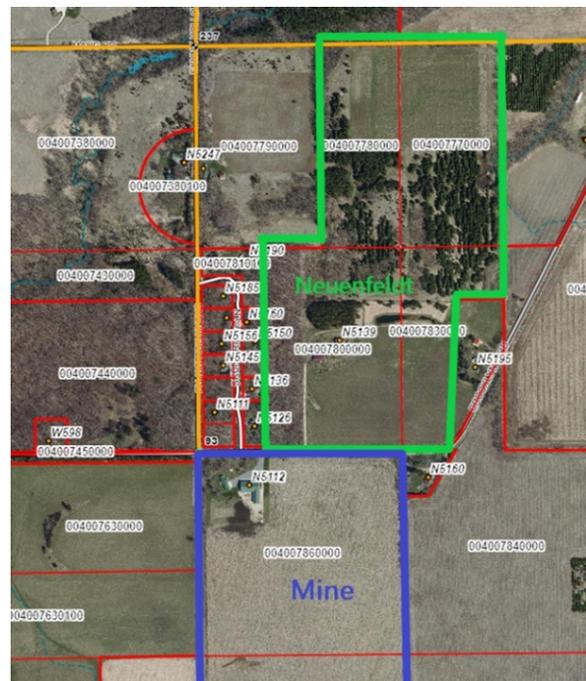


FIGURE 2. Ernie and Ida Neuenfeldt property.

II. LEGAL BACKGROUND

The Board has elected to review this matter de novo and decide anew whether the CUP should be granted. There are many rules that guide the Board's decision, starting with the

definition of a “conditional use permit” in the Zoning Code:

A use that may be considered in a particular zoning district if it is adaptable to the limitations of a particular site or made to be complimentary to adjacent land uses. The Land Use Planning and Zoning Committee ... shall only grant a conditional use permit if the use is consistent with the purpose and intent of this chapter, and may impose conditions that are related to the requested use and reasonable to ensure compliance with this chapter. The applicant must provide substantial evidence the conditions are or will be satisfied.

Zoning Ord. § 350-77; *see also id.* § 350-56(B)(1) (requiring consideration of “the particular facts and circumstances of each proposed use” when deciding a conditional use).

The term “substantial evidence” as used in the ordinance is a term of art, created in 2017 Wis. Act 67. ““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.” Wis. Stat. § 59.69(5e)(a)2. Before a decision to grant or deny a CUP may even be made, “[a]n applicant for a conditional use permit must demonstrate, with substantial evidence, that an application and all requirements and conditions relating to the conditional use are, or will be, satisfied.”³

While the same standard applies to CUP opponents, there is a common misconception that testimony of neighbors is not substantial evidence. This is not true. For example, when the Town of Cedarburg rejected a CUP for a cell tower in an A-1 district because it was not “compatible” with the surrounding area, the court found a similar statutory requirement for substantial evidence was satisfied:

The simple undisputed facts are the Akerlund farm is surrounded by areas zoned residential, and the Town has been trying to keep this area rustic and rural. . . . [A]lthough the tower itself will not be placed in the residential areas, it will be very

³ See Memo fr. Wis. Legislative Council to Senator Janet Bewley re: Local Government Discretion When Reviewing Conditional Use Permit Applications (Mar. 17, 2020) (copy attached).

close by, and **it was reasonable for the Town to conclude that the tower was incompatible with many of the neighboring homeowners' residential lifestyle, and for some, the values of their homes would be diminished by the ominous, shadow-casting tower. Several people at the hearings spoke out on these terms.**

Eco-Site, LLC v. Town of Cedarburg, 2019 WI App 42, ¶ 27, 388 Wis. 2d 375, 933 N.W.2d 179. (emphasis added); *see also Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 277, 461 N.W.2d 827 (Ct. App. 1990) (affirming denial based on personal knowledge of area traffic congestion). The Court of Appeals has also recently confirmed that state law does not prevent considering decreased property values. *Scenic Ridge of Big Ben Homeowner's Assoc., Inc. v. Village of Vernon*, 2022 WI App 55, ¶¶ 14-15, 2022 WL 4232437 (Ct. App. Sept. 14, 2022) (unpublished, per curiam opinion).

There are numerous Ordinance provisions that the Applicants here must satisfy with substantial evidence. Some of these are general standards that apply to all proposed conditional uses:

No conditional use shall be approved or approved with conditions by the Land Use Planning and Zoning Committee **unless it shall find** the conditional use:

- (a) Will not have a negative effect upon the health, safety, and general welfare of occupants of surrounding lands;
- (b) Will be designed, constructed, operated, and maintained so as to be harmonious and be appropriate in appearance with the existing or intended character of the general vicinity and that such a use will not change the essential character of the same area;
- (c) Will not be hazardous or disturbing to existing or future neighboring uses;
- (d) Will not be detrimental to property in the immediate vicinity or to the community as a whole;
- (e) Will be served adequately by essential public facilities and services, such as highways, streets, police and fire protection, drainage structures, and schools, and that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such service; and

(f) Will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public or private streets or roads.

Ord. § 350-56(B)(2) (emphasis added). Because the Ordinance uses the term “shall,” it is mandatory that the Board find each of these standards is met. *See Hayen v. Hayen*, 2000 WI App 29, ¶ 18, 232 Wis. 2d 447, 606 N.W.2d 606; *Schroeder v. Dane Cnty. Bd. of Adjustment*, 228 Wis. 2d 324, 333, 596 N.W.2d 472 (Ct. App. 1999).

Additional Ordinance requirements apply to proposed CUPs in the F-1 Farmland Preservation District, such as the mine here. This is required by Wisconsin’s Working Lands law, which only permits local governments to approve non-metallic mines as conditional uses in farmland preservation districts if they meet certain criteria. *See Wis. Stat. § 91.46(6)*. The Green Lake County ordinances recite these criteria, only allowing mines if:

- (1) The operation complies with Subchapter I of Chapter 295, Wisconsin Statutes, and rules promulgated under that subchapter, with applicable provisions of local ordinances under § 295.14, Wis. Stats. (including all applicable provisions of this chapter), and with any applicable requirements of the Wisconsin Department of [Transportation] concerning the restoration of nonmetallic mining sites.
- (2) The operation and its location in the farmland preservation zoning district are consistent with the purposes of the farmland preservation zoning district.
- (3) The operation and its location in the farmland preservation zoning district are reasonable and appropriate, considering alternative locations outside the farmland preservation zoning district, or are specifically approved under state or federal law.
- (4) The operation is reasonably designed to minimize the conversion of land around the extraction site from agricultural use or open space use.
- (5) The operation does not substantially impair or limit the current or future agricultural use of surrounding parcels of land that are zoned for or legally restricted to agricultural use.
- (6) The owner agrees to restore the land to agricultural use, consistent with any required reclamation plan, when extraction is completed.
- (7) Compliance with Chapter 323 (Nonmetallic Mining Reclamation)

Ord. § 350-27(A)(2)(e).

Applicants cannot obtain a conditional use permit just by saying, because they are allowed in the district in some fashion, they must receive their permit. *See Eco-Site*, 388 Wis. 2d 375, ¶ 19 (describing such arguments as “overreach”). Only non-metallic mines that are “consistent with the purposes of the farmland preservation zoning district” may be located in the district as conditional uses. Wis. Stat. § 91.46(4)(a). “The ordinance permits [mines], if the conditions are met, but it does not rubber stamp them.” *See Eco-Site*, 288 Wis. 2d, ¶ 19.

Finally, because the Board has elected to hear this matter de novo and decide whether or not the CUP should be issued, two votes of the Board are necessary to grant the CUP. *See* Ord. § 350-63(B)(4) (“The concurring vote of two members of the Board shall be necessary to . . . decide in favor of the applicant on any matter on which it is required to pass, or to effect any variation in the requirements of this chapter.”) In other words, while this matter has come to the Board on an appeal of the CUP, the question is not whether the Committee’s decision should be reversed or affirmed, but whether the CUP should be granted. This is consistent with the Board’s broad authority in Wis. Stat. § 59.694(7)-(10).

III. THE PROPOSAL FAILS TO MEET REQUIRED STANDARDS FOR A CONDITIONAL USE PERMIT.

a. The Proposal does not meet the standard CUP requirements of Green Lake Co. Ord. § 350-56(B)(2).

The Applicants do not meet their burden to show they can satisfy the standard requirements that apply to a CUP by substantial evidence. Moreover, other substantial evidence shows they cannot meet these requirements, as further explained below.

- i. The Proposal lacks substantial evidence that it will not have a negative effect upon the health, safety, and general welfare of occupants of surrounding lands.*

Applicants have provided little evidence that they will comply with the first CUP standard,

and substantial evidence shows the project creates health, safety, and welfare risks through groundwater and surface water quality impacts.

Applicants claim they will mine to just five feet above the groundwater table, which would be important to avoid mobilizing arsenic and other metals in the bedrock and delivering them to groundwater. (EOR Report § 2.1.) Sulfide minerals are well documented in the formations the Applicants are intending to mine, and about 30% of drinking water wells in the county are already contaminated with excess levels of arsenic. (EOR Report § 3.1.) Arsenic levels in an immediately adjacent property to the Site have been documented at a concentration of 101-150 parts per billion, well above the enforcement standard of 10 parts per billion. (EOR Report, Attachment B at 29.) An irrigation well just a mile from the Mine site had to be abandoned in 2012 because of high levels of sulfides in the water that corroded brand-new irrigation equipment after just 106 hours of pumping. (EOR Report, Attachment B at 35.)

Data indicate groundwater at the site is higher than the Applicants believe, and higher than elevation of Powell Spring. (EOR Report § 2.1.) Even if well levels showed lower groundwater, however, groundwater in the area is known to fluctuate, risking that mining will occur in groundwater at some point in the future. (*Id.*) Mining under these conditions then risks releasing arsenic to groundwater in ways that would harm drinking water resources as well as groundwater-fed surface water resources such as Mitchell Glen and Powell Spring, along with area creeks. (*Id.* § 3.1.) So would installation of a water supply well at the mine site for washing and other purposes, though Applicants have not elaborated on their water supply plans. (*Id.*) Such a well may also disrupt groundwater supply in area drinking water wells. (*Id.* § 2.2.) The CUP should be rejected for this reason alone.

Even if Applicants manage to stay above groundwater, there are still risks from excavated and exposed rock. Exposing sulfide minerals to oxygen mobilizes metals in the rock such that they are carried off-site by stormwater, at which point they could enter drinking water wells, creeks, springs, and ultimately Green Lake. (EOR Report § 3.2.) While monitoring systems can be set up to detect acid mine drainage, they are complicated and would require long-term monitoring and enforcement and may not detect drainage before it becomes a problem. (*Id.*) Such programs are also not typical functions of County zoning departments. Because conditions that could help ensure the safety of the population and environment around the Mine are unfeasible, the CUP should simply be denied.

In addition to these impacts, blasting itself involves chemicals—ammonium nitrate and fuel oil—that can contaminate and have contaminated groundwater, according to the DNR. (EOR Report § 3.3.) Blasting also dislodges sediment and rust, disrupting drinking water sources. Applicants have not addressed these issues, but they must be known and understood before any CUP should be issued. (*Id.*)

Finally, while the Applicants have submitted an Erosion Control and Storm Water Management Plan to DNR, it is of limited value in addressing the critical questions presented by the Mine. These questions include the amount of stormwater, the effectiveness of proposed stormwater treatment devices, and the chemical content of stormwater. (EOR Report § 4.) The proposed settling ponds will not treat contaminants that are dissolved in water, such as nitrates and petroleum components, and contamination of groundwater and local trout streams is again a concern, as is impact to downgradient properties like the Neuenfeldts.’ (*Id.*) The CUP cannot be approved under these circumstances.

- ii. *The Proposal lacks substantial evidence that it will be designed, constructed, operated, and maintained so as to be harmonious and be appropriate in appearance with the*

existing or intended character of the general vicinity and that such a use will not change the essential character of the same area.

Applicants only point to best management practices they “may” observe, but not only is there no evidence these practices would mitigate impacts to the point they will satisfy the Ordinance, but the Applicants do not actually commit to following them. Their proposed documents say only that Applicants “may elect” to use some or all of the practices. These wobble words do not assure this standard is satisfied.

Meanwhile, dozens of neighbors testified before the LUPZC and are expected to provide comments to the Board. Their testimony about expected impacts and the detrimental effects these impacts will have on the neighborhood are substantial evidence that the Board must consider. So is the testimony of Appellants’ real estate expert, Mr. Hungerford, which demonstrates the highest and best use of land in the area is agricultural and conservation. Applicants cannot meet this standard.

[REDACTED]

- iii. *The Proposal lacks substantial evidence that it will not be hazardous or disturbing to existing or future neighboring uses.*

The Applicants have not showed, and cannot show, they will meet this standard, for the reasons described in i-ii, above, and throughout this position statement.

- iv. *The Proposal lacks substantial evidence that it will not be detrimental to property in the immediate vicinity or to the community as a whole.*

The Mine will have immediate and significant detrimental effects on the surrounding properties, diminishing their market values and severely reducing the landowners' use and enjoyment of their property. Well-known impacts of mining operations to nearby properties include noise pollution and dust from blasting, crushing, and hauling, heavy traffic due to machinery and trucking the aggregate, decreased wildlife, and disrupted surface and ground water flow. (REMI Report at 27; *see also* EOR Report §§ 3.2, 4.)

The first and perhaps most directly impacted property will be Ernie and Ida Neuenfeldt's. The 27-acre parcel on which their recently built home and shop building are situated will plummet in value from \$665,000 to \$465,500 due to the Mine, a loss of 30% of its value. (REMI Report at 29.) This is a result of the market shock to land situated adjacent to a nuisance industrial use like mining, which causes increased traffic and dust and substantial noise disturbance due to blasting, crushing, and hauling aggregate materials. (*Id.* at 25-28.) The Mine may further devalue the Neuenfeldt's property due to flooding, decreased water quality and quantity, and erosion of surface features. (*Id.* at 31-32; *see also* EOR Report.) Necessary improvements to prevent or lessen these negative effects to the Neuenfeldts' property, including constructing a 3-4-foot-high berm along its southern edge, will cost approximately \$125,000. (REMI Report at 32.) In short, the Mine will devastate Ernie and Ida's lifetime of investment in their land.

In addition to the diminution of their property value, the Neuenfeldts will suffer a loss of use and enjoyment of their property. Currently, they utilize the property for sustenance, including by harvesting fruits, vegetables, deer and turkey. Mines and their accompanying noise pollution due to blasting and truck traffic are known to have detrimental effects on wildlife, which will be driven away from the property. Flooding and erosion may also decrease the Neuenfeldts' corn and hay yields, affecting the profitability and, thus, desirability of the two farm fields they rent out to local farmers. Noise from blasting and traffic will also impair the Neuenfeldts' peaceful enjoyment of their land, which until now has been quiet, wild, scenic, and secluded. The Mine will threaten the Neuenfeldts' way of life, in addition to gutting the property's market value.

The Mine will have a significant detrimental effect on residential properties other than the Neuenfeldts' as well. Studies show that residences within one half-mile of a mine experience drops in market value of 25%. (REMI Report at 28-29.) There are 28 homes located within one half-mile of the Mine. (*Id.* at 29.) Even accepting their county assessed values as market value, an unlikely scenario, these properties will drop collectively at least \$909,500 in value. (*Id.* at 29-30.) If their assessed values are actually just 50% of market value, which is more likely and was the case for the Neuenfeldts' property, the collective property value loss to these 28 homes will be \$1,819,000. (*Id.*) These homeowners, too, will suffer a loss of use and enjoyment of their properties due to noise pollution, dust and traffic, and similar effects.

Finally, two family dairy farms are located across Skunk Hollow Road and south from the Site less than one half-mile. In addition to the property value their residences will lose, these farmers' livelihoods depend on their dairy cows. Their cows, in turn, depend on clean and plentiful well water. Should the Mine contaminate reduce water supply or quality in wells

at these farms, as possible due to the Mine's position near a groundwater divide mapped by USGS (EOR Report at §§ 2.2, 3.1, 3.3), dairy farming will become impossible, as trucking in an alternative source of water for the herds will be economically infeasible.

- v. *The Proposal lacks substantial evidence that it will be served adequately by essential public facilities and services, such as highways, streets, police and fire protection, drainage structures, and schools, and that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such service.*
- vi. *The Proposal lacks substantial evidence that it will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public or private streets or roads.*

The application makes no mention of its use of public facilities and services, like the public highways and country roads its many trucks and heavy equipment will utilize and, ultimately, degrade. The Applicants clearly intend for Green Lake County and the Town of Brooklyn to bear the brunt of the costs of this degradation to County Highway K and Brooklyn G, respectively. Furthermore, the application does not address the Mine's water consumption at all, or how it will meet its substantial water needs. The conspicuous omission of this information is grounds itself for denial of the CUP. *See Weber v. Town of Saukville*, 209 Wis. 2d 214, 237–38, 562 N.W.2d 412 (1997) (“[A] court should measure the sufficiency of a conditional use application at the time that notice of the final public hearing is first given... Here, the conditional use application was incomplete because it did not contain information regarding the quantity of water to be used in the quarrying operation...”).

The proposed vehicular entrance to the Site is located immediately north of the intersection of County Highway K and Brooklyn G. However, the application also makes clear that the Applicants own a property at the intersection of Skunk Hollow Road and Brooklyn G, immediately north of the Mine. This purportedly residential parcel contains an approximately 11,580 square-foot garage with eight garage doors, plus three 1,000-gallon

propane tanks. Given that a residential property would not require such significant facilities, it is reasonable to assume this is intended to store equipment from the proposed Mine.

Heavy machinery and quarry trucks at the intersection of Skunk Hollow Road and Brooklyn G would be disastrous. The section of Skunk Hollow Road leading to the intersection is a blind hill with a 9% grade, over 100 feet of elevation change, and only a two-way stop sign. It is a popular road for bicyclists and a busy one for vehicles. This steep road has been notorious for vehicular accidents, accounting for at least one death (Kris Greening, 1997) and three serious accidents. The addition of heavy machinery and trucks to the already dangerous Skunk Hollow/Brooklyn G intersection would introduce intolerable risk for local residents.

b. The Proposal does not meet the farmland preservation requirements of Green Lake Co. Ord. § 350-27(A)(2)(e) and Wis. Stat. § 91.46(6).

The CUP application does not show Applicants can meet the farmland preservation standards—in fact, the application barely even mentions those standards. While the proposal fails out of the gate, other evidence shows Applicants cannot meet these standards.

- i. The Proposal lacks substantial evidence that it complies with Subchapter I of Chapter 295, Wisconsin Statutes, and rules promulgated under that subchapter, with applicable provisions of local ordinances under § 295.14, Wis. Stats., and with any applicable requirements of the Wisconsin Department of Transportation concerning the restoration of nonmetallic mining sites.*

Chapter 295 of the Wisconsin Statutes addresses reclamation requirements after the mine closes. The Applicants have not provided a reclamation permit, have not demonstrated to the County that they can comply with all state law provision regarding reclamation, and no County entity has determined that the Applicants can comply with reclamation requirements. Moreover, the Applicants say the Mine will operate for thirty or more years, making reclamation a remote future event. Appellants further address reclamation below.

- ii. *The Proposal lacks substantial evidence that the operation and its location in the farmland preservation zoning district are consistent with the purposes of the farmland preservation zoning district.*

The Applicants have not shown they satisfy this factor by substantial evidence, or even acknowledged the purpose of the County's Farmland Preservation zoning district, which is "to promote areas for uses of a generally exclusive agricultural nature in order to protect farmland and to allow participation in the state's farmland preservation program." Ord. § 350-27(A). To be consistent with this purpose, the Applicants must show the mine "furthers or does not contradict objectives, goals, and policies" of the Farmland Preservation ordinance. Wis. Admin. Code § ATCP 49.01(5) (emphasis added).

Nothing about the mine, which is an industrial use, promotes the area for uses of a generally exclusive agricultural nature in order to protect farmland and participation in the farmland preservation program. In fact, the Applicants admitted before the LUPZC that "[m]ining will have an impact on farmland loss," but essentially claimed this impact did not matter because "crushed stone and gravel are important materials in supporting local economic development." This is not the standard.

- iii. *The Proposal Lacks substantial evidence that the operation and its location in the farmland preservation zoning district are reasonable and appropriate, considering alternative locations outside the farmland preservation zoning district.*

Applicants have made no showing on this factor. Applicants did not explain whether they reviewed other, non-Farmland Preservation locations in Green Lake County, which is known to have substantial reserves of limestone throughout the County. In fact, Applicants admitted to the LUPZC that there are 18 existing active non-metallic mines in the County already. Rather, Applicants appear to have chosen this site for their own personal convenience because they already own it.

Under these circumstances, there is no need for the proposed mine to be located in the Farmland Preservation district. At a minimum, Applicants must show why they could not use a different parcel, outside of the Farmland Preservation District, rather than the site most convenient to them. Otherwise, the purpose of the Farmland Preservation District will be meaningless, contrary to the Ordinance.

- iv. The operation is reasonably designed to minimize the conversion of land around the extraction site from agricultural use or open space use.*
- v. The operation does not substantially impair or limit the current or future agricultural use of surrounding parcels of land that are zoned for or legally restricted to agriculture.*

The Applicant has not presented substantial evidence to show these standards are met. To the contrary, relevant to standard iv., and as explained above, the Mine puts open space use (at Powell Spring and Mitchell Glen) at risk due to its groundwater and potential acid mine drainage effects. Relevant to standard v., the above has already demonstrated that the property of Ernie and Ida Neuenfeldt, which is zoned A-1, will be substantially impaired by the mine. This land is used for agricultural purposes such as cropping, growing fruit trees, and gardening. The Nehm dairy farm south/southwest of the Site may also see disruptions to groundwater supply wells that the Applicants have not studied, but should have through a proper hydrologic study. (EOR Report § 2.2.)

- vi. The owner agrees to restore the land to agricultural use, consistent with any required reclamation plan, when extraction is completed.*
- vii. Compliance with Chapter 323 (Nonmetallic Mining Reclamation)*

The Applicants acknowledged in their presentation to the LUPZC that “mining reclamation projects on occasion are converted into agricultural uses,” such that reclamation to agricultural use appears to be the exception and not the rule. Applicants claim they will restore the land here to agricultural use, but the Board must closely scrutinize this claim. A

table provided with the application materials shows the costs to restore the land to agriculture will be significant—mostly attributable to bringing in fill material (about 95,000 cubic yards/acre) to restore the land to grade.

Multiplying the cost of reclamation per the 40 active acres the mine will disturb, it does not seem

Hauling of Imported Fill Material	\$70,000.00/Acre
Leveling of Imported Fill Material	\$1000.00/Acre
Redistribute Overburden, Topsoil, & Grade	\$1,375.00/Acre
Modify Erosion Control Measures for Agriculture	\$50.00/Acre
Total Cost Per Active Acre	\$72,425.00/Acre

credible or realistic that the Applicants will spend over \$2.8 million in 2022 dollars to restore the land to agricultural use. Moreover, generously assuming that a dump truck carries 30 cubic yards, it will take over 3,100 dump trucks to reclaim just one acre. This will only exacerbate the neighborhood impacts of the mine from traffic, noise, and dust.

CONCLUSION

“Available information suggests that the Skunk Hollow Mine cannot be operated as proposed without adverse impacts on the health and welfare of nearby residents or without degradation of aquatic resources,” and “application materials lack important information” regarding risks to public health and the environment. (EOR Report, § 5.) For these reasons and the reasons stated above, the Applicants cannot show they are entitled to a CUP for a mine at the proposed location. The CUP should be denied.

Dated this 8th day of December, 2022.

PINES BACH LLP

Electronically signed by Leslie A. Freehill

Christa O. Westerberg
Leslie A. Freehill

Attorneys for the Appellants

Mailing Address:

122 West Washington Ave
Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
cwesterberg@pinesbach.com
lfreehill@pinesbach.com

Wisconsin Legislative Council



Anne Sappenfield
Director

TO: SENATOR JANET BEWLEY

FROM: Anna Henning, Senior Staff Attorney, and Scott Grosz, Principal Attorney

RE: Local Government Discretion When Reviewing Conditional Use Permit Applications

DATE: March 17, 2020

You requested an overview regarding county and municipal authority to deny an application for a conditional use permit or to impose conditions when granting such a permit. As is described in greater detail below, current law, as affected by 2017 Wisconsin Act 67, requires counties and municipalities to issue a conditional use permit if an applicant for the permit satisfies conditions specified by local ordinance or imposed by a local zoning board. However, counties and municipalities retain the authority to deny conditional use permits and impose application-specific conditions, if the conditions are related to the purpose of the relevant local zoning ordinance and are supported with “substantial evidence.”

CONDITIONAL USE PERMIT PROCESS

Generally, a conditional use permit must be issued by the zoning authority in the relevant city, village, town, or county before a person may use property in a manner that is designated as a conditional use within a given zoning district.

Wisconsin law, as affected by 2017 Wisconsin Act 67¹, requires a city, village, town, or county to grant a conditional use permit if an applicant meets, or agrees to meet, all of the requirements and conditions specified in the relevant ordinance or imposed by the relevant zoning board. Any such conditions must be related to the purpose of the ordinance and based on substantial evidence.² In addition, those requirements and conditions must be reasonable and, to the extent practicable, measurable.

An applicant for a conditional use permit must demonstrate, with substantial evidence, that an application and all requirements and conditions relating to the conditional use are, or will be, satisfied.

¹ 2017 Wisconsin Act 67 was prompted, in part, by the Wisconsin Supreme Court’s decision in *AllEnergy Corporation v. Trempealeau County Environment and Land Use Committee*, 2017 WI 52. In *AllEnergy*, a majority of Wisconsin Supreme Court justices rejected an argument that, in that particular case, a land use committee acted outside the scope of its authority because it denied a conditional use permit application based in part on general concerns raised by the public.

² The Act defines “substantial evidence” to mean facts and information, other than merely personal preference 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 city, village, town, or county must then demonstrate that its decision to approve or deny the permit application is supported by substantial evidence. [ss. 59.69 (5e), 60.61 (4e), 60.62 (4e), and 62.63 (7) (de) 2., Stats.]

A conditional use permit may remain in effect as long as the conditions upon which the permit was issued are followed, except that a city, village, town, or county may impose conditions relating to the permit's duration, and the ability of the applicant to transfer or renew the permit, as well as any other additional, reasonable conditions specified in the relevant zoning ordinance or by the relevant zoning board.

The city, village, town, or county must hold a public hearing on a conditional use permit application and authorize a person whose conditional use permit application is denied to appeal the decision in circuit court.

LOCAL DISCRETION TO DENY OR IMPOSE CONDITIONS

As described above, local units of government retain meaningful discretion in setting requirements and conditions through the conditional use permitting process. Retention of that discretion is supported by the legislative history for 2017 Wisconsin Act 67.

Between introduction as 2017 Assembly Bill 479 and enactment as 2017 Wisconsin Act 67, the legislation was subject to significant amendment, particularly with respect to its effect on local approval of conditional use permits. With respect to conditional use permits, Assembly Substitute Amendment 1, as amended by Assembly Amendment 4, modified the bill to: retain the continued ability of a zoning board to impose conditions on a particular application in addition to conditions specified by ordinance; allow for conditions that may not be "measurable"; and remove limits on the use of public testimony as the basis for denial of a conditional use permit. As evidenced by the public testimony on the bill, retention of local discretion was a key aspect of compromise between the Wisconsin Realtors Association and various municipal groups, resulting in changes to the municipal groups' positions on the amended bill with respect to the treatment of conditional use permits. That local discretion is evident in the relevant provisions of current law, as affected by 2017 Wisconsin Act 67 and described above.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

AH:SG:jal