

SAUK COUNTY BOARD OF ADJUSTMENT
October 31, 2019 Session of the Board

PRESENT: Linda White, Chair
David Allen, Secretary
Jim Mercier
Valerie McAuliffe
David Wernecke, Alternate

ABSENT: Dan Kettner, Vice Chair

STAFF PRESENT: Gina Templin
Brian Simmert

Chair White called the session of the Sauk County Board of Adjustment (BOA) to order at approximately 9:00 A.M. The Chair introduced the members of the Board, explained the procedures and the order of business for the day. The staff certified that the legally required notices had been provided for the scheduled public hearing. The certification of notice was accepted on a motion by Allen, seconded by Mercier. **Motion carried, 5-0.**

The Board adopted the agenda for the October 31, 2019 session of the Board on a motion by McAuliffe, seconded by Allen. **Motion carried, 5-0.**

The Board adopted the minutes from the September 20, 2019 Board of Adjustment meeting on a motion by Mercier, seconded by Allen. **Motion carried 5-0.**

COMMUNICATIONS:

None.

APPEALS:

- A. SP-01-2019. Potential revocation of a special exception permit pursuant to §. 7.152(10) to review if the conditions of the special exception permit (SP 01-2019) for a non-metallic mining site, one acre or greater, have been met as proposed by David Leatherberry and approved by the Sauk County Board of Adjustment. Said property is part of the NE ¼ of the NW ¼ and SE ¼ of the SW ¼ of Section 26, T12N, R6E and including parcel 002-0779-00000 and 002-0784-00000, Town of Baraboo, Sauk County.

Brian Simmert Land Resources and Environment, appeared and provided a background and history of the request and the relationship between the Town of Baraboo and Sauk County.

White asked about the two extension requests. Simmert explained. He also addressed the formal action taken by the Town of Baraboo regarding the previous road maintenance agreement. He continued to detail the multiple days that the applicant continued to operate in violation repeatedly, knowingly that the property was in violation and why.

White asked that even though the special exception permit was approved with conditions, he cannot operate until a land use permit is issued. Simmert confirmed and explained.

White asked about other non-metallic mining operations that are similar in violations. Simmert stated that we have no other pits that are in violation. He stated that we have one other pit that is in violations and the department is pursuing that.

Daniel Olson, Corporation Counsel for Sauk County, spoke about anticipated argument regarding the financial assurance and explained why. He continued to explain to the board why the special exception permit should be revoked based on the behavior of the mining operator and the substantial information provided by the Land Records staff provided on the violations that have occurred.

Wernecke asked about the time limit of when another Special Exception permit can be applied for, should a revocation be done. Olson referred to Simmert. Simmert stated there is no time limit.

Mercier asked if there is a financial obligation to the citations that were issued. Olson stated there are, however that is not for the board to decide.

White asked what is the difference between the consequences between the violating now and violating after revocation. Olson stated there is however, he does not wish to discuss legal strategy.

Mark Steichan, Boardman and Clark, representing David Leatherberry, stated they were retained about 2 weeks ago when the previous counsel withdrew due to a conflict of interest. He feels that the land use permit should be issued because the road maintenance agreement and the financial assurance have been met. He thinks the board should decide what kind of finance assurance should be accepted. He referred to the email from the DNR states a mortgage is not acceptable. He provided Appendix P, which is a letter from the DNR dated October 24, 2019 to Brian Simmert and referred to Admin Code regarding alternate financial assurance. He then presented Appendix Q, Chapter 708. He spoke of the error in the mortgage that was recorded in the amount.

Wernecke asked about an agreement and the county's involvement and agreement of them or signature on them taking place in the legal process. Steichan stated the person who is mortgaging the property only signs a mortgage. Wernecke stated there is a party that was not included in the negotiations and they were not involved in the agreement. Steichan stated that if an applicant choses a different form, there wouldn't be a signature by the county.

White asked how the county received cash and asked about the Mortgage. Steichan explained how the county would receive based on the Mortgage.

White asked how financially behind they are and explained the question and asked how the county is guaranteed to receive finances for reclamation. Steichan stated he cannot say what the appraised property is and does not know about any other mortgages.

White asked about an appraisal would the value of having an open pit be involved in that. Steichan stated it might and could be valued either way. White questioned the value of a mortgage.

Allen asked about the mortgage and if it is a first, second, third. Steichan stated there are no other mortgages on the property.

Steichan suggested that the bank said 4 weeks at the quickest, 6 weeks most likely for other financial assurance. He then spoke of the road agreement and stated there is a road agreement between the Town and the Leatherberry's which was put in place in 2013. He spoke of the fact that the existing road agreement does not expire and has a letter of credit associated with it. He also stated that the penalties for the citations are relevant today and the court will determine the penalties. He feels that there is confusion over the road agreement and financial assurance and feels that it was not that the Leatherberry's are scott-free and does not feel it is necessary for this board to revoke the permit.

Whited asked why he feels these permits come up for review and renewal at a 5 year term. Steichan stated because circumstances can change and the nature of the pit is changing, the reclamation, the cost, the materials, etc. and that is why they come up periodically. White stated the other reason is for public interest reasons and explained. Steichan stated there is an agreement in place and no complaints or statements showing the existing agreement in place is not effective.

White asked about the new road agreement with the township and the number one concern was no recourse for the amount of finances billed to the landowner. Steichen stated that the way it is drafted, if the town decided they were going to put the amount of the special assessment, the landowner has no right to appeal.

Wernecke asked about a condition of receiving a land use permit, which was never issued and during this time, the landowner continued to operate, knowingly, and they have an obligation that people operate by the rules. Steichan stated he is right, there is an interest in the county and to the public that requirements are complied with, but there should be some consideration given that the road maintenance agreement was satisfied with and the financial assurance was met, although, not acknowledged, although it doesn't excuse it. He stated there are number of citations issued pending the circuit court, and feels the board should simply give the landowner 60 days to get financial assurance.

White stated he had 9 months to meet these qualifications thus far and what is a satisfactory time to meet the qualifications. Steichan stated he doesn't feel this is a situation of bad faith and this is down to two conditions and feels both have been satisfied and doesn't know how else to deal with the town other than to deal with it in court. He spoke more on the financial assurance and why he feels it is satisfactory.

White asked if he called the town's attorney or if he called them. Steichen stated the county called him and let him know the town's attorney was leaving for the weekend and he cannot be sure who called whom.

Mercier asked about all the references to the town's attorney and asked about open communications between Mr. Leatherberry and the town. Steichan stated he believes so, but does not not know for sure.

White spoke about the road agreement at the January meeting and the discussions then. Steichan spoke of the transcript from the January meeting and suggested there was an assumption that it expired and needed to be renewed. He continued to explain why he feels the existing road agreement is valid.

White asked about the first citation or two, why was there continued operation and why should that be overlooked. Steichan stated at the pretrial conference that he made it very clear that there would be no continued operations and there have been no further violations issued since then, which has been 2 weeks.

White asked about the agreement referred to. Steichan stated about February. White confirmed he signed an agreement knowing he did not have a land use permit.

Mercier asked why this took so long to come up. Steichan stated it has been a debate over the conditions and that the board needs to decide what type of financial assurance is acceptable to the board.

White asked Simmert to reappear.

White asked about the first extension, then the second extension, then the January hearing and the amount of work to be done. Simmert referred the board to their packet and the effort made by the staff on the status and the continued to notice on what needed to be done.

Wernecke asked about the county notifying the Leatherberry's and their attorneys and the effort to starting meeting the conditions. Simmert explained they do have an approved reclamation plan and storm water plan and explained.

Wernecke reviewed the sequence of events. Simmert confirmed.

McAuliffe asked about the transcript and the road maintenance agreement in Appendix M. Simmert spoke of the testimony by Attorney Cross in January, representing the Leatherberry's and explained how the draft road maintenance agreement came into effect.

White asked about the Town of Baraboo having other pits and if this is more restrictive or less. Simmert stated he cannot speak to that and it is specific to each situation and evaluation.

White asked if he knows of any other case where the Town of Baraboo's requirements are unacceptable. Simmert stated he is not aware of any.

Allen asked about the road maintenance agreement being in effect and how that affects this. Simmert stated that is between the Town's attorney and Leatherberry's attorney, and the county's interest is that there is an agreed upon agreement between the town and the Leatherberry's.

Daniel Olson, Sauk County Corporation Counsel, reappearing, addressed the road agreement and said one party says they have an agreement and the town says no we do not have an agreement and who do they rely on – the county is going to respect the Town. He then addressed the financial assurance and referred to NR135.

Mark Steichen, reappearing, stated that the board of adjustment is the regulating authority, not the county zoning department, and it is the board that should specify what they want. He continued to address the road agreement and disagrees with the county's council.

White asked about the disregard for the financial assurance and disregard for the county's position on the financial assurance.

Simmert reappearing.

White asked if there are any mortgages used in any other sites. Simmert stated there are no other mortgages used.

White asked how was the previous mortgage accepted. Simmert stated he cannot speak to that, but the regulatory authority is the county and they have the right to accept or reject financial assurance.

Seeing as no one else wishes to speak, Chair White closed the public portion of this hearing at approximately 11:03.

White stated she has several misgivings with the continuous violations and lack of preparations. She talked about the road agreement and issues that, but feels that is not their decision to make. She is very concerned with the view that you can violate until you get caught and the mortgage is a very expensive process for the county to go through to collect if something were to happen. She addressed how it could be appraised and the issues that comes with using a mortgage for financial assurance and protecting the public and the ability to convert to cash without a great legal process.

Allen stated these are very difficult and this board deals with several mines. He is disappointed in the amount of resources wasted and feels all parties should have worked together and feels they should not have given the amount of extension they did. He also feels the mortgage is not acceptable.

Wernecke feels the extensions given and reasons why they were needed, the board was lenient, and then approved a special exception permit and relied on staff and corporation counsel to carry out the criteria to be compliant, and then they seem to apply their own rules and operated in violation until this meeting today. He stated he feels it would be wrong, in the public interest, not to revoke this permit. He also feels there should be a time limit before they hear another request for a special exception permit, as well as based on their history of their attitude of county ordinance, hopes the county pursues maximum violation amounts.

Mercier agrees with all statements previously made and feels if he had a business likes this, why would not you work with the town and county to make sure the problems get resolved.

McAuliffe stated she agrees with previous statements and does not feel it is the board's responsibility to decide on the town agreement and feels that the department has been more than helpful in deciding whether something is more than agreeable.

White stated that the fact that there was a conflict entered into in February shows a blatant disregard for the rules, and whatever is agreed to with the county needs to show the ability for the county to collect. As for the road

agreement, that is for the owner and town to fight out. The board's responsibility is to show that the public is protected.

Motion by White, seconded by McAuliffe to revoke the permit for all the reasons stated by the members during deliberation and with a reminder that no operations shall take place. **Motion carried 5-0.**

Motion by Allen, seconded by Mercier, to adjourn at 11:14 a.m. **Motion carried, 5-0.**

Respectfully submitted,

David Allen, Secretary