

SAUK COUNTY BOARD OF ADJUSTMENT

*SAUK COUNTY WEST SQUARE BUILDING
505 BROADWAY
BARABOO, WI 53913
Telephone: (608) 355-3285*

November 28, 2011

DECISION
SAUK COUNTY BOARD OF ADJUSTMENT
Appeal Application No. SP-28-11

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Milestone Materials
P.O. Box 441
Baraboo, WI. 53913

Dear Sirs:

On November 17, 2011, the Sauk County Board of Adjustment considered your application for a special exception permit, pursuant to Sauk Co. Code § 7.05(2)(l)19. Based upon the applicable records, evidence and testimony presented at the hearing, the Board of Adjustment makes the following:

FINDINGS OF FACT

Milestone Materials, hereinafter referred to as "Applicant", applied for a special exception permit pursuant to Sauk Co. Code § 7.05(2)(l)19, to authorize the continued operation of a quarry after the change of ownership. The property is located in section 28 in the Town of Excelsior and subject to Chapter 7, of the Sauk County Zoning Ordinance.

Sauk Co. Code § 7.05(2)(l)19, provides that a special exception permit is required for mineral extraction activities in the Agricultural District.

The surrounding area contains agricultural and residential properties and the Village of Rock Springs. Six special exception permits have been granted since 1988 for mineral extraction activities at this location. A sanitary permit was issued for up to five privies in 1993.

CONCLUSIONS OF LAW

The Sauk County Board of Adjustment may not grant a special exception permit for mineral activities unless all of the conditions listed in Sauk Co. Code §7.05(2)(l)19, are met. As part of its review, the Board must determine whether the location of the site is consistent with the intent of the ordinance and whether the site will significantly injure the public health, safety or welfare. The applicant has the burden of showing that the permit meets the standards designated in Sauk Co. Code § 7.05(2)(l)10. Edward Kraemer & Sons, Inc. v. Sauk County Board of Adjustment, 183 Wis. 2d 1, 515 N.W.2d 256, 262 (1994).

Upon reviewing the evidence and testimony, the Board determined the mineral extraction site is consistent with the purpose and intent of the Agricultural District. The board made this decision based on testimony and information provided at the hearing, and the following:

The Board determined that this site has been used for mineral extraction activities for more than fifty years. The applicant has met with the town of Excelsior and they are in favor of granting the permit with conditions. The applicant also agreed to operate within the conditions imposed when the permit to renew the mineral extraction at this site was granted in 2008, as well as the conditions requested by the Town of Excelsior.

DECISION

Based upon the evidence, testimony, exhibits and legal authority, the Sauk County Board of Adjustment, by a vote of five to none, approves your request, subject to conditions, for a special exception permit to operate mineral extraction activities.

In issuing the special exception permit, the Board set forth the following conditions the Applicant shall comply with:

A. All work on and use of the premises shall proceed with the plans and supplemental evidence presented at the hearing. It is the responsibility of the applicant to secure all required Town, State, Federal and County permits within one year of the hearing date. County permits required for this approval include a land use permit for the batch plant as well as an annual reclamation permit.

B. No work shall be commenced prior to receiving the Board of Adjustment decision letter and securing the required permits.

C. The plant shall operate for the term and during the hours as permitted by special exception permit SP-06-08 due to expire November 2016, as detailed herein:

1. No requirements are waived or deemed satisfied, except the special exception permit herein granted, and it remains your responsibility to ensure that any other permits required by governmental agencies or persons are procured.
2. The special exception permit approving the conducting of mineral extraction activities on the subject premises shall be conditioned upon compliance with all terms of the ownership and management, operations plan and reclamation plan data presented by the Applicants to the Board in these proceedings. It is the intent of the Board of Adjustment to maintain the general conditions of the permit previously granted in SP-22-98, except as otherwise specified in this decision. This qualification is stated to clarify, if the Board has not managed to specifically address all such points, that the Board is not approving various requests contained in either the written materials or the supplemental testimony at the hearing that the

Board go along with a looser scheme of regulation, such as acknowledging that "...emergencies caused by nature, accidents or derailments may necessitate deviation from the general hours."

3. The special exception permit herein granted shall be for a term of five years, commencing immediately. This period is contingent upon Milestone Materials becoming the owner and operator of the quarry site. If the owner selects another operator, then this permit is void. As reflected elsewhere in this decision and in the Ordinance, the right to continue activities under this special exception permit throughout its full term shall be contingency upon compliance with the conditions prescribed, as is the right to receive a further renewal of the permit.

The Board of Adjustment has consistently interpreted the Sauk County Zoning Ordinance as intending that provisions requiring special exception permits be administered so as to allow property owners the maximum freedom possible in their use of their land consistent with the protection of the public and those interests identified in the Ordinance. Unlike a situation where someone seeks a variance from the terms of the applicable provisions of the Ordinance, a special exception permit is, by definition, applicable to a use which the County Board has intended to be allowable if adequate safeguards can be fashioned to protect the public and other persons' interests from undue interference. In the judgment of the Board, the intent of the Ordinance is to weigh the legitimate interest and right of the property owner to engage in the proposed activity against the unavoidable harm or interference with the interests or rights of neighboring property owners which would result from allowing the proposed use even under available restrictions.

The Ordinance does obviously intend to provide means whereby conditions can be fashioned and enforced which are reasonably related to the public interest and proper respect for the rights of all persons affected by the activities in question. It seems clear the previous program of regulations has well served the intended purpose. The Board of Adjustment believes it must do all it can to maintain the effectiveness of these conditions. It is for this reason that the Board has resisted any alterations of the previous permit which has not been clearly justified. And for the same reason, the Board wants to reiterate the seriousness of any violation of the attached conditions.

4. The Sauk County Conservation, Planning, and Zoning Department shall inspect all permitted operations at least three times each year on an unscheduled, unannounced basis to ensure compliance with these conditions. At the discretion of the Department, such additional inspections may be made and expert assistance procured as appears reasonably appropriate to ensure continuous compliance. The Applicants

shall grant permission to all duly identified staff and agents for the Sauk County Conservation, Planning, and Zoning Department desiring to enter the premises to inspect permitted operations, subject only to such limited delays as may be reasonably necessary for the protection of a person and property, such as in the instance of on-going blasting in a specific area where it is impractical to attempt to cease operations so as to permit immediate inspection safely. Provision for a vigorous, on-going inspection programs appears to the Board of Adjustment to be the best way to respond to concerns. Based on what it sees as good performance thus far, the Board of Adjustment continues to believe that the Department, which is under the direct supervision of a committee of elected County Board of Supervisors, is well-suited to determine if a more substantial investment of resources should be devoted to public monitoring of quarry operations than the minimum three times per year previously established by the Board of Adjustment. Three times each year should be sufficient to ensure that reclamation activities are being conducted concurrently with the mineral extraction activities as required under the approved plans. Whether additional expense and effort is justified in more frequent monitoring should be subject to ongoing review and, insofar as there is active public concern, there appears no reason to place an arbitrary limit on the frequency and intensity of the effort to assure concerned property owners and other interested persons that operations are being conducted in a responsible and legitimate fashion. Even frequent inspections should not create an undue disruption of the applicants' operations.

5. The Board of Adjustment continues to believe that a performance bond in the amount of \$500,000 is reasonable and requires that evidence of the same shall be furnished to Sauk County to ensure the faithful performance and completion of the reclamation practices called for by the reclamation plan data submitted by the applicants, in the event neither of the applicants, nor any assignee in interest or asset of the same be available to pay the costs of such performance and completion. At the option of the applicants, a cash deposit or equivalent arrangement, in a form approved by the Sauk County Conservation, Planning and Zoning Department, may be utilized in lieu of a bond. This provision allows some flexibility in minimizing the cost of establishing financial responsibility.

At the same time that the members of the Board of Adjustment place great emphasis on the Applicants' proposal to perform reclamation activities concurrently with mineral extraction and processing, it is clear that at any time, a tremendous amount of work will have to be performed in order to restore the entire quarry area to the final standards envisioned by the reclamation plan prepared by Pinnical Engineering, May 13, 2008, which standards are continued in full force and made applicable to this permit. This bond or equivalent deposit is not to be used to relieve the applicants

from the responsibility to directly fund and perform the scheduled reclamation practices. It is intended that if a financial catastrophe abruptly renders the applicants or any assignee incapable of proceeding further with reclamation activities, this bond or equivalent would provide funds to accomplish the final restoration of the area to a degree comparable to that conceptualized by Pinnical Engineering on behalf of the applicants. Engineering and environmental practices may have to be altered, of course, if the anticipated sequence of operations is suddenly disrupted, but the concurrent phasing of operations called for by Pinnical Engineering's proposal should minimize the need to make significant adjustments to the original plan. The Sauk County Conservation, Planning & Zoning Department shall have the authority, if the eventuality arises, to utilize the funds available to retain necessary professional assistance for appropriate redesign work, as well as for the contracting of the work to be performed.

6. The Applicants shall make whole any persons suffering losses as a result of damage to buildings or wells caused by the permitted operations; it shall be the responsibility of any persons making any such claim to first present to the applicants or their designated representative at the premises satisfactory evidence as to the amount of damages claimed and of causation. In the event of any unresolved dispute between a claimant and the applicants with regard to the amount of damages or causation, the applicants agree that the same shall be submitted to arbitration in accordance with Chapter 788 of the Wisconsin Statutes, if the claimant so requests.

The only indication of a reasonably quantifiable relationship between activities at the existing quarry and economic harm to neighboring properties was the testimony that in the past several property owners had claimed that blasting at the quarry had resulted in damages to their buildings or wells. By agreeing to submit any such claims to arbitration, the applicants or their assignees or agents have done everything that the Board of Adjustment believes they can be fairly required to do as a condition of such a permits as this to compensate property owners for those economic losses which can be concluded on the basis of the evidence presented at the hearing, to be your responsibility. The reports indicating that no demand for payment on such a claim has ever been seriously pressed since the last permit was issued, and the improved tenor of quarry/neighbor relations evident on the record, make the availability of arbitration a significant success.

7. The applicants shall not operate at any time when their primary dust control measures, in particular those dependent on the spraying of water, cannot be effectively utilized and, within 24 hours of being notified by the Sauk County Conservation, Planning and Zoning Department that it has determined that excessive dust exists with regard to any aspect of the

permitted operations, the applicants shall implement appropriately specified dust control measures, including the activation of all wet dust suppression system and other methods of dust control available at the processing and leading points, the application of dust control measures for emissions caused by vehicular traffic on roadways, and the curtailment of operations as necessary under prevailing conditions to abate observable excess dust.

It is not the intent of the Board of Adjustment to attempt to go beyond the air quality standards and technology required by the State of Wisconsin Department of Natural Resources, Federal Environmental Protection Agency or other more expert and specialized regulatory governmental units. As documented in the record presented to the Board of Adjustment, sophisticated technology has been proposed to control and monitor the air quality problems associated with the existing quarry and which are to be anticipated to continue to arise from time to time with the proposed quarry expansion, even though the actual expansion of quarrying shall be vertical on the same site as ongoing operations and no alteration of the outer perimeters of the quarry has been asked for or authorized.

8. The applicants shall arrange for all blasting in connection with the permitted operations to be monitored at the blasting site and, upon the request of residents, at any dwelling within ½ mile of a blast site, with a certified instrument capable of producing reliable records of vibration and noise levels for each shock which shall be provided to the Sauk County Conservation, Planning, and Zoning Department within 10 days of the recorded event. The Board members felt the operator shall notify, in writing, all affected neighbors within ½ mile, including the Department of Conservation, Planning and Zoning at least 24 hours prior to the actual blast. This written notification shall be followed up with a telephone call or personal visit to the above interested parties four hours prior to the blast, identifying the time of the proposed blast. Delays or shot cancellations will again require the notification procedure. The radius of neighbors to be notified for each blast to be determined in accordance with all applicable state standards.

Other than requiring separate monitoring on an ongoing basis for each blast, the Board of Adjustment intends to defer to the adequacy and expertise of federal and state regulatory agencies for the substantive regulations to govern the blasting aspects of permitted operations, as proposed by the applicants. The additional monitoring should not be onerous in view of the limited number of blasts intended each year and the high degree of anxiety provoked in neighboring property owners by each such blasting event. Making compliance with applicable state regulations and independent monitoring conditions of this special exception permit are, in the judgment of the members of the Board of Adjustment,

significant and reasonable accommodations to the rather large number of people directly exposed to the physical effects of these blasts.

9. The Board of Adjustment hereby specifically makes it the joint responsibility of both the owner and operator of the quarry premises to take all reasonably available measures to minimize switching of rail cars and other activities causing quarry related rail traffic to interfere with traffic on the streets and highways serving the Village of Rock Springs. No longer shall the sole standard for evaluating compliance with this condition be the provisions of s. 192.292 of the Wisconsin Statutes, prohibiting the stopping of any railroad train, locomotive or car upon or across any highway or street crossing, or the leaving of the same upon any such crossing longer than ten minutes, except in the cases of accident.

It shall be the responsibility of the applicants to ensure that continuing care is taken to minimize this type of disruption. This seems patently practicable, given the previous testimony, that it would be "not very difficult" to avoid trains shuttling back and forth across the roads in Rock Springs by presorting them for loading at other facilities of the railroad company.

10. Chain link fencing, at least six foot high, shall be maintained in good condition on the West, North and East sides of the site, inside the access road to the property to the west of the actual active quarry site, and except for such gates which shall be unlocked only during times necessary for ingress and egress, as proposed by the applicants.
11. The previous permit required the applicants to provide, at least on a monthly basis, an informed and knowledgeable representative who shall be available to speak to and answer questions which may be raised at a public forum, upon receipt of a petition signed by ten persons offering to arrange appropriate meeting facilities and to publicly advertise such a meeting in a timely manner through local news media. At the present time this condition is being continued in the same form, but the Board of Adjustment strongly encourages the applicants to pursue arranging such meetings with interested persons as a means for developing and maintaining an image as a good neighbor.

The applicants may choose, if they so desire, among competing requests during any month for which there has been more than one such petition received, and it shall be the responsibility of the petitioners to make arrangements for a forum at which any member of the public may come to receive information concerning the permitted operations and related plans and activities of the applicants which are pertinent to the future interests of the applicants and neighboring property owners in the subject premises. By limiting the need to provide such a representative to one time per

month and imposing reasonable assurances that the forum will be a truly responsible and public opportunity for sharing information, the members of the Board of Adjustment believe this condition is as consistent with the stated desires of the applicants as is possible.

12. No operations shall be conducted at any time prior to 6:00 a.m. or after 8:00 p.m. on Monday through Friday, nor prior to 6:00 a.m. or after 2:00 p.m. on Saturday. These hours are modified to the extent that the Board of Adjustment specifically includes within these limits all rail loading activities associated with the permitted operations. Compliance with these hours of operation constitutes an absolute performance standard. The Board of Adjustment are not willing to accept the previous applicants' statement that "...there will be times when loading of rail cars will take place during times beyond our proposed quarry operations schedule." There may be economic loss to the Applicants and inconvenience to the Applicants' employees on occasion, but the members of the Board of Adjustment envision no reason why the community should be subjected to the noise and oppressive inconsideration associated with the extending the unpleasant and unavoidable side effects of quarry-related operations beyond the hours proposed.

The railroad can provide for sudden requirements caused by nature, accidents or derailments through other means, such as maintaining facilities where aggregate may be stockpiled in advance for precisely such purposes. It may not be as economical or convenient for the railroad, but insufficient reason has been suggested to cause the members of the Board of Adjustment to assume that local residents should have to be the ones to bear the costs of that aspect of rail operations.

- D. The conditions requested by the Town of Excelsior, including no trucks coming to or leaving the quarry can use town roads, except if they are making deliveries on that particular road.
- E. Sauk County Conservation, Planning and Zoning shall be granted permission to view the site to ensure compliance with these conditions and other relevant provisions of Sauk County Ordinances. The power to ensure compliance with these conditions is given to Sauk County Conservation, Planning and Zoning. If the department finds that any of these conditions have been violated, they are hereby authorized to take corrective action, either through suspension of the permit, citations or by any means of enforcement that is within their power.
- F. Failure by the Applicant to follow all of the conditions set forth by the Sauk County Board of Adjustment is grounds for suspension or revocation of the special exception permit and possible enforcement action. In order to have the special exception permit reinstated after suspension, the applicant must comply with all conditions established by the Board of Adjustment, as determined by the Sauk County Conservation, Planning and

Zoning Director or appear in front of the Board of Adjustment. In order to have the special exception permit reinstated after revocation the applicant must appear in front of the Board of Adjustment for a new hearing and comply with all requirements as outlined in this letter.

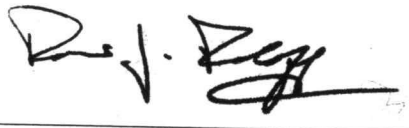
APPEAL RIGHTS

A complete record of the hearing and the decision of the Board is available for inspection at the Sauk County West Square Building. Please note that advance arrangements may be necessary to inspect such records. This decision will become final unless a written appeal is filed with the Sauk County Circuit Court within 30 days of the decision being filed in the Sauk County Planning and Zoning Office. Copies of the record may be secured upon written request and upon payment of the transcription fees.

Very truly yours,

SAUK COUNTY BOARD OF ADJUSTMENT


Linda White, Chair


Robert Roloff, Secretary

Filed on this date: Nov 28, 2011

COPY TO:

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