

MIKE O'CONNOR,

Plaintiff,

v.

BUFFALO COUNTY BOARD OF ADJUSTMENT,

Defendant,

v.

GLACIER SANDS, LLC,

Case No. 2012 CV 71

Intervening Defendant.

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SCHOOL DISTRICT OF COCHRANE-  
FOUNTAIN CITY,

Plaintiff,

v.

BUFFALO COUNTY BOARD OF ADJUSTMENT,

Defendant,

and

GLACIER SANDS, LLC.

Case No. 2012 CV 74

Intervening Defendant.

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**DECISION**

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FACTS

This is a certiorari review of two cases which have been consolidated. These actions seek certiorari review of a decision by the Buffalo County Board of Adjustment

BUFFALO COUNTY, WI  
CIRCUIT COURT  
FILED  
AUG 01 2013  
ROSELLE M. SCHLOSSER  
CLERK OF COURT

(BOA) granting Glacier Sands authorization to mine and process sand on property it leases from R & J Rolling Acres, LLP(R&J).

R&J and Glacier Sands submitted an application seeking a conditional use permit on March 27, 2012. The BOA held a public hearing on April 19, 2012 receiving input from the public on this application. The BOA also visited the site of Glacier Sands proposed mine. The BOA held additional public hearings on June 14 and June 27, 2012 to receive additional public input. Plaintiff O'Connor and a representative of the School District appeared at both public hearings to voice their opposition to the issuance of a conditional use permit. The public hearing on June 14 included a presentation from a Wisconsin Department of Transportation planner regarding the department's analysis of traffic safety factors along State Highway 88, near the proposed mine. The BOA met on June 27, 2012 and approved the application with conditions. The board issued its decision approving the application and issuing the conditional use permit. This written decision was filed in the office of the BOA on July 5, 2012. Plaintiffs O'Connor and the School District both filed their petitions for certiorari review on August 6, 2012.

R&J and Glacier Sands had submitted a previous the application in January, 2012. This application was similar to the application that was approved. This application was denied by the BOA on March 8, 2012. The application that Glacier Sands submitted on March 27, 2012 was submitted just before a moratorium on "frac sand" mining took effect.

The plaintiffs claim that the second application, which was approved, should be barred by the doctrine of "claim preclusion". The plaintiffs also claim that the Buffalo

County zoning ordinance does not allow for the mining of frac sand and that this requires the court to reverse the decision of the BOA issuing the conditional use permit in this case. The plaintiffs also take the position that the decision to grant the conditional use permit by the BOA was arbitrary and unreasonable, thereby requiring the court to reverse the decision of the BOA. Finally, plaintiffs argue that the board of adjustment erred in issuing the conditional use permit because R&J Rolling Acres did not exist as a business entity at the time of the application. In support of their arguments, plaintiffs ask that the court consider supplementing the record by accepting evidence in the form of an audio recording purporting to be from a BOA hearing on March 8, 2012.

#### STANDARD OF REVIEW

It is well accepted that Certiorari review is limited to four questions:

- (1) Whether the Buffalo County BOA kept within its jurisdiction;
- (2) Whether Buffalo County BOA proceeded on a correct theory of law;
- (3) Whether the BOA action was arbitrary, of oppressive or unreasonable and represented its will and not its judgment; and
- (4) Whether the evidence was such that the BOA might reasonably grant the conditional use permit to R&J and Glacier Sands.

In reviewing the validity of the Buffalo County BOA's decision to issue the conditional use permit to R&J and Glacier Sands, the court is bound by a presumption of correctness and validity with respect to that decision. The plaintiffs bear the burden to overcome the presumption of correctness. See Ottman v. Town of Primrose, 332 Wis. 2d 39 (2011). Buffalo County's interpretation of its own ordinances is only unreasonable if "it is contrary to law, if it is clearly contrary to the intent, history, or purpose of the

ordinance, or if it is without a rational basis.” See Guerrero v. City of Kenosha Housing Authority, 337 Wis. 2d 484 (Wis. App. 2011)

### DECISION

The first issue for the court to decide is whether the second application, submitted after the denial of the first application, is prohibited by law. Plaintiffs claim that the exclusive remedy that R&J and Glacier Sands had upon denial of their first application was the certiorari review process. Plaintiffs argue that the doctrine of claim preclusion (formerly known as res judicata) applies to prohibit a second application after denial of the first one. Plaintiffs arguments on this issue are not persuasive. Taken to its logical conclusion, this argument would result in forever barring a second application in every case where an initial application was denied. This result would not be reasonable. On this issue, the Wisconsin Supreme Court, in Lindas v. Cady, 183 Wis. 2d 547 (1994) stated:

“The other cases Lindas cites, Duel, Schleck, Fond du Lac, and Davis, all deal with the ability of the agencies to reconsider their own unreviewed determinations. In holding that agencies are not precluded from doing so, the cases all reflect the holding in Duel which stated that, ‘[t]he extent of the power of an administrative body or agency to reconsider its own findings or orders has nothing to do with res judicata; the latter doctrine applies solely to courts.’ ”

See Lindas at pages 564 – 565.

The plaintiffs request to reverse the decision of the BOA granting the conditional use permit in this case on the grounds of claim preclusion is hereby denied.

The plaintiffs claim that the existing Buffalo County zoning ordinance does not permit the mining of frac sand. The applicable Buffalo County zoning ordinance reads as follows:

“Manufacturing and processing of natural mineral resources indigenous to Buffalo County incidental to the extraction of sand and gravel and the quarrying of limestone and other rock for aggregate purposes, including the erection of buildings, in the installation of necessary machinery and equipment incidental thereto, but not the storage of cement, asphalt, or road oils or the mixing of concrete or blacktop or related materials, provided that any county, town or municipal government or its agent may store or make such materials when incidental to the improvement of highways or streets.”

Plaintiffs claim that a plain reading of this ordinance does not allow frac sand mining. Plaintiffs position is that the language “for aggregate purposes” applies to the extraction of sand, gravel and the quarrying of limestone or other rock. The defendants claim that the phrase “for aggregate purposes” applies only to the quarrying of limestone and other rock. These two interpretations are both reasonable. The Buffalo County BOA’s interpretation of its zoning ordinance must be upheld unless “it is contrary to law, if it is clearly contrary to the intent, history, or purpose of the ordinance, or if it is without a rational basis.” See Guerrero v. City of Kenosha Housing Authority, supra. The plaintiffs have not shown that the BOA’s interpretation is contrary to law, or is contrary to the intent, history, or purpose of the ordinance, or if it is without a rational basis. Therefore, plaintiffs request to reverse the decision of the BOA granting the conditional use permit to R&J and Glacier Sands on the grounds that it is not permitted by the applicable Buffalo County zoning ordinance is hereby denied.

Plaintiffs argue that the decision of the BOA to grant the conditional use permit in this case should be reversed because the decision was arbitrary and unreasonable. The essence of the plaintiffs position on this issue is that the decision of the BOA to issue the

conditional use permit was based on the same evidence and information that the BOA used to deny the first application.

The BOA conducted three separate public hearings on the second application for the conditional use permit. The BOA gained additional information at the public hearings, including a presentation from a representative of the Wisconsin Department of Transportation. The BOA also conducted a second site visit. The additional information included a Transportation Safety Impact Assessment (TSIA). The BOA also heard evidence in opposition to the granting of the permit from the plaintiffs. At the conclusion of the April 19 meeting, the BOA delayed its decision to allow the Wisconsin Department of Transportation time to undertake its study and report back to the Board. A representative of the Department of Transportation addressed the BOA on June 14, 2012 giving the board additional information including a written summary of the TSIA analysis. At the conclusion of the June 14, 2012 meeting, the BOA again delayed its decision to review information provided by the Department of Transportation. The Department of Transportation representative appeared again at the BOA meeting on June 27, 2012. The BOA considered all of this information in making its decision. The BOA also considered the “location, nature and size of the proposed use.” In its written decision, the BOA stated:

“The location for the sand mine on the property is compatible with the nature of the property and the surrounding land usage. The surrounding land use consists of agriculture and forested property. The proposed sand mine is located in an existing agricultural field that contains two knolls directly east of state-run Highway 88. As the sand fill is exhausted, it will be converted back into agricultural crops per NR 135.”

Plaintiffs claim that the issuance of the conditional use permit to R&J Rolling Acres was arbitrary and unreasonable because there had been no formal business entity filing on this name. The plaintiffs provided no legal authority requiring a formal business entity filing. This fact does not overcome the presumption of correctness given to the BOA's decision and it does not render the decision arbitrary and unreasonable.

Given all of the information and evidence received and considered by the BOA in making its decision, the plaintiffs have not proven that the Buffalo County BOA acted arbitrarily and unreasonably in issuing this conditional use permit. Therefore, plaintiffs request to reverse the decision of the BOA granting the conditional use permit on the grounds that the decision was arbitrary and unreasonable is hereby denied.

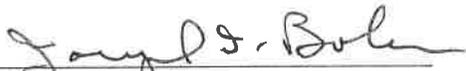
With regard to various issues regarding the application and its supporting documents, and whether the proper procedure was followed by the BOA, the court finds that the application was complete and proper, and all BOA meetings were properly noticed. Plaintiffs provided no authority to support their argument that the second CUP application is barred by the moratorium on frac sand mining that took effect two days after the filing of the second application.

The plaintiffs have asked the court to supplement the record by permitting evidence of a purported recorded conversation from a meeting of the Buffalo County BOA on March 8, 2012. No proper foundation has been laid for the admission of this evidence. Therefore the court will not consider it.

For the reasons set forth above, the plaintiffs request to reverse the decision of the Buffalo County board of adjustment granting the conditional use permit to R&J and Glacier Sands is DENIED.

Dated this 30<sup>th</sup> day of July, 2013.

BY THE COURT

  
The Honorable Joseph D. Boles  
Pierce County Circuit Court Judge

cc: Aaron Graf  
Michael Screnock  
John Hibbard  
John Eckman/Karla Vehrs