STATE OF WISCONSIN CIRCUIT COURT BUFFALO COUNTY

MIKE O'CONNOR, Plaintiff, v. **BUFFALO COUNTY BOARD OF ADJUSTMENT,** Defendant, and **GLACIER SANDS, LLC,** Intervenor.	Court File No. 12-CV-71 Case Code: 30955 – Petition for Writ of Certiorari

MEMORANDUM OF LAW OF PLAINTIFF MIKE O'CONNOR IN SUPPORT OF REVERSAL UPON CERTIORARI REVIEW

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INTRODUCTION

Mike O'Connor, a resident of Buffalo County living in the vicinity of the proposed R&J Rolling Acres ("R&J) "frac sand" mine, seeks reversal of the decision by the Buffalo County Board of Adjustment ("BOA") to issue a conditional use permit ("CUP") to R&J. The BOA lacked jurisdiction to consider the R&J application it approved because, having denied R&J a CUP on a virtually identical application weeks earlier, R&J's sole remedy was to seek certiorari review. Wisconsin law simply does not give an aggrieved applicant the right to a second, *de novo* bite at the apple in the hopes it receives a different, more favorable result. The BOA's decision to approve an application it rejected weeks earlier—with no record evidence mitigating the grounds for the first denial—also is patently arbitrary and unreasonable. And, while the BOA noted concerns about transportation safety issues, it approved the second application without waiting for the final WisDOT report, which ultimately concluded that the addition of sand mining trucks will have a "noticeable impact" on the safety of the proposed haul route. The decision to approve the R&J application was arbitrary and unreasonable and resulted from the BOA's will, not its judgment. Accordingly, O'Connor respectfully requests that the Court reverse the BOA's decision and find that no CUP may be issued to R&J.

STATEMENT OF THE RECORD

For the convenience of the Court and parties, O'Connor is submitting a two-volume appendix along with this brief. The appendix primarily contains documents produced by the BOA as part of the certified record in the case (*e.g.*, R0001). The appendix also contains several documents omitted from the BOA's record, which are attached as exhibits to the Affidavit of Gary LeMasters and the Affidavit of Karla Vehrs. All cites to the appendix are denoted as A___.

FACTUAL BACKGROUND

A. The Buffalo County Zoning Ordinance and frac sand mining.

Buffalo County has a Zoning Ordinance that regulates the use of land within the county. The Ordinance divides land into residential, agricultural, recreational, commercial, and industrial districts.[1] Section 41 of the Ordinance identifies conditional uses that, under certain circumstances, may be allowed in agricultural districts, such as the district in which R&J proposes to mine frac sand. (A256.) Those conditional uses include the "[m]anufacturing 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." (*Id.*)

A CUP only may be issued by the BOA after considering seven factors enumerated in the Ordinance. (A266.) These factors include the proposed use's "compatibility with existing uses on land adjacent thereto" and "relationship to the public interest, the purpose and intent of this ordinance and substantial justice to all parties concerned." (*Id.*) The purpose of the Zoning Ordinance is to "promote the public health, safety and general welfare . . . ." (A252.)

R&J proposes to mine industrial silica sand, commonly referred to as "frac sand." Frac sand "consists of well-rounded sand composed of almost pure quartz grains."[2] Minn. DNR, Industrial Silica Sand FAQs, at www.dnr.state.mn.us/lands_minerals/silicasand.html. The sand is extremely hard and able to withstand high pressure without breaking. (*Id.*) Because of its industrial uses, the value of frac sand "is significantly higher than sand and gravel used in the construction industry." (*Id.*) Deposits of frac sand are found in portions of Illinois, Iowa, Minnesota, and Wisconsin. (*Id.*)

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[1] Relevant portions of the Zoning Ordinance are included in the accompanying Appendix as Exhibit 1 to the Affidavit of Karla Vehrs. (A252 et seq.)

[2] The Court may take judicial notice of these facts pursuant to Wis. Stat. § 902.01.

The increase in demand for frac sand is related to the growing practice of hydraulic fracturing, also known as "fracking," as a method of extracting oil and gas from underground shale rock formations. (*Id.*) The fracking process uses a "mixture of proppant (usually frac sand), water, and chemicals and injects this mixture into a well under very high pressures. Small cracks form in the bedrock, frac sand 'props' open the fissures, and conduits form that increase the flow of fluids and gas within a well." (*Id.*) The smooth, round quality of frac sand "allow[s] for oil and gas to flow between individual grains without clogging the fractured rock." (*Id.*)

B. R&J's First Application to mine frac sand is denied by the County on March 8, 2012.

On January 13, 2012, R&J submitted an application to Buffalo County (the "First Application") for a CUP to conduct "Frac sand mining operation including: mine, wash plant, storm pond, recycle water pond" on 205 acres of property in Gilmanton, Wisconsin. (A2.) The narrative in the application further provided:

> Noise impacts include excavating equipment and haul trucks. Dust will be controlled by using wet dust sppression (sic) system. There will not be smoke, glare, refuse, gas or effluent resulting from the proposed use. While there are no wetlands indicated on the WIDNR wetland map, there are soils conducive to wetlands north of the property and across STH 88. The haul route from the plant will be to the south on STH 88 to STH 35. There will be 80 trucks/day leaving the site Monday through Friday. Storm water drainage from the site will be directed to the sotrm (sic) pond. Discharge from the pond will be to Pratt Creek on the west side of STH 88.

(*Id.*) While the application identified the property owner and applicant as "R & J Rolling Acres, LLP," neither the Wisconsin Department of Financial Institutions nor the business registration filings from any other state contain a record of an entity with that name. (A251.)

The First Application included seven exhibits, each of which either was photocopied from public records or printed from an online map site. (A4-10.) The application did not

contain any of the following: an explanation of the proposed scope of operations, the extent or duration of daily operations, specific steps to be taken to address the transportation, public health, safety, and welfare concerns implicated by the large-scale mine, an environmental impact statement or any other technical information or reports related to issues such as groundwater, storm water, water usage, air emissions, noise levels, wetlands, endangered species, or reclamation, or any information regarding financial assurance in the event the mine caused damage to Buffalo County or its residents. (*Id.*)

The BOA considered the First Application at two public hearings, held on February 2 and March 8, 2012. (A11, A37.) At the February hearing, a representative of R&J informed the BOA that they intended to have 150 trucks leave the site each day, rather than the 80 disclosed on the application. (A21-22.) Individuals who addressed the BOA at that hearing expressed concerns about, among other things, traffic safety due to the substantial proposed truck traffic, water usage, and the information missing from the application. (A23-34.) Over 200 people attended the March hearing (A38), many of whom again voiced concerns about traffic safety and the health and environmental effects of the proposed mine. (A71-83.) At the hearing, R&J orally changed the number of trucks it leaving the site each day from 150 to 126. (A46.) The BOA visited the proposed site as part of both public hearings. (A18, A42.)

At the conclusion of the R&J portion of the March 8 hearing, the BOA considered a number of proposed changes to conditions that were prepared in advance for a possible CUP. (A43.) All of those proposed changes addressed issues relating to traffic safety. The changes included a proposal to bar hauling on federal holidays and during school pick-up and drop-off hours, to limit the hours during which hauling could occur on different days of the week, to

require trailers to be covered with tarps, and to limit the number of truckloads to 80 per day—the figure listed in the First Application. (*Id.*)

Despite approving motions to add limiting conditions relating to traffic safety and reduce the number of truckloads to 80 each day, the BOA denied the First Application by a 2-1 vote. (*Id.*) The written decision, filed on March 29, 2012 (the "March Order"), identified traffic issues as the basis for denial. (A86-87.) These traffic issues included the concerns of neighbors and other citizens regarding "safe travel on State Trunk Highway 88 in light of significantly increased large vehicle (truck) traffic on the road," the documentation of slow and unsafe reaction times of trucks on the roads over which frac sand would be transported, the frequency with which trucks cross the centerline of Highway 88 due to the road layout and sharp corners, and the frequency with which trucks would be travelling on county roads under the proposed plan (at one truck each 3.33 minutes throughout the day). (*Id.*)

At the March 8, 2012 public hearing, county resident Gary LeMasters placed a device in the front of the room to record the hearing. (A90-91.) The device continued to record after the BOA voted to deny the First Application and after the county's official recording stopped. As the recording reflects, the BOA and/or members of the county's zoning staff were approached by Del Twidt, then Chairman of the County Board and Acting County Administrator,[3] less than 20 seconds after the motion to deny passed. In the recording, and amid other crowd background noise, Mr. Twidt can be heard saying, "I think these gentlemen need to be advised as to how they can re-apply." (A90-92.)

R&J did not appeal the denial of the First Application.

[3] Mr. Twidt's simultaneous service in both roles violates Wis. Stat. § 59.18.

C. R&J files a second, materially identical application with Buffalo County.

On March 27, 2012, nineteen days after the First Application was denied (but before the March Order was filed with the County), R&J filed a new application for the mining of frac sand (the "Second Application"). (A93-105.) The Second Application differed from the first in only three respects. First, instead of identifying "80 trucks/day" leaving the mine, the number "80" was whited out and replaced with the handwritten number "126"—the number R&J settled on at the March 8 public hearing. (*Compare* A2 *with* A94.) Second, instead of providing that trucks would leave the site "Monday through Friday," the word "Friday" was whited out and replaced by the word "Saturday." (*Id.*) Third, the misspelled word "sotrm" (as in "storm pond") was whited out and corrected. (*Id.* at p. 22.) Aside from these three details, the Second Application was virtually identical to the first. The Second Application did not address any of the underlying traffic safety issues that led to the BOA's denial of the First Application.

D. The Buffalo County frac sand Moratorium takes effect two days after the Second Application is filed.

In response to numerous applications for CUPs to operate frac sand mines in Buffalo County, on March 20, 2012, the Board of Supervisors approved a seven-month "Moratorium on the Expansion and Creation of New Nonmetallic Mining Operations Within the Unincorporated Areas of Buffalo County Pending Further Study" (the "Moratorium"). The Moratorium took effect on March 29, 2012. (*See* A272, *et seq.*) The Moratorium contained a "grandfather clause," excepting from its prohibitions applications submitted before the effective date that were "determined to be in complete conformity with all zoning requirements in effect." (A274.)

In the Moratorium, the Board of Supervisors made a number of findings:

- "The purpose of this moratorium is to allow the County adequate time to study the possible impacts that nonmetallic mining operations may have on the health, safety and welfare of the residents of Buffalo County including air quality and water quality concerns and potential impact to the infrastructure of the County, to

determine the advisability of amending its Comprehensive Use Plan Strategy and to review and consider amending or adopting other police power or zoning ordinances so as to effectively regulate nonmetallic mining operations in the public interest." (A273.)

- "[T]he mining, processing and transporting of crystalline silica sand may have an impact on air and water quality, which may affect the health and safety of county residents and could impact roads and infrastructure within the County." (A274.)

- "[D]ue to the increased demand for crystalline silica sand and the potential for large-scale nonmetallic mining operations, it is critical that all necessary regulations and safeguards be in place before such nonmetallic mining operations expand or commence." (*Id.*)

- "[T]he current Buffalo County Zoning Ordinance and other current regulatory ordinances may not adequately address the health, safety and welfare of Buffalo County residents and the enhanced strain on the County infrastructure as a result of crystalline silica (frac) sand mining/nonmetallic operations." (*Id.*)

The Moratorium was extended for six months and now is set to expire at the end of April 2013.

E. Despite its earlier rejection of a materially identical application, the BOA holds three public hearings and ultimately approves the Second Application.

The BOA held three hearings to consider the Second Application, all after the Moratorium took effect. The first hearing, held on April 19, was preceded by published notice 14 and 7 days before the hearing. (A106.) At that hearing, numerous members of the public voiced concerns about traffic safety issues created by the mine, particularly on Highway 88. (A141-157.) At the time of the first public hearing, the Wisconsin DOT was preparing a report on the impact of trucks transporting frac sand on traffic safety on Highway 88. (A110.) As a result, the BOA voted to delay a decision on the Second Application until the Wisconsin DOT could finish its report. (A114.)

The BOA held its next hearing on the Second Application on June 14, 2012, which likewise was preceded by published notice 14 and 7 days before the hearing. On June 14, the DOT sent the county its "Traffic Safety Impact Assessment – Summary of Initial Finding," regarding traffic concerns on Highway 88. (A224-226.) The Summary was not the final report

over which the BOA delayed its decision on the Second Application; rather, it presented initial findings by the DOT. The Summary itself noted that "additional analysis is required" to understand lane departures and possible mitigation strategies for those departures. (A225.) The DOT's initial findings were then discussed in oral testimony given at the June 14 hearing. DOT representative Tom Beekman explained that his department had found 20 curves in the relevant 30-mile stretch of Highway 88 in which "a vehicle of the size that the sand mines generate . . . would have some challenges staying inside their lane." (A185.) He further testified that the DOT did not yet know what needed to be done to correct for "lane departures" and whether mitigation would require "a minor adjustment to the pavement" or "a more significant regrading." (A186.) At the end of the hearing, the BOA voted to further delay a decision on the application. (A222.)

Just thirteen days later, on June 27, 2012, the BOA took up the Second Application again. However, it failed to provide proper statutory notice of the hearing and impending vote. Indeed, during a discussion *on the record* that preceded the June 14 vote to delay consideration of the Second Application, the county zoning staff told the BOA at least twice that the application could not be considered on June 27 because the deadline for including the application in published notices already had passed. (A220-222.) The Notice of Public Hearing for that hearing also failed to list the Second Application. (A276.) And the notice identified June 14 and June 21 as the dates on which notice had been published—even though those dates were only 13 and 6 days before the hearing, rather than the statutorily-mandated 14 and 7. (*Id.*)

At the June 27 hearing, the BOA again heard testimony from DOT representative Tom Beekman. (A236-237.) His testimony provided little additional information from that presented 13 days earlier. Instead, Mr. Beekman identified additional steps DOT planned to take to study

the route's safety and possible mitigation efforts where safety concerns existed. (*Id.*) As of June 27, however, the final DOT report still had not been issued. (A277, *et seq.*)

On June 27, the BOA approved the CUP for the R&J frac sand mine, including 105 loaded trucks per day leaving the mine. (*See* A245, *et seq.*) In voting to approve the Second Application, the BOA did not include any conditions requiring the use of quad axle trucks—the only trucks then known to avoid center-lane encroachment—or preventing the mine from transporting frac sand until improvements could be made to the stretches of road known to have "lane encroachments" for larger trucks. (*Id.*) Instead, in its written decision approving the Second Application (the "June Order"), the BOA stated in its conclusions that "the WisDOT acknowledges that STH 88 may have some sub-standard features, but believes the road can handle increased traffic volumes." (A247.)

The full report by the DOT's contractor AECOM was completed on July 24, 2012. (A278.) The report confirmed that a large number of curves causing center-lane encroachments—ranging from 20 to 32 depending on the size of truck involved—exist along the project corridor for all but dump trucks. (A279.) The report's conclusion states, "The 600 additional sand mine trucks anticipated with current potential development will have a *noticeable impact on the safety and operations* of the road." (A286 (emphasis added).) And while the report identifies a number of remediable instances of insufficient stopping times at intersections, it also expressly states that "[p]rivate driveways, field entrances, business entrances, etc. were not reviewed for [intersection sight distances]." (A283.)

ARGUMENT

I. CERTIORARI STANDARD OF REVIEW.

O'Connor seeks certiorari review pursuant to Wis. Stat. § 59.694(10) of the decision of the BOA to approve the Second Application. Under that statute, a "person aggrieved by any decision of the board of adjustment, or a taxpayer [may] commence an action seeking the remedy available by certiorari." Wis. Stat. § 59.694(10). The Court's review is limited to: "(1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably make the order or determination in question based on the evidence." *Murr v. St. Croix County Bd. of Adjustment*, 796 N.W.2d 837, 841 (Wis. App. 2011). In considering this case, "the court may take evidence . . . which shall constitute a part of the proceedings upon which the determination of the court shall be made." Wis. Stat. § 59.694(10).

II. THE BOA'S APPROVAL OF THE SECOND APPLICATION SHOULD BE REVERSED BECAUSE WISCONSIN LAW DOES NOT ALLOW AN APPLICANT A SECOND, *DE NOVO* BITE AT THE APPLE.

The BOA's approval of the Second Application violated Wisconsin law, which does not allow an aggrieved applicant to simply resubmit its application for a CUP hoping for a different result. Instead, the remedy for a "person aggrieved by a decision of the board of adjustment" is to file a certiorari action in circuit court, as O'Connor has done here, challenging the decision. *See* Wis. Stat. § 59.694. Moreover, R&J's remedy to appeal the denial of the First Application to this Court is exclusive. "[W]here a statute specifies a direct method of judicial review of agency action, the method so prescribed *is regarded as exclusive*." *Sauk County v. Trager*, 346 N.W.2d 756, 759 (Wis. 1984) (emphasis added); *see also Assoc. of Career Employees v. Klauser*, 536 N.W.2d 478, 484 (Wis. App. 1995). Wisconsin law simply does not allow R&J—whether with

active support of certain County authorities or not—to re-file its previously denied application in an attempt to obtain a different, more favorable result.

R&J's Second Application further was barred by *res judicata*. When R&J failed to seek certiorari review of the denial of its First Application, that decision became final on April 28, 2012, 30 days after the written decision was filed in the BOA's office. Wis. Stat. § 59.694(10). Once final, *res judicata* barred the BOA from considering the second, virtually identical application. *Res judicata*, or claim preclusion, provides that a "final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences," including all claims that actually were or *might have been* litigated. *Barber v. Weber*, 715 N.W.2d 683, ¶¶ 9, 20 (Wis. App. 2006). The doctrine has three elements: "(1) identity between the parties or their privies in the prior and present suits, (2) prior litigation that resulted in a final judgment on the merits by a court with jurisdiction, and (3) identity of the causes of action in the two suits." *Id.* The first and third of these elements are readily satisfied by comparing the First and the Second Applications. The parties are identical between the two applications. Moreover, both applications sought approval for a frac sand mine, with the only differences being the number of trucks advanced and rejected at the last hearing on the First Application being specifically identified in the Second Application (126 trucks per day) and the duration of hauling being increased by one day a week. (*Compare* A2 *with* A94.)

As to the second factor, the decision of an administrative zoning body constitutes a "judgment on the merits by a court with jurisdiction." *Barber* at ¶ 12 (holding that the Pewaukee County Zoning Board of Appeals "was acting in an adjudicatory capacity"); *Farwell v. Mohorko*, 2006 WL 5894937 (Outagamie Cty. Cir. Ct., Oct. 31, 2006) (A287, *et seq.*) (applying claim preclusion to decision of Outagamie County Board of Adjustment). In deciding whether

administrative proceedings constituted "litigation" with a "final judgment" for purposes of claim preclusion, courts also look to whether the parties were represented by counsel at the county level, whether they had an opportunity to make written or oral arguments, and whether the administrative body issued a written decision. *Barber* at ¶ 13. All three of these considerations were present in the BOA's consideration of the First Application: R&J was represented by counsel Brian Nodolf throughout the proceedings (*see, e.g.*, A54-55); R&J had a full opportunity to present evidence and testimony at the two public hearings held on its First Application (*see* A12, *et seq.*, A45, *et seq.*); and the BOA reached a decision that was memorialized in its March Order. (A85-87.)

The BOA's decision on the First Application was final and precluded it from considering the Second Application. To the extent R&J disagreed with the decision and believed the BOA acted improperly, its remedy was to appeal to this Court, not to file an identical application in the hopes in would obtain a different result.[4] The BOA acted outside its jurisdiction when it voted to approve that application, which now should be reversed by this Court.

III. THE APPROVAL OF THE SECOND APPLICATION WAS ARBITRARY, OPPRESSIVE, AND UNREASONABLE AND IMPROPERLY APPLIED WILL OVER JUDGMENT BECAUSE IT WAS BASED ON THE SAME RECORD THAT LED TO THE DENIAL OF A MATERIALLY IDENTICAL APPLICATION JUST THREE MONTHS EARLIER.

Even if the BOA had the jurisdiction to consider the Second Application—and it did not—it acted arbitrarily, oppressively, and unreasonably when it approved an application materially identical to the one that it denied weeks earlier. Under the Zoning Ordinance, the BOA must evaluate seven factors in considering a CUP application. (A266.) Its conclusions as to each of those factors must be set forth in written findings and conclusions. Tellingly, the

[4] R&J's decision not to appeal the denial of the First Application suggests that it believed the decision was sufficiently supported by the record and could not be reversed by the Court.

findings and conclusions made by the BOA in its March and June Orders—like the applications themselves—are nearly identical in discussing the first six mandated factors. (*Compare* A85-87 *with* A245-247.) However, as to the seventh factor—the factor on which the decision denying the First Application was primarily based—the March and June Orders compare as follows:[5]

> The zoning department has received considerable written opposition (~~35~~ letters/emails on file at the zoning office) as well as oral opposition (as presented at public hearings and meetings) to the proposed sand ~~mine~~ mining operation and the proposed truck haul route. Concerned neighbors and other citizens submitted numerous pictures and included information with regard to safe travel on State Trunk Highway 88 in light of ~~significantly~~ increased large vehicle (truck) traffic on the road.
>
> ~~David Nelson has documented reaction times of vehicles approaching several driveways/State Trunk Highway 88 intersections. He lists many reaction times of southbound traffic once a vehicle has been spotted departing driveways until the time when the intersection has been reached by southbound traffic. Due to the extreme weight of the semi trucks and trailers, the reaction time to slow down, not to mention stopping at these driveways/intersections, could be compromised.~~
>
> Also submitted were photos of vehicle tracks crossing the centerline of State Trunk Highway 88 (on the dug way south of the proposed mine site) immediately following a slight snowfall, this is due in part to the current road layout and the severity of the corners.
>
> ~~At 126 loads out of product and 126 unloaded trucks returning, 252 total trucks would be on the road in a given day. This equates to one truck passing a single designated point each 3.33 minutes though out the day (14 hour hauling period).~~
>
> The Wisconsin DOT Northwest Region contracted with AECOM to conduct a "Traffic Safety Impact Assessment" for STH 88 during May and June of 2012 in light of the potential increase in truck volume on STH 88 from proposed, new non-metallic mine operations in the area. Representatives of the DOT were present at the hearing/meetings to present the initial as well as updated results of their assessment and answer questions. Specifically, AECOM addressed crashes and crash rates as well as geometric and operational features pertaining to STH 88. Overall, the WisDOT acknowledges that STH 88 may have some sub-standard features, but believes the road can handle increased traffic volumes.

(*Id.*)

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[5] Language from the March Order that was omitted in the June Order is denoted in ~~strikethrough font~~; language that was added for the first time in the June Order is denoted in underlined font.

The BOA's June Order is remarkable both for what it deletes, as well as what it adds. The June Order deleted reference to reaction and stopping/slowing times that formed a basis for denying the First Application. Yet, there is nothing in the record of the Second Application that explained away or ameliorated this safety concern. To the contrary, the DOT Summary indicated that further study was needed to determine the safety of stopping distances at several intersections along the haul route. Likewise, the BOA omitted reference to the total trucks per day (loaded and unloaded) passing a single designated point—a fact it apparently believed relevant in denying the First Application weeks earlier. Yet, when the BOA ultimately voted to deny the First Application, it was considering that application on the condition that the mine be limited to only *80 trucks per day*. (A43.) Without any explanation or basis in the record, the BOA deleted its discussion of the number of trucks from the June Order and approved *105 trucks per day*—25 more than what it previously rejected. (A248.) Lacking any basis for eliminating these grounds for denial from the June Order, the decision by the BOA to do so constitutes arbitrary and unreasonable conduct.

The only material finding added to the June Order further demonstrates arbitrary, oppressive, and unreasonable conduct by the BOA. In the June Order, and in an apparent attempt to explain away the underlying reasons for the denial of the First Application, the BOA finds that, "[o]verall, the WisDOT acknowledges that STH 88 may have some sub-standard features, but believes the road can handle increased traffic volumes." (A247.) However, this conclusion is unsupported by the record and, even if it were, would not justify an entirely different outcome from that reached by the BOA on the same application just three months earlier. First, the June Order gives the false impression that the DOT traffic study was complete. (*Id.*) Instead, the June 14, 2012 Summary specifically noted in ***bold, underlined, italics font*** that

additional analysis was required to look into issues of lane departures—trucks veering into the lane of oncoming traffic in curves—and stopping distances near several intersections with Highway 88. (A225.) Of course, the BOA refused to wait until the final study actually was issued—a curious decision given that the study ultimately confirmed the safety issues that resulted in the denial of the First Application. Indeed, when the final report was issued in July 2012 (not June, as the BOA's Order suggests), it did not state that Highway 88 "can handle increased traffic volumes." Rather, it concluded that the "600 additional sand mine trucks anticipated with current potential development *will have a noticeable impact on the safety and operations* of the road." (A286, emphasis added.)

Second, the finding that Highway 88 could "handle increased traffic volumes" did not address the reasons the First Application was denied. The March Order makes no reference to whether the highway itself could "handle" additional trucks. (*See* A85 et seq.) Instead, the March Order denied the First Application because of stopping distance and reaction time concerns and a conclusion that guaranteeing one heavy-haul truck passing a single point on the highway every 3.33 minutes was inconsistent with "the public interest, the purpose and intent of [the] ordinance and substantial justice to all parties involved." (A86.) The June Order even fails to explain what the term "handle" means—a significant omission given that the statement is the BOA's *sole attempt* to justify its different outcome. Indeed, the order continues to note significant traffic safety issues. (A246-47.)

Reaching the opposite result on identical applications and largely the same record in a span of only three months must, by definition, be found arbitrary and unreasonable. The American Heritage Dictionary of the English Language defines "arbitrary" as "determined by chance, whim, or impulse, and not by necessity, reason, or principle." To overcome the

appearance that its June Order was not arbitrary, the BOA would have needed to receive and cite overwhelming evidence justifying the different outcome. Of course, no such overwhelming evidence exists. Instead, the June Order reiterated lane departures and "sub-standard features" of Highway 88, deleted previous (and undisputed) findings inconsistent with approval, while vaguely concluding that the road "can handle increased traffic volumes."[6]

Finally, the evidence demonstrates that the approval of the Second Application improperly constituted the exercise of the BOA's will over its judgment. The BOA's judgment was reflected in its March Order denying the First Application. The June Order simply ignores that reasoned judgment and constitutes the will of the BOA, ignoring the reasons the First Application was denied while inexplicably reaching a completely different decision on a nearly identical record. The exercise of will over judgment may be best exemplified by the improper direction given by Buffalo County Board Chairman and Acting Administrator Del Twidt at the end of the March 8 public hearing. Within seconds of the vote denying the First Application, Mr. Twidt told members of the BOA or the county zoning staff that "these gentlemen need to be advised as to how they can re-apply." (A92.) Instead of advising R&J to seek certiorari review, Mr. Twidt determined that the same application should simply be reconsidered and not-so-subtly implored the BOA to reach a different outcome the second time. When the BOA then did so—on the same application and same facts—just three months later, its decision plainly represented its will rather than its judgment. The process by which the R&J applications were considered severely undermines the credibility and finality of the BOA's actions. This Court should

[6] Before denying the First Application, the BOA voted to limit the number of truckloads leaving the R&J mine to 80 each day as a condition of the CUP. Even with that limitation, the First Application was denied for traffic safety reasons. Approving 105 trucks per day—after having just rejected only 80—points to arbitrary and unreasonable conduct by the BOA. Indeed, if the BOA's actions here are not arbitrary, one wonders what conduct would satisfy that standard.

overturn the BOA's exercise of its will over its judgment and reverse the approval of the Second Application.

IV. THE BOA PROCEEDED ON AN INCORRECT THEORY OF THE LAW BECAUSE FRAC SAND MINING IS NOT AN ALLOWABLE CONDITIONAL USE UNDER THE ZONING ORDINANCE.

The BOA's decision must be reversed because frac sand mining is not allowed under the Zoning Ordinance. In its conclusions in both orders, the BOA found that the "intended use of the silica ('frac') sand mine will be for manufacturing and processing of natural mineral resources indigenous to Buffalo County for aggregate purposes." (A86, A246.) This language derives from Section 41.1 of the Zoning Ordinance, which limits the "manufacturing and processing of natural mineral resources . . . incidental to the extraction of sand and gravel" for "*aggregate purposes*." (A256.)

The BOA erred when it concluded that frac sand mining is for "aggregate purposes" and thus allowed under the Zoning Ordinance. When the plain and ordinary meaning of an ordinance is clear, "a court should simply apply the clear meaning of the ordinance to the facts before it." *Bruno v. Milwaukee County*, 660 N.W.2d 656, ¶ 7 (Wis. 2003). Here, the clear meaning of the "aggregate purposes" limitation in the Zoning Ordinance means that mining may only occur if the extracted sand or gravel is to be used in aggregate materials such as concrete, cement, asphalt, and black top. This interpretation is consistent with other language in the same section of the ordinance that addresses "the storage of cement, asphalt, or road oils," "the mixing of concrete or black top or related materials," and "the improvement of highways or streets." The common thread underlying these terms and phrases is a uniquely local and everyday use for the "mineral resources." Of course, frac sand is not mined for local or everyday uses and it is not used for aggregate purposes, such as construction and road building materials. To consider frac sand mining and the product it generates to be an "aggregate purpose" renders the phrase

meaningless. Because the Zoning Ordinance does not allow frac sand mining as a conditional use, the BOA's decision should be reversed.[7]

V. THE BOA ACTED OUTSIDE ITS JURISDICTION BY APPROVING THE SECOND APPLICATION AT A HEARING FOR WHICH NO NOTICE WAS PROVIDED.

The CUP issued to R&J should be declared void because it was issued at a hearing for which no published notice was given. Section 214 of the Zoning Ordinance provides that, "[b]efore issuing a Special Use Permit [or CUP], the Board of Adjustment shall hold a public hearing." (A266.) Moreover, notice "specifying the time, place and matters to come before the Committee shall be given in the manner specified in Section 222." (*Id.*) Section 222 then requires that notice be given consistent with "Class II notice under Chapter 985 of the Wisconsin Statutes." (A268.) In order to comply, the county is required to publish notice "once each week for consecutive weeks, the last of which shall be at least one week before the act or event." Wis. Stat. § 985.01(1m).

Buffalo County failed to comply with its notice requirements for the June 27, 2012 public hearing at which the BOA approved the Second Application. To do so, notices of the June 27 hearing should have been published on June 13 and June 20. Instead, they were published on June 14 and June 21. (A276.) This is inconsistent not only with the county's practice as to all other public hearings relevant to this action (*see* A11, A37, A106, A172 (all indicating 7 and 14 days' notice of the respective public hearings)), but also with the statements of county staff at the June 14 hearing that the Second Application could not be considered at the June 27 hearing. (A220-222.) Moreover, even if the notices had been timely published, they failed to list the Second Application as one of the items that would be considered at the June 27 hearing. (A276.)

[7] The County currently is attempting to revise its Zoning Ordinance. As part of that revision, the County is attempting to remove the "aggregate purpose" language from the Ordinance and to allow frac sand mining as a conditional use.

"Notice and hearing provisions are invariably intertwined with due process considerations." *Gloudeman v. City of St. Francis*, 422 N.W.2d 864, 868 (Wis. App. 1988). The failure to comply with notice-of-hearing rules renders a zoning action void. *Id.* at 866. Because the BOA held a third hearing on the Second Application—a hearing at which it took additional testimony, made changes to the conditions attached to the CUP, and voted on that CUP (A227-231)—its action is void for having occurred without proper public notice.

VI. THE SECOND APPLICATION WAS INCOMPLETE, AND ITS APPROVAL WAS THEREFORE IMPROPER BASED ON THE MORATORIUM.

Under Sections 202 and 211 of the Zoning Ordinance, an application for a CUP must contain an accurate map of the property showing: "(a) the boundaries of the property involved, (b) the location of the centerline of any abutting streets or highways, (c) the location on the lot of any existing buildings, proposed additions, or proposed new buildings, including the measured distances between such buildings, and from the lot lines, and from the centerline of any abutting streets or highways to the nearest portion of such building, and (d) the high water line of any stream or lake on which the property abuts." (A265.) Neither the First nor the Second Application contained such a map. (*See* A1-10, A93-105.) And under section 285 of the Moratorium, an application for a non-metallic mining CUP may be considered while the Moratorium is in effect, only if that the application "is determined to be in complete conformity with all zoning requirements in effect." (A274.) Because the Second Application was not in "complete conformity" with the requirements of the Zoning Ordinance, the BOA acted outside its jurisdiction when it considered and voted to approve it.

VII. APPROVAL OF THE CUP FOR R&J WAS ARBITRARY AND UNREASONABLE AND OUTSIDE THE BOA'S JURISDICTION BECAUSE R&J DOES NOT EXIST AS A BUSINESS ENTITY.

The BOA acted in an arbitrary, oppressive, and unreasonable manner in approving a CUP for "R&J Rolling Acres" because R&J does not exist as a business entity. In its June Order, the

BOA ordered the County Board Chair to issue a CUP to "R&J Rolling Acres" for the mining site identified in the Order. (A247.) However, no such entity actually exists, either as an LLP (*see* A2, A94), or as any other business entity. (A251 ¶ 7.) "R&J" therefore has no registered agent, no registered address, and would not be subject to judicial process in the event it became necessary to pursue legal action for violations of conditions in the CUP. Indeed, it is unclear how the conditions imposed by the CUP or penalties for violations ever could be enforced against this non-existent entity. The BOA acted arbitrarily and unreasonably, as well as outside its jurisdiction, when it granted a CUP for a large-scale industrial mine to a non-existent entity.

VIII. THE BOA'S APPROVAL OF THE SECOND APPLICATION WAS ARBITRARY AND UNREASONABLE BECAUSE IT IS INCONSISTENT WITH THE COUNTY'S FINDINGS IN ITS MORATORIUM.

The express purpose of the county's Zoning Ordinance, as stated in its preamble, is "to promote the public health, safety and general welfare." (A252.) When the county enacted the Moratorium in March 2012, it found that nonmetallic mining may have impacts "on the health, safety and welfare of the residents of Buffalo County including air quality and water quality concerns." (A273.) The Moratorium was enacted to allow time for the county's Zoning Department, Highway Department, Health and Human Services Department, and the UW Extension to "study and analyze the impact of nonmetallic mining and . . . make final recommendations." (A274.)

At the time the BOA approved the Second Application, none of the studies referenced in the Moratorium had been completed. Moreover, the BOA was presented no evidence or expert testimony in the course of considering either application to address the health and safety concerns enumerated in the Moratorium. Not surprisingly, the June Order contains no findings or conclusion about air quality, water quality, or other health and safety issues, despite the

requirement that the BOA address the "relationship [of the application] to the public interest, the purpose and intent of this ordinance and substantial justice to all parties involved." (A246.)

Because R&J presented no evidence to the BOA to overcome the county's findings about potential health, safety and welfare risks of frac sand mining in approving the Second Application—risks which remain unresolved today—the BOA's decision necessarily was arbitrary, oppressive and unreasonable and should be reversed.

CONCLUSION

This certiorari action does not involve mere disagreement with the BOA's decision. Rather, Buffalo County and the BOA acted egregiously in deciding that R&J should receive a second, *de novo* bite at the apple *within seconds* of the BOA's denial of its First Application. In so doing, the county all but preordained that the outcome on the Second Application would be different than the outcome on the first. As a quasi-judicial body, the BOA's job is to impartially weigh the applications and evidence presented to it. The BOA appears to have done that when it denied the First Application in March 2012. The only remedy available to R&J at that time was to seek certiorari review of the BOA's decision. Accordingly, the BOA acted outside its jurisdiction by taking up the Second Application at all. When it then reached the opposite outcome just three months after denying an identical application with no additional record evidence, the BOA acted in an arbitrary, oppressive, and unreasonable manner, undermining public confidence in the due process mechanisms essential to such decisions. For these and the other reasons discussed above, O'Connor respectfully requests that the Court reverse the grant of a CUP to R&J.

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