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TO: Buffalo County Board of Adjustment (BOA)

FROM: Attorney Glenn M. Stoddard

RE: Opposition to Glacier Sands' Frac Sand Dry Plant & Rail Spur CUP Application

DATE: July 9, 2012

I represent a group of property owners who own residential property in the Town of Milton, Buffalo County, Wisconsin. My clients own property which is located immediately adjacent to the land proposed by Glacier Sands for a Conditional Use Permit (CUP) under the Agricultural (A) zoning district of the Buffalo County Zoning Ordinance (Ordinance), for a proposed frac sand dry plant and rail spur, pursuant to Ordinance Art. IV. § 41.

On behalf of my clients, I respectfully request that the Buffalo County Board of Adjustment (BOA) deny Glacier Sands' CUP application for the following reasons:

Based on the Ordinance and Glacier Sands' CUP application, it is apparent that Glacier Sands should have been required to apply for a rezoning of the site to Industrial (I) zoning, rather than apply for a CUP under the existing Agricultural (A) zoning district, pursuant to Ordinance Art. IV. § 41. 1. If a rezoning application had been required, and a rezoning approved, the proposed rail spur would be a permitted use under Ordinance Art. VII. § 70. 5, and the proposed the frac sand dry plant would be a conditional use under Art. VII. § 71. 1. This is the approach that should have been required for Glacier Sands' proposed project based on the intent, purpose, and plain meaning of the Ordinance.

Ordinance Art. IV. § 41. 1, does not, by its plain meaning, include the type of uses being proposed in Glacier Sands' CUP application. In fact, that provision states as follows:

1. 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, and 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 black top or related materials, provided that any county, town, or municipal government or its agent may

store or mix such materials when incidental to the improvement of highways or streets.

Ordinance Art. IV. § 41. 1.

The above provision says nothing about “transportation terminals and facilities,” which are expressly listed as a permitted use under the Industrial (I) zoning district, pursuant to Ordinance Art. VII. § 71. 1. Further, although the above provision includes “processing of natural mineral resources indigenous to Buffalo County,” it expressly states that such processing must be “incidental to the extraction of sand” in this context. This means a CUP for frac sand processing in the Agricultural (A) zoning district is only appropriate if the processing is done near or “incidental to” the actual sand mining or “extraction” sites. This provision cannot reasonably be applied to the location at issue, because any processing that would take place there would not be incidental to the mining or “extraction” but, instead, to the “transportation terminals and facilities” associated with and incidental to the proposed rail spur.

However, even if the BOA decides to require Glacier Sands to apply for a rezoning to Industrial (I) zoning, instead of considering the CUP application under Agricultural (A) zoning, such a rezoning cannot be lawfully or reasonably approved by Buffalo County or the Town of Milton. This is because a rezoning in that location to Industrial (I) zoning, for a proposed frac sand dry plant and rail spur, would constitute “spot zoning,” be highly inconsistent with surrounding zoning and existing land uses, be likely to cause private and public nuisances, and be contrary to protection of public health, safety, and general welfare. As such, it would be inconsistent with the purposes of the Ordinance and zoning in general under the Wisconsin Statutes and applicable case law.

With respect to Glacier Sands’ CUP application, as submitted under Agricultural (A) zoning pursuant to Ordinance Art. IV. § 41. 1, if the BOA decides to consider it on its merits—rather than require Glacier Sands to start over and apply for a rezoning to Industrial (I) zoning—the CUP application must be denied by the BOA for essentially the same reasons a rezoning must be denied. This is because the proposed development and land use would be highly inconsistent with surrounding zoning and existing land uses, would likely cause private and public nuisances, and be contrary to protection of public health, safety, and general welfare. Thus, approval of Glacier Sands’ CUP application would be inconsistent with the purposes of the Ordinance and zoning in general under the Wisconsin Statutes and applicable case law.

Further, the BOA must apply the standards set forth in Ordinance Art. XX1. § 212, which apply to all CUP applications. The standards are as follows:

Section 212

Standards Applicable to all Conditional Uses

In passing upon a Special Use Permit application, the Board of Adjustment shall consider the following factors:

1. The location, nature, and size of the proposed use.
2. The size of the site in relation to it.

3. The location of the site with respect to existing or future roads giving access to it.
4. Its compatibility with existing uses on land adjacent thereto.
5. Its harmony with the future development of the district
6. Existing topography, drainage, soils types and vegetable cover.
7. Its relationship to the public interest, the purpose and intent of this ordinance and substantial justice to all parties concerned.

Ordinance Art. XXI. § 212.

In addition, based on the location and activities associated with Glacier Sands' proposed frac sand dry plant and rail spur, as set forth in the CUP application, including the storage and processing of silica sand, the trucking and loading of sand into rail cars, the increased train and truck traffic, and the dust, noise, and light that would be generated at the site, the proposed project would be directly contrary to standards 4, 5, and 7, in Ordinance Art. XXI. § 212, above. Consequently, this is another reason why the BOA must deny Glacier Sands' CUP application.

Finally, I understand the BOA will be holding a public hearing on this matter on July 24, 2012. I am planning to attend the BOA's public hearing on that date and I hereby request that I be given at least fifteen (15) minutes during the hearing to speak on behalf of my clients in opposition to Glacier Sands' CUP application.

Thank you for your consideration.