COUNTY OF BUFFALO
BOARD OF ADJUSTMENT

IN RE: John & Patricia Starkey Application for CUP for Frac Sand Drying Facility	**REQUEST TO DENY APPLICATION FOR CONDITIONAL USE PERMIT**

TO: THE BUFFALO COUNTY BOARD OF ADJUSTMENT

INTRODUCTION

Petitioners John and Nettie Rosenow urge the Buffalo County Board of Adjustment (the "Board") to deny the application for a conditional use permit ("CUP") for the development of an industrial frac sand drying plant by John and Patricia Starkey and/or Glacier Sands, LLC (collectively, the "Petitioners"). The proposed industrial drying plant is not allowed under Buffalo County's Zoning Ordinance (the "Ordinance"). In fact, the type of industrial operation proposed by the Petitioners—to the extent discernable at all from their application—is prohibited by the Ordinance. The Petitioners' application also is not in the best interests of the community (*see* Ordinance, § 212) and the current moratorium precludes consideration of proposals such as this one.

The Board should deny the Petitioners' CUP application for the following reasons, each of which is addressed below:

- The Board cannot approve any frac sand-related proposal because the only extractive operation and incidental processing allowed under the Ordinance is for "aggregate purposes," which frac sand is not.
- Petitioners' proposed frac sand drying plant is barred by the Ordinance.
- Neither the Petitioners nor the County has adequately studied and addressed the environmental, health, safety, and traffic-related concerns posed by frac sand mining in general and this proposed drying plant in particular, despite the Board's duty to make decisions regarding the health, safety and welfare of County residents.

- Petitioners' application fails to include the detail needed for sound public decision-making on an industrial project of this scale and consequence. (Ordinance, §§ 212, 213.)

- Petitioners' application does not constitute a "complete application" within the wording and intent of Section 285 of the Moratorium because, among other things, it did not timely include the applicable fees.

- The County lacks a Zoning Administrator to review any application, and is missing other key positions; as a result, it lacks capacity to review an industrial operation of this size and scope.

BACKGROUND

In recent months, Buffalo County has seen a sharp increase in applications seeking to open industrial frac sand mines in our communities. Although Petitioners' application is not for a mine, it seeks to greatly expand frac sand-related operations in this County by opening an industrial plant to dry frac sand and by providing staging for shipments of dried frac sand out of the County. Consistent with the concerns of the Rosenows and many other residents, the Buffalo County Board of Supervisors passed a seven-month moratorium on the commencement and expansion of nonmetallic mining in the county, which took effect on March 29, 2012 (the "Moratorium"). The statements and findings that the Board made in support of the Moratorium included:

- "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";

- "[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";

- "[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";

- "[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."

In support of their plans to operate an industrial frac sand drying plant for the receipt and processing of sand from as many as 500 trucks a day, Petitioners have provided only ten lines of narrative explaining the project and a handful of basic maps modified from existing public records. The application is silent on the manner, scale and staging of operations and omits any discussion of the equipment to be used in plant operations. Petitioners' application does not even contain a substantive description of the proposed industrial drying plant or provide an explanation as to how such a plant works. As a result, the County and its residents have received none of the information they would ordinarily need to assess the implications of the proposed drying plant, including potential safety issues arising from such a plant.

ANALYSIS

I. The Ordinance does not allow frac sand mining or frac sand operations and clearly bars the type of industrial plant Petitioners propose.

The plain language of the Ordinance does not allow frac sand mining or processing as a conditional use on agriculturally zoned land. Instead, the Ordinance, drafted long before the advent of industrial frac sand mining, limits conditional uses to 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** . . . ." (Ordinance, § 41(1) (emphasis added).) In order to give meaning to all provisions of the Ordinance as required by law (*Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162-63 (1997)), the phrase "aggregate purposes" must mean the purpose for which the sand and gravel are being put. Here, the only possible meaning is for end use as concrete, asphalt, cement, and

black top. Importantly, the prohibitions that follow relating to "the storage of cement, asphalt, or road oils or the mixing of concrete or black top or related materials" clearly demonstrate that the phrase "aggregate purposes" envisions exclusively road and construction materials. (Ordinance, § 41(1).)

Frac sand does not have an "aggregate purpose" for construction materials or roads. To the contrary, frac sand is mined exclusively to be disaggregated—that is, separated from clay, silts and other minerals—and subject to further processing, such as the type Petitioners now propose. Stated differently, the phrase "aggregate purpose" would have no meaning at all if frac sand were deemed to fall within its scope.[1] Accordingly, frac sand mining and related operations are not allowed conditional uses on agricultural land.

This limitation on the type of mining and processing allowed in the County is both logical and critical to maintaining the agricultural essence of the communities zoned as such. Mining that occurs for "aggregate purposes" is most commonly done on a small scale and is only carried out on an as needed basis to meet local demand. Such mining and on-site processing is consistent with the agricultural character of the surrounding land. Frac sand mining is anything but small scale and local. Instead, it is a major industrial undertaking, to be carried out continuously, twenty-four hours a day, for years to come. This is a proposed use of the sort that the County has never before seen and which was never contemplated by its Ordinance.[2] Because

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[1] In an April 18, 2012 letter to the Board, attorneys for Glacier Sands, LLC, asserted that frac sand was an aggregate, so it satisfied the Ordinance. This interpretation, however, renders the phrase "aggregate purposes" a meaningless redundancy, something that is precluded by well-settled law governing statutory interpretation.

[2] In their April 18 letter, Glacier Sands asserted that the Ordinance allows frac sand mines because the provision contains the language "incidental to" and that the clause somehow modified the requirement that the sand and gravel be used for "aggregate purposes." But the provision must be read as a whole. Under the Ordinance, the sand, gravel and rock, must be put to "aggregate purposes."

the proposed drying plant involves a use that has no "aggregate purposes," it is not an approved conditional use and must be denied.

Notwithstanding that frac sand mining and related operations are not conditional uses under the Ordinance, the proposed drying plant is barred by the plain language of the Ordinance. The Ordinance only allows processing of natural minerals "incidental to the extraction of sand and gravel . . . including the erection of buildings, and the installation of necessary machinery and equipment *incidental* thereto . . . ." (Ordinance, § 41(1) (emphasis added).) Even assuming, for the sake of argument, that an on-site wash plant is "incidental to" mining sand and gravel, there is nothing "incidental" about a stand-alone drying plant that receives up to 500 daily truckloads of sand from outside mines.

Moreover, by barring the "storage of cement, asphalt, or road oils or the mixing of concrete or black top or related materials . . ." (id.), the Ordinance clearly prohibits industrial operations such as the drying plant here. The Ordinance may allow mining of sand and gravel for "aggregate purposes"—and the washing of sand and gravel to prepare it for further processing—but it bars industrial plants to manufacture finished product. Although Petitioners' application leaves the operations of a drying plant largely to the imagination, such a plant is more analogous to a cement plant than to a wash plant located at the mine site itself. There simply is nothing in the Ordinance that allows the industrial operation Petitioners propose. As a result, Petitioners' application must be denied.

II. Petitioners cannot satisfy the conditions required by the Ordinance.

Before this Board can issue a CUP, it must consider seven enumerated factors, including the "relationship [of the proposed special use] to the public interest, the purpose and intent of this ordinance and substantial justice to all parties concerned." (Ordinance § 212.) The very first enumerated purpose of the Ordinance is "to promote the public health, safety and general

welfare." Given that the entire reason for the Moratorium was the Board's determination that there are currently too many unanswered questions about the health, safety and welfare effects of frac sand mining and processing, the Board cannot properly grant Petitioners a CUP at this time.

In the Moratorium, the Board of Supervisors found the County to be incapable of determining whether frac sand mines and operations are consistent with the public health, safety and welfare. In fact, the Board of Supervisors acknowledged that frac sand mining and related operations "may have an impact on air and water quality, which may affect the health and safety of county residents." (Emphasis added.) The Board of Supervisors additionally concluded that the Ordinance itself may be inadequate to address legitimate health, safety and welfare concerns associated with frac sand. The Board of Supervisors determined that further time was needed to study the health, safety and infrastructure impacts of large-scale frac sand mines and associated operations and to decide whether to put in place "necessary regulations and safeguards" regarding those industrial operations. To date, the review contemplated by the Moratorium has not concluded, and no decisions regarding additional regulations or safeguards have been made.

By the County's own admission, the Board lacks the ability to conclude that the proposed industrial drying plant is consistent with public health, safety and welfare. Moreover, absent some new and compelling studies, regulations, and/or safeguards, this Board would be acting contrary to its unambiguous duties under the Ordinance if it granted Petitioners' application.

III. Even if an industrial frac sand drying plant application could be considered—and it cannot—the "application" submitted by Petitioners is not complete and lacks sufficient information from which to approve any CUP.

Under the Moratorium Ordinance, Section 285, "[a]n applicant who has submitted *an application for a mining reclamation permit and/ or a conditional use permit* for Non-Metallic Mining on or before the effective date of the moratorium [March 29, 2012] that is determined to be **in complete conformity with all zoning requirements in effect**, as of the date of the

application, shall not be affected by the terms of the moratorium * * *" (emphasis added). Petitioners' application fails to qualify for exemption from the moratorium on two counts: (i) the application fees were post-dated after the Moratorium went into effect; and (ii) the CUP application itself is so grossly incomplete under the Ordinance as to fail the "conformity" requirement of the exemption provision in the Moratorium. Moreover, even if deemed "complete," the skeletal nature of the application gives the Board nothing on which to conclude the proposed industrial drying plant is consistent with the Ordinance.

First, although the check in the County's file from Glacier Sands was marked as "received" on March 16, 2012, the check was post-dated April 14, 2012—nearly one month later.[3] In short, Glacier Sands provided a check to the County that could not be cashed the day it was received. Providing the County with a post-dated check cannot legitimately be considered a timely payment of applicable fees under the Ordinance.[4] The use of post-dated checks also raises significant questions regarding the financial viability of the individuals and entities pushing frac sand mining and related operations in Buffalo County. Petitioners' application was not complete before the Moratorium went into effect and is barred by the Moratorium.

Second, Petitioners' application is incomplete because—whether intentionally or not—it provides no details regarding the operations and facilities encompassed by the proposed industrial drying plant. Among other problems, the application is silent on the mechanics of how frac sand is dried, including whether the operations use instrumentalities and methods that, if improperly employed, can explode, catch fire, or result in other serious public safety hazards. And the application contains no information concerning the ultimate operator of the plant.

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[3] The handwriting on the check is unclear and it is possible the check was dated April 4. Regardless of which date appears on the check, it was too late.

[4] Someone from the County may have recognized this deficiency, as the copy received by counsel reflects highlighting over the date listed on the check.

Petitioners' application fails to explain how an industrial frac sand drying plant is compatible with existing uses on adjacent land. Even assuming an elementary school was not located next to the proposed plant, Petitioners do not explain how an industrial plant operating 24 hours a day, seven days a week, receiving hundreds of daily truckloads of sand, and shipping out that dried and processed sand on an undisclosed number of rail cars is compatible with agricultural land. Once the adjacent elementary school is considered, Petitioners' failure to meet their burden of establishing land-use compatibility is laid bare. Concluding that Petitioners' proposed operation is consistent with neighboring farms and an elementary school is pure guesswork, because Petitioners have provided the County no information whatsoever that would support such a finding.

Petitioners' application also ignores the health, safety and welfare issues presented by 500 trucks per day arriving at and leaving from the proposed industrial drying plant, as well as the heavy railroad traffic such a plant requires. No study is provided concerning the potential dangers and roadway damage of 1,000 trucks per day (500 loaded/500 unloaded) on state and/or county highways traveling to and from the plant, or public safety issues posed by increased rail traffic. Petitioners even ignore the effect of truck traffic on the roads immediately servicing the proposed plant on which all 1,000 trucks must travel. Noise emanating from the plant, the trucks, the trains, and the dump truck facility likewise is not legitimately addressed.[5] Simply put, Petitioners' application contains no details from which the Board could determine the plant's compliance with the Ordinance, including its compatibility with existing uses on neighboring land and the safety of children in the neighboring elementary school. (Ordinance, § 212(4).) Petitioners' application therefore is incomplete. But, even if considered "complete," the lack of

[5] The application fails to provide any information from which a determination of the scope and range of noise could be made.

any real detail prevents full consideration of and reasoned decision-making on the application or a finding that the proposed drying plant is consistent with public health, safety and welfare.

Finally, Petitioners' "bare-bones" CUP application displays the level of regard in which they hold the County's review process specifically and environmental and land use values generally. It is a transparent attempt to minimize effort and expense. Petitioners apparently believe that they can win acceptance of an industrial drying plant by providing only minimal information, as long as they proclaim a message of "jobs"—likely a largely empty promise in the end—in a loud and public way.[6] With their CUP in hand, operations will proceed regardless of the intentionally ignored and previously undisclosed effects of dry plant operations on the school, neighboring land owners, and the County.

IV. Without a Zoning Administrator, no CUP application may be considered by the Board and the absence of County technical review staff renders its administration of the Ordinance impossible.

According to the Ordinance, Buffalo County must have a Zoning Administrator whose duty it is to "administer, supervise, and enforce" the provisions of the Ordinance. (Ordinance § 190.) That position, however, has been vacant for some time. Most notably for Petitioners' application, a CUP may not be approved in Buffalo County unless an application is made through the Zoning Administrator. (Ordinance § 210.) Since there is no Zoning Administrator to receive and process Petitioners' application, neither this application nor any other CUP application can be validly processed or issued by this Board.

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[6] Petitioners' backgrounds, including the principals in Glacier Sands, reflect no real experience in operating frac sand mines or drying plants. If Glacier Sands and its principals will not actually be running mining operations or the drying plant, the repeated (non-binding) promises made by them of local jobs and their declared commitment to County residents are completely baseless.

Further, the County lacks the staff needed to process and analyze any frac sand drying plant under its Ordinance. A visit to the County's web site reveals the following positions are currently vacant:

- Nonmetallic mining staff;
- Conservation technician; and
- Zoning technician/inspector.

Just as important, the County Board Chairman is currently serving as County Administrator, in plain violation of Wis. Stat. § 59.18(1).

For the County to review the Petitioners' proposal in the absence of any technical review capacity contravenes the Ordinance. These positions exist for a reason—to provide technical support to the Board as it makes important and far-reaching zoning determinations. Without technical staff, the County simply cannot make the decision Petitioners' application seeks.

CONCLUSION AND REQUEST FOR RELIEF

The County has no basis, in either law or fact, upon which to consider or approve the Petitioners' "application" for a CUP for an industrial frac sand drying plant. For the foregoing reasons, the Rosenows request that Petitioners' application be denied.[7]

DATED: July 10, 2012

LINDQUIST & VENNUM P.L.L.P.

By _____
John C. Ekman, #1031034 (WI)

4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2274
(612) 371-3211
(612) 371-3207 (facsimile)

ATTORNEYS FOR PETITIONERS JOHN AND NETTIE ROSENOW

3716574

[7] The Rosenows reserve the right to supplement this Request following receipt of the records that are due to them under a recent Open Records Requests to which the County still has not yet responded.