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September 12, 2013

Via U.S. Mail

John Hibbard
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712 S Barstow Street
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Ronald Stadler
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P.O. Box 1806
Madison, WI 53701-1806

**Re: Mike O'Connor v. Buffalo County Board of Adjustment, et al.
Circuit Court File Nos. 12-CV-71 and 12-CV-74**

Counsel:

Enclosed and served upon you please find:

1. Notice of Appeal of Plaintiff Mike O'Connor; and
2. Docketing Statement; and
3. Affidavit of Service.

Thank you.

Very truly yours,

LINDQUIST & VENNUM LLP



Karla M. Vehrs

September 12, 2013
Page 2

KMV/tel
Enclosures

cc: Mike O'Connor

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September 12, 2013

Via Federal Express

Clerk of Court
Buffalo County
407 South Second Street
Alma, WI 54610-0068

Re: Mike O'Connor v. Buffalo County Board of Adjustment, et al.
Court File Nos. 13-CV-71/12-CV-74

Dear Clerk:

Enclosed for filing please find the original Notice of Appeal of Plaintiff Mike O'Connor along with an Affidavit of Service upon all counsel of record. Please contact me with any questions or concerns. Thank you.

Very truly yours,

LINDQUIST & VENNUM LLP



Karla M. Vehrs

KMV/tel
Enclosures

cc: Ronald Stadler, Esq.
Aaron Graf, Esq.
Michael P. Screnock, Esq.
John Hibbard, Esq.
Mike O'Connor

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September 12, 2013

Via U.S. Mail

Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

**Re: Mike O'Connor v. Buffalo County Board of Adjustment, et al.
Circuit Court File Nos. 12-CV-71 and 12-CV-74**

Dear Clerk:

Enclosed for filing please find:

1. Notice of Appeal of Plaintiff Mike O'Connor (copy);
2. Docketing Statement (original and one copy);
3. Affidavit of Service (copy); and
4. Check in the amount of \$195.00 for the filing fee.

Please contact me with any questions or concerns. Thank you.

Very truly yours,

LINDQUIST & VENNUM LLP



Karla M. Vehrs

KMV/tel
Enclosures

September 12, 2013

Page 2

cc: Ronald Stadler, Esq.
Aaron Graf, Esq.
Michael P. Screnock, Esq.
John Hibbard, Esq.
Mike O'Connor

<p>MIKE O’CONNOR, Plaintiff, v. BUFFALO COUNTY BOARD OF ADJUSTMENT, Defendant, and GLACIER SANDS, LLC, Intervenor.</p>	<p>Court File No. 12-CV-71</p>
<p>SCHOOL DISTRICT OF COCHRANE-FOUNTAIN CITY, Plaintiff, v. BUFFALO COUNTY BOARD OF ADJUSTMENT, Defendant, and GLACIER SANDS, LLC, Intervenor.</p>	<p>Court File No. 12-CV-74</p>

NOTICE OF APPEAL OF PLAINTIFF MIKE O’CONNOR

To:
Clerk of Court, Buffalo County, 407 South Second Street, Alma, WI 54610-0068;
Clerk of Court of Appeals, P.O. Box 1688, Madison, WI 53701-1688;
Ronald Stadler, Aaron Graf, Gonzalez, Saggio & Harlan LLP, 111 East Wisconsin Avenue, Suite 1000, Milwaukee, WI 53202;
Michael P. Screnock, Michael Best & Friedrich LLP, One South Pinckney Street, Suite 700,

P.O. Box 1806, Madison, WI 53701-1806;
John Hibbard, Attorney at Law, 712 S Barstow Street, Eau Claire, WI 54701:

PLEASE TAKE NOTICE that Plaintiff Mike O'Connor appeals to the Court of Appeals, District III, from the final decision in case number 12-CV-71 (consolidated for circuit court adjudication with 12-CV-74) entered on August 1, 2013 in Buffalo County, Hon. Joseph D. Boles presiding, in which the court denied O'Connor's request to reverse the decision of the Buffalo County Board of Adjustment granting a conditional use permit to R&J Rolling Acres.

This is not an appeal within Wis. Stat. §752.31(2).

This is not an appeal entitled to preference by statute.

DATED: September 12, 2013

LINDQUIST & VENNUM LLP

By  _____

John C. Ekman (State Bar #1031034)

jekman@lindquist.com

Karla M. Vehrs (State Bar # 1089860)

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**ATTORNEYS FOR PLAINTIFF/APPELLANT
MIKE O'CONNOR**

Case Caption (Case Name)

MIKE O'CONNOR,
Plaintiff,

v.

BUFFALO COUNTY BOARD OF ADJUSTMENT,
Defendant,
and
GLACIER SANDS, LLC,
Intervenor.

SCHOOL DISTRICT OF COCHRANE-FOUNTAIN CITY,
Plaintiff,

v.

BUFFALO COUNTY BOARD OF ADJUSTMENT,
Defendant,
and
GLACIER SANDS, LLC,
Intervenor.

DOCKETING STATEMENTCircuit Court Case No. 12CV71, 12CV74

Case Number Issued by Court of Appeals

Appellant(s) (Cross-Appellant)

Mike O'Connor

Attorney's Name and Address

John C. Ekman
Karla M. Vehrs
Lindquist & Venum LLP
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2274
WI Bar Nos. 1031034, 1089860

Attorney's Telephone Number

612-371-3211

(Space for file stamp.)

Respondent(s) (Cross-Respondent)

Buffalo County Board of Adjustment
and
Glacier Sands, LLC

Attorney's Name and Address

Aaron J. Graf (for Buff. Cty. Bd. of Adj.)
Gonzalez Saggio & Harlan, LLP
111 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
WI Bar No. 1068924
and
Michael P. Srenock (for Glacier Sands LLC)
Michael Best & Friedrich LLP
One South Pinckney Street, Suite 700
P.O. Box 1806
Madison, WI 53701-1806
WI Bar No. 1055271

Attorney's Telephone Number

414-277-8500
608-257-3501

CRITERIA FOR EXPEDITED APPEALS

- This Docketing Statement is used solely to determine whether an appeal should be placed on the expedited appeal calendar. The respondent is not required to respond to the Docketing Statement. Generally, an appeal is appropriate for the expedited appeal calendar if:
 1. no more than 3 issues are raised;
 2. the parties' briefs will not exceed 15 pages in length; and
 3. the briefs can be filed in a shorter time than normally allowed.
 These requirements can be modified somewhat in appropriate cases.
- Parties should assume that the appeal will proceed under regular appellate procedure unless the court notifies them that the appeal is being considered for placement on the expedited appeals calendar.

JURISDICTION

Has judgment or order appealed from been "entered" (filed with the clerk of circuit court)?

Yes No If yes, date of entry August 1, 2013.

Is appeal timely? (See §808.04, Wisconsin Statutes)

Yes No

Is judgment or order final (does it dispose of the entire matter in litigation as to one or more of the parties)?

Yes No (If "no", explain jurisdiction basis for appeal on separate sheet.)

NATURE OF ACTION – Briefly describe the nature of action and the result in circuit court:

Pursuant to Wis. Stat. 59.694(10), O'Connor filed this certiorari action in the Buffalo County Circuit Court seeking review of the decision of the Buffalo County Board of Adjustment to issue a conditional use permit ("CUP") to R&J Rolling Acres to conduct silica sand, or "frac sand," mining in Gilmanton, Wisconsin. In a decision filed on August 1, 2013, the circuit court upheld the decision of the board of adjustment.

ISSUES – Specify the issues to be raised on appeal: (Attach separate sheet if necessary.)

(Failure to include any matter in the docketing statement does not constitute waiver of that issue on appeal.

The court may impose sanctions if it appears available information was withheld. Court of Appeals Internal Operating Procedures, sec. VII(2)(b).)

1. Under Wis. Stat. 59.694(10), the remedy for a "person aggrieved by a decision of the board of adjustment" is to file a certiorari action in circuit court challenging the decision. Here, the Buffalo County Board of Adjustment denied the original application of R&J Rolling Acres for a frac sand mining CUP. But rather than seeking certiorari review as required, the applicant refiled a virtually identical application, which the board of adjustment proceeded to grant. Was the second application barred by the doctrine of claim preclusion?
2. The Buffalo County Zoning Ordinance allows as a conditional use the "manufacturing and processing of natural resources indigenous to Buffalo County for aggregate purposes." The frac sand proposed to be mined by R&J Rolling Acres will be mixed with fluids and other chemicals for use in the extraction of oil and gas, not for construction aggregate. Is frac sand mining allowed as a conditional use under the Buffalo County Zoning Ordinance?
3. A CUP is issued in order to attach various enforceable conditions to a party's ability to put its property to the specified use. The Buffalo County Board of Adjustment below issued a CUP to R&J Rolling Acres, even though no such entity exists and the record contains no indication of R&J's agents. Did the board of adjustment err in granting a CUP to a non-existent business entity and assuming that the conditions to that permit would be legally enforceable?

STANDARD OF REVIEW – Specify the proper standard of review for each issue to be raised, citing relevant authority:

Each of the questions presented is an issue of law, which the Court reviews de novo. State v. Starks, 2013 WI 69, ¶ 28, 833 N.W.2d 146, 155 (Wis. 2013) ("The proper interpretation of a statute and case law raises questions of law that we review de novo."); Board of Regents of University of Wisconsin v. Dane County Bd. of Adjustment, 2000 WI App 211, ¶ 11, 238 Wis.2d 810, 819, 618 N.W.2d 537, 541 (Wis. App. 2000) ("The interpretation of an ordinance is a question of law, which is generally subject to de novo review.").

Do you wish to have this appeal placed on the expedited appeals calendar? (See Criteria For Expedited Appeals.)

Yes No If "no", explain : Due to the issues presented, the briefs will be longer than 15 pages. A standard briefing schedule is required.

Will a decision in this appeal meet the criteria for publication in Rule 809.23(1)?

Yes No

Will you request oral argument?

Yes No

List all parties in trial court action who will not participate in this appeal:

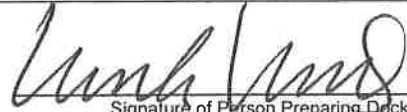
<u>Party</u>	<u>Attorney's Name and Telephone Number</u>
School District of Cochrane-Fountain City	John Hibbard, 715-835-8448

Reason for not Participating
 Cochrane-Fountain City School District was a party below because it was the plaintiff in the case consolidated with the present case for circuit court adjudication; Cochrane-Fountain City School District is not pursuing an appeal.

Are you aware of any pending or completed appeal arising out of the same or a companion trial court case that involves the same facts and the same or related issue?

Yes No Name of Case _____

Appeal Number _____



Signature of Person Preparing Docketing Statement

Karla M. Vehrs

Name Printed or Typed

September 12, 2013

Date

Appellant Note:

You MUST attach a copy of the following trial court documents to this form:

1. Trial court's judgment or order and findings of fact.
2. Conclusions of law.
3. Memorandum decision or opinion upon which the judgment or order is based.

You MUST also furnish all opposing counsel with a copy of this completed Docketing Statement and attached trial court documents.

MIKE O'CONNOR,

Plaintiff,

v.

BUFFALO COUNTY BOARD OF ADJUSTMENT,

Defendant,

v.

GLACIER SANDS, LLC,

Case No. 2012 CV 71

Intervening Defendant.

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.

DECISION

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.

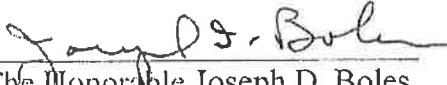
With regard to various issues regarding the application and its supporting documents, and whether the proper procedure was followed by the BOA, the court finds that the application was complete and proper, and all BOA meetings were properly noticed. Plaintiffs provided no authority to support their argument 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 30th 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

