



**Walworth County
Land Conservation Committee Meeting
Monday, April 22, 2013 at 2:00 p.m.**

**Walworth County Government Center
County Board Room 114
Elkhorn, WI 53121**

***Dan Kilkenny – Chair, Nancy Russell – Vice Chair
Tim Schiefelbein – Supervisor***

Sue Bellman – USDA/FSA Representative, Rosemary Badame – Citizen Member

(Posted in Compliance with Sec. 19.84 Wis. Stats.)

It is possible that a quorum of the County Board or a committee of the County Board could be in attendance.

AGENDA

1. Call to order
2. Roll call
3. Approval of the Agenda
4. Approval of minutes, March 18, 2013 and March 25, 2013, Land Conservation Committee meetings (enclosure pp. 1 – 4)
5. Public Comment
6. Discussion/Possible Action - Baker Final Determination – Burdick Trucking and Excavation, Inc. Mining Site Operator, Baker Enterprises, Owner (enclosure pp. 5 – 15)
7. Next meeting date: Monday, May 20, 2013, 2:00 p.m.
8. Adjournment

Submitted by: Michael P. Cotter, Director, Land Use and Resource Management Department, Louise Olson, Deputy Director, Land Conservation Committee Designee

Posted: April 17, 2013

Walworth County Land Conservation Committee

MINUTES

March 18, 2013 – 2:00 p.m.

County Board Room 114 – Government Center
Elkhorn, Wisconsin

DRAFT

The meeting was called to order at approximately 2:07 p.m. by Chairperson Kilkenny.

Roll call – In attendance were Chairperson Kilkenny, Vice Chairperson Russell, Supervisor Schiefelbein and Citizen Members Bellman and Badame. A quorum was declared.

Others present – Supervisors Carl Redenius, Ken Monroe and Rick Stacey; David Bretl, County Administrator; Michael Cotter, Deputy Corporation Counsel/LURM Director; Louise Olson, Deputy LURM Director; Fay Amerson, Urban Conservation Specialist; Attorney Bill White, Michael Best & Friedrich, LLP; Chris Rieck, Conservation Tech; Thomas Portle, WDNR; Warren Hansen, Farris, Hansen & Associates; and Andrew, James and Jean Baker.

Approval of the agenda was moved and seconded by Supervisor Schiefelbein and Citizen Member Badame, with no withdrawals, and carried 5 – 0.

Approval of the October 15, 2012 Land Conservation Committee meeting minutes was moved and seconded by Vice Chairperson Russell and Supervisor Schiefelbein, and carried 5 – 0.

Public comment period – none

Public Hearing related to Certificate of Completion Reclamation of a Nonmetallic Mining Site is Complete; Burdick Trucking and Excavation, Inc. Mining Site Operator, Baker Enterprises, Owner; Discussion/Possible Action – Baker Final Determination – Committee may make their determination at this time or in writing within 20 days. On the advice of counsel, Vice Chairperson Russell recused herself from the proceedings due to the fact that she had been on-site when the reclamation was made. There was still a quorum, so the proceedings continued. Bretl briefly explained the procedure for the hearing. As Corporation Counsel, Bretl was representing the committee and could provide the committee with legal advice if they wanted. He added that this is a more formal procedure than normal. A record needs to be created in case this issue goes to court. He reminded everyone that the proceedings are being recorded and speakers would need to use the microphones. The parties introduced themselves, with the aggrieved party going first. Attorney White pointed out that Andrew Baker is not listed as an aggrieved party in the appeal. Attorney White questioned Andrew's role. Andrew Baker stated that he is not an attorney, but he had been asked to come and speak on his grandparents' behalf. Bretl recommended that the committee note that objection. Chairperson Kilkenny noted the objection, and the proceedings continued. It was pointed out that Burdick Trucking could potentially be affected by the decision in this matter, but they were not represented at the hearing. At approximately 2:15 p.m., Andrew Baker began giving his opening statement. Baker provided the committee with a binder of exhibits. Chairperson Kilkenny then swore in Andrew

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Baker. At approximately 2:37 p.m., Baker completed his opening statements, and Attorney White began his cross examination of Baker. Once the parties concluded, Bretl suggested the committee determine which items would be entered into evidence. Attorney White objected to Exhibit F in the Bakers' binder, which was a letter from their attorney.

On motion and second by Supervisor Schiefelbein and Citizen Member Badame, the Bakers' binder, with the exception of Exhibit F, was moved into evidence. It was clarified that Exhibit F was excluded because the letter was hearsay, and the county did not have the ability to cross-examine the person who wrote the letter. The motion carried 4 – 0.

Attorney White gave his statements. At approximately 3:31 p.m., Attorney White called Tom Portle to testify. Chairperson Kilkenny administered the oath to Mr. Portle, and Mr. Portle provided his testimony. At approximately 3:42 p.m., Warren Hansen was sworn in as the County's next witness. Both parties were given the opportunity to question Mr. Hansen.

Chairperson Kilkenny stated that the hearing needed to adjourn for today. The committee members were not to discuss the issues with the parties. Attorney White stated that he would like attachment 3 from the Land Conservation Committee packet moved into evidence.

On motion and second by Supervisor Schiefelbein and Citizen Member Badame, Mr. Portle's letter to Fay Amerson (dated August 31, 2012) was received into evidence. The motion carried 4 – 0.

The parties discussed a date for the next meeting. Andrew Baker wanted to have the meeting on-site when conditions allowed. Attorney White objected. The parties agreed to reconvene on March 25th.

On motion and second by Supervisor Schiefelbein and Citizen Member Badame, the hearing was set to continue on March 25th at 1:00 p.m. The motion carried 4 – 0.

Chairperson Kilkenny did not have any announcements.

The next regular meeting of the land conservation committee was confirmed for April 22, 2013 at 2:00 p.m.

Adjournment. On motion and second by Supervisor Schiefelbein and Citizen Member Badame, Chairperson Kilkenny adjourned the meeting at approximately 4:07 p.m.

Respectfully submitted by Tammy Werblow, assistant to the county administrator.
These minutes are subject to approval by the committee.

Walworth County Land Conservation Committee

MINUTES

March 25, 2013 – 1:00 p.m.

County Board Room 114 – Government Center
Elkhorn, Wisconsin

DRAFT

The meeting was called to order at approximately 1:13 p.m. by Chairperson Kilkenny.

Roll call – In attendance were Chairperson Kilkenny, Supervisor Schiefelbein and Citizen Members Bellman and Badame. Vice Chairperson Russell had recused herself. A quorum was declared.

Others present – Supervisor Carl Redenius; David Bretl, County Administrator; Michael Cotter, Deputy Corporation Counsel/LURM Director; Louise Olson, Deputy LURM Director; Fay Amerson, Urban Conservation Specialist; Chris Rieck, Conservation Tech; Attorney Bill White, Michael Best & Friedrich, LLP; and Andrew, James and Jean Baker.

Public comment period – none

Public Hearing related to Certificate of Completion Reclamation of a Nonmetallic Mining Site is Complete; Burdick Trucking and Excavation, Inc. Mining Site Operator, Baker Enterprises, Owner. Attorney White continued with his case. Andrew Baker pointed out that Exhibit F from the Bakers' binder had been removed from the evidence. He wanted to replace that excluded exhibit with the Affidavit of James Baker. He requested that be put into evidence. Attorney White called Fay Amerson to the stand, and Chairperson Kilkenny administered the oath. Amerson was questioned by both parties.

Exhibits numbered 1-18 provided by the County shall be labeled Exhibit A; Exhibit B shall be the four sheets of the reclamation plan; Exhibit C shall be the 2010 photos; Exhibit D shall be the 2011 photos; and Exhibit E shall be the 2012 photos. Attorney White had no objection to the new evidence from Andrew Baker.

On motion and second by Citizen Member Badame and Supervisor Schiefelbein, the exhibits were moved into evidence. The motion carried 4 – 0.

Citizen Member Bellman left at approximately 3:04 p.m. The remaining three members will be responsible for the deliberations. At approximately 3:33 p.m., Andrew Baker gave his rebuttal

On motion and second by Supervisor Schiefelbein and Citizen Member Badame, the Affidavit of James Baker was moved into evidence. The motion carried 3 – 0.

The committee took a brief break at 3:37 p.m. The hearing reconvened at 3:51 p.m. Andrew Baker offered his closing statements at 3:52 p.m. At 4:05 p.m., Attorney White offered his closing statements.

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Discussion/Possible Action – Baker Final Determination – Committee may make their determination at this time or in writing within 20 days. At 4:25 p.m., the Committee began deliberations. Bretl suggested that the Committee could deliberate now to reach a preliminary vote on how they stand on this issue. Supervisor Schiefelbein felt that if there was a procedural failing, such as the public hearing not being held, the case would be closed. Bretl stated that the Committee needs to weigh the totality of the evidence. Supervisor Schiefelbein felt that the County acted within their purview, but he was not sure how to reconcile the lack of a public hearing. Citizen Member Badame did not feel that the County acted inappropriately. Bretl stated that the Committee could request briefs from both parties. If they chose to do that, he suggested a simultaneous exchange of briefs. Chairperson Kilkenny stated that there were two issues at hand: the lack of the owner's consent on the plan and the requirement for public notice and opportunity for public hearing.

The Committee requested that briefs be sent to County Administrator Bretl by April 15th. He will then distribute the briefs to the Committee members. The decision will then be made at the regular Land Conservation Committee meeting on April 22nd. It was clarified that Citizen Member Bellman and Vice Chairperson Russell would not take part in the deliberations.

Chairperson Kilkenny did not have any announcements.

The next regular meeting of the land conservation committee was confirmed for April 22, 2013 at 2:00 p.m.

Adjournment. On motion and second by Citizen Member Badame and Supervisor Schiefelbein, Chairperson Kilkenny adjourned the meeting at approximately 5:04 p.m.

Respectfully submitted by Tammy Werblow, assistant to the county administrator.
These minutes are subject to approval by the committee.

To: Walworth County Land Conservation Committee

From: Baker Enterprises, Inc

Date: April 10, 2013

Re: Response to request for brief relating to Sec. 26-311 – Permit Modification, Walworth County Non-Metallic Mining Reclamation Ordinance.

This brief is written in support of Baker Enterprises' Request for Review of the Initial Determination to issue the Certificate of Completion to Burdick Trucking and Excavating and to provide supplement information to the information presented at hearings on March 18th and 25th, 2013.

There was discussion among the Land Conservation Committee members at the hearing for the above referenced Request for Review regarding Sec. 26-311(f) of the Walworth County Nonmetallic Mining Reclamation Ordinance, which states, "*Public hearing on plan modifications.* Pursuant to section 26-294, the county shall provide public notice and the opportunity for a public hearing for the proposed modification or (sic?) any reclamation plan previously approved by the county." That discussion, and considering no public notice was issued by County staff for the modification of the reclamation plan approved for the Baker property, led to your request for each party to submit a brief on the matter.

The Bakers argued at the hearing that there is no room for discretion in the interpretation of 26-311(f) when read in context of the purpose of 26-311. The use of the word "shall" and phrase "any reclamation plan previously approved by the county" should be read literally, within reason, and not left up to staff discretion. In other words, for example, "may" or "should" could have been used in this section to imply any area of discretion by staff, but they were not. In terms of ordinance construction overall, the term "shall" appears to be the strongest word used to compel action by a permit applicant or review staff and does not imply discretion or optional standards. For example, 26-291(a) states, "All operators of nonmetallic mining sites shall apply for a reclamation permit from the county" (emphasis added) and 26-292(a) states, in part, "All operators who conduct or plan to conduct mining shall submit to the county a reclamation plan that meets all of the following requirements and complies with the standards of div. 2" (emphasis added). "Shall" continues to be used throughout 26-292 to affirm the uniform standards for reclamation plans. In these sections, "shall" takes the meaning of "has the duty to." There is no reason to believe "shall" is intended to be construed in another other way in 26-311.

Case law may exist to discount the legal meaning of the word "shall," but until the County Ordinance is amended to fully incorporate that impact, "shall" must be interpreted as absolute, or "has the duty to." Keep in mind, section 26-265 states, in part, "Where any terms or requirements of this article may be inconsistent or conflicting, the more restrictive requirements or interpretation shall apply."

The Bakers argue 26-311(f) should be read literally within the context of this section of the ordinance. The Bakers agree it is not reasonable that every minute change to a reclamation plan necessitates a public notice. Minor changes or plan adjustments are often made in the field that are inconsequential to ordinance compliance and the overall post mining land use. However, if a formal plan modification is requested by the operator or ordered by the County under the provisions of 26-311, the staff shall issue a public notice when the modified plan is proposed. Said another way, if a modification is significant enough to require the submission of new plan documents, in this case site plans by a professional engineer as verbally ordered by Walworth County staff, the public notice requirements shall be met. There is no exception by ordinance for sites that were existing prior to the NR 135 based reclamation ordinance, as argued by County staff, or for sites where modifications are ordered by the County.

Furthermore, if discretion was indeed intended in 26-311(f), the paragraph should include suggestions or examples of when a public notice “may” or “should” be provided and when it is in fact not necessary. No such examples exist, which, as argued by County staff, leaves public notice entirely at their discretion with no guidance on when a notice should be issued. The Bakers argue that was likely not the intention when the ordinance was adopted, which supported further when the section of Wisconsin Administration Code NR 135 relating to permit modifications is examined.

NR 135 details the standards, procedures and requirements included in most local Reclamation Ordinances statewide. In review of NR 135.24, “Permit modifications,” most of the section is consistent with the corresponding section in Walworth County Ordinance. However, there is no specific reference to opportunity for public notice or public hearing in NR 135. Absent of direct guidance for such a provision in the state administrative code, it is presumed (meeting minutes have not been reviewed to help determine intent) the choice was made at the time of drafting and adoption by the County Board to add this requirement for an opportunity for public notice for plan modifications. Again, when read narrowly, notifications would be required when modified plans were submitted as the result of enforcing 26-311(a), 26-311(b) or 26-311(c). In this way the County Ordinance is more specific than NR 135 in terms of administrative procedures, which helps to maintain consistency in enforcement by limiting discretion. Also, as noted above, there are no exceptions for sites existing prior to the NR 135 based Walworth County Ordinance. Because the County Ordinance varies from NR 135 in this instance, care must be taken when using general DNR guidance to administer local ordinance administrative provisions. If variance from NR 135 is a concern, it should be noted that the DNR reviews ordinances prior to adoption and this provision was not deleted simply because it varied from NR 135 standards.

As County staff describe in their document outlining the history of state and local legislation, the language in NR 135 relating to “existing” mines (those operating, generally, prior to 2001) was removed in 2006 (the County ordinance was subsequently amended in the April 2007 to reflect the same change). Prior to this amendment, “existing” sites were afforded a grace period to get into compliance with NR 135, which necessitated some reduced standards compared to those required for new sites opening after 2001. One of the standards that varied was the public notice, as addressed further below. By 2006 all sites were expected to have reclamation plans in compliance with NR 135 and local ordinances. There was, and still is, no longer a need to have separate ordinance standards and procedures for “existing” sites and “new” sites. Under the current NR 135, all private mine sites are now generally treated the same, whether they were active prior to 2001 or not.

The **March 2003 Guidance by Dan Graff, WDNR Nonmetallic Mining Program Attorney**, is cited by the County staff in their “Response to Request for Review of Initial Determination” document (paragraph numbers 9 and 11) to support their decision to not issue a public notice for this modification, despite clear County Ordinance requirements. Utilizing this DNR guidance document to support this decision is not appropriate for a number of reasons. Each reason is written to be independent from the others.

First, the guidance is from 2003 and intended to address the approval of the first reclamation plans under NR 135 based local ordinances and to help regulatory authorities work through approving the “existing” sites at the time. As described in the guidance, when NR 135 was adopted there were many different scenarios in the state depending on if local communities already required some form of reclamation standards (but possibly not to the extent of NR 135). The Baker/Burdick reclamation plan was approved in 2004 or 2005 as an “existing” site, meeting the NR 135 and Walworth County ordinance standards. This DNR guidance was probably helpful in that process, but it does not pertain now after the plan was approved. In other words, the guidance does not address modifications to plans already approved under a NR 135 based ordinance. Most operators in the state were just having their NR 135 based plans approved between 2001 and 2004. Therefore, there was no reason, at the time, to provide guidance on the procedure to approve plan modifications.

Secondly, this guidance refers to a version of NR 135 which no longer exists. As noted above, and by County staff at the hearing, the language referring to “existing” sites (and definition thereof) was removed from NR 135 in late 2006 and from County Ordinance in early 2007. The procedural differences between regulating existing mines versus new mines are no longer included in NR 135 or County Ordinance, therefore this guidance from 2003 is functionally out-dated. The County staff appear to be relying on section III. C. of the guidance when they refer to the modified plan for the Baker property as “supplemental information” in the written response to the Baker’s Request for Review. However, “supplemental information” is used in the guidance to describe a situation where the County could request more information to complete a plan previously approved under local ordinance which did not meet the compliance requirements of the new NR 135 based ordinance. The Baker/Burdick site already had a NR 135 based approved plan when the County staff ordered the modified plan in 2010 to account for the change in mine acreage. Therefore, County staffs’ use of the term “supplemental information” in this case to parallel the term in the guidance is not correct. Not only does the term “supplemental information” not apply to this situation, this section of the guidance refers to NR 135.21(1)(e) Wis. Adm. Code which was one of the provisions removed in 2006. The Bakers argue that there is no basis for the County staff to defend their decision to not issue a public notice (and opportunity for a public hearing) by using provisions of NR 135, and the supporting guidance, that were removed years prior to making the decision.

Finally, current informal guidance on the DNR website (“frequently asked questions”) directly addresses public notice requirements for plan modifications. It reads, in part, “NR 135 provides that existing mines - those in operation prior to August 1, 2001, that applied for and received an automatic reclamation permits - do NOT need a public informational hearing. However, a new mine (any mine opened after August 1, 2001) as well as any existing mine that requires a major revision to its reclamation plan would need to provide an opportunity for a public informational hearing¹.” The website also includes the following, “The reclamation permit is a life-of-mine permit, and a substantial modification would cause it to be reopened and may necessitate a public hearing.¹” One example of a substantial change listed is when there is an increase or decrease in the area to be mined (and reclaimed). A decrease in the area to be mined is what triggered the County to order a modified plan in this case.

In conclusion, Section 26-311 of the Walworth County Non-Metallic Mining Reclamation Ordinance contains standards and procedures related to permit or plan modifications which the Bakers have argued were not properly implemented by County Staff in the administration of the reclamation permit held by Burdick on their property. The Bakers have argued that the administrative decisions made relating to this, and other, sections of the ordinance led to the approval of a modified reclamation plan for their property without their full consent. The administrative choices also culminated in the final approval of the plan implementation via the Certificate of Completion issued to the site operator/permit holder, which was issued despite the objection of the Bakers that the reclamation was not complete. Those choices led the Bakers request for review of the decision to issue the Certificate of Completion.

In hindsight, whether or not a public notice was issued may seem minor in terms of how it affects the general public, but the Committee should also consider how providing the public notice (and opportunity for a public hearing) could have changed the outcome of this reclamation project. The public notice serves as an opportunity for a checks and balances of sorts of a final plan approval that is made solely by administrative staff (i.e. no committee approval). The Bakers have argued at length that the review of the modified plan ordered by the county should have been done according to the detailed requirements for reclamation plans in the ordinance. One of the requirements is to have the landowner concur with the plan prior to approval. There are no alternative requirements for modified plans.

¹ Wisconsin Department of Natural Resources. (website update July 12, 2012). Non metallic mine reclamation plans: Frequently asked questions. Retrieved from <http://dnr.wi.gov/topic/Mines/Reclamation.html>, accessed April 2, 2013

Not only was written landowner concurrence deemed not necessary by County staff, the modified plan document was given to the Bakers' son only after the major grading work was started by the subcontractor hired by Burdick (when the landowners were out of the country). This was the extent of the notice of a formal modified plan offered to the Bakers. The major work on the site began approximately two months after the County staff gave the verbal order to create the modified plan and approximately one week after the plan was signed by the engineer. The County staff contends the plan reflects all the wishes of the landowner, but they (or their son, acting as their representative) were given, literally, no opportunity to review the plan documents (in draft or final form) before the major grading work commenced in 2010. As discussed at the hearing, when attempts were made to stop the work so that the plan could be reviewed, Ms. Amerson advised the landowners' son, if he did so, the Bakers would be responsible for the reclamation to full ordinance standards. There has been no dispute that this conversation occurred, the only disagreement is whether the words "will" or "may be required" were used by Ms. Amerson. During the hearing the Committee suggested that the Bakers should have appealed the approval of the modified plan prior to it being implemented, which is exactly what the Bakers' son attempted to do as soon as he had the plans in his hands (keep in mind there was no written approval by County staff to appeal prior to implementation). But, according to Ms. Amerson, they risked the possibility of assuming the responsibility to complete the work if they exercised those rights.

This entire exchange between staff and landowner representative, the subsequent critical decision of whether or not to stop the work and likely much of subsequent adverse, costly, experience for all involved could have been avoided had the Bakers been given the chance to review the plans prior to equipment moving on site. The lack of opportunity for proper review by the landowner prior to implementation is critical in this situation. Once the County approved the plan and the significant grading work in the fall of 2010 despite the landowner objection, the permit holder/lessee was unwilling to deviate from the 2010 plan do any significant work on site to bring it closer to compliance with the details of the agreed upon 2004 plan (as expected by the Bakers, other than the changes necessary because of the change to the physical extent of the mine). The public notice requires a period of a number of weeks for review by the surrounding landowners and the possible request for a public hearing. This provision allows time for review and clarification of the plan details by other interested parties in order to resolve conflicts or concerns before approval by County staff. This would have also required County staff to give more time for the landowners to review the plans. Keep in mind, Mr. Portle from the DNR testified that a landowner's signature is not required for modified plans. He is right; it is not spelled out as required specifically in the ordinance for plan modifications. However, the Bakers have argued, and showed at the hearing, that there are no specific, distinct, alternative standards for plan modifications as compared to any other plan approved by ordinance. Mr. Portle also said that the signature is good to have. Lack of a distinct requirement for a signature on the modified document should not be interpreted as broadly giving the County staff authority to avoid giving the landowner any notice of the modified plan. Nor does it give the authority for staff to suggest, or say, to the landowner representative that they would be responsible for the work if the contractor left the job for any reason.

This brief constitutes our final appeal for you, as the decision maker in this review process, to consider that the County staff misinterpreted the Walworth County Non Metallic Mining Reclamation Ordinance as it was applied to our property. County staff has claimed discretionary decision making authority on a number of occasions in this process where the ordinance does not clearly allow it. Not issuing a public notice was just one of the ordinance provisions that the Bakers argue was not properly considered by County staff. These decisions have adversely affected the landowner in terms of the short and long term repair needs (due to gully erosion and sparse permanent vegetation on steep slopes), the long term maintenance challenges and limited overall safe use of the site. We appreciate your time and effort in carefully weighing this decision in light of all the facts supported by the ordinance or other evidence in this complex case.

The previously filed and approved reclamation plan for the site had obviously not been completed since the site was not completely mined. Baker Enterprises, Inc. did not propose an alternate reclamation plan yet demanded that one be completed since the site had not been fully mined; however, Baker Enterprises, Inc. did demand end uses for its benefit, e.g., a baseball diamond and a pond. Revised reclamation plan recognizing the nature of the reclamation needed after partial mining of the site was prepared by Burdick Trucking & Excavation and approved by the Walworth County Land Use and Resource Management Department in September 2010, which also required Burdick Trucking & Excavation to implement the plan. Even though Burdick Trucking & Excavation, Inc., was in liquidation, Debbie Burdick, the individual responsible for winding up the affairs of the corporation, retained staff and equipment to complete the reclamation in 2010, and hired a company to undertake repairs and re-stabilize the reclaimed site in 2011.

A Certificate of Completion was issued by the Walworth County Land Use and Resource Management Department, on August 16, 2012, consistent with the standards contained in Section 26-281 (8) of the WCO and after seeking the advice of the WDNR. The modified non-metallic mining reclamation permit and plan was ordered by the County pursuant to its authority in WCO Section 26-311(a):

By the County. A non-metallic mining reclamation permit issued under this Article may be modified by the County if it finds, due to changing conditions, the non-metallic mining site is no longer in compliance with Ch. NR135 Wis. Adm. Code or this Article. Such modification shall be by an order modifying the permit in accordance with Section 26-332. This modifying order may require the operator to amend or submit new application information, reclamation plan, proof of financial assurance or other information needed to insure compliance with Ch. NR135, Wis. Adm. Code or this Article. (emphasis added).

At the conclusion of the hearing on March 25, 2013, Appellant, Baker Enterprises, Inc. submitted that the permit modification implemented by the County pursuant to the above section was invalid for two reasons. First, that a public hearing notice and opportunity for a hearing

must have been implemented under WCO Section 26-311(f) and, second, that no revised reclamation plan may be implemented unless the property owner consents to the plan. Walworth County submits that these two reasons are not accurate and are therefore insufficient to invalidate the modified reclamation plan and the Certificate of Completion which was approved by Walworth County with the concurrence and guidance by the WDNR pursuant to its authority under Chapter 135 of the Wisconsin Administrative Code.

DISCUSSION

There is no requirement that the property owner have the ultimate and unilateral right to consent to (or reject) a modification to the reclamation plan. Throughout WCO Section 26.311, the operator has the ability to request a modification to the plan. Nowhere is that allowed to be initiated by the landowner nor is there any indication in the Walworth County Ordinances that the approval of the landowner must be secured prior to the exercise of regulatory authority by Walworth County. Baker Enterprises, Inc. relies on the fact that it approved the plan in 2004 and that the County tried to accommodate Baker Enterprises, Inc. when the reclamation plan was modified in 2010. Neither of these can leverage Baker Enterprises, Inc. into a position that it has veto power over a reclamation plan modification. We would, therefore, submit that this argument is groundless.

The second argument is that a public notice must have been published and the opportunity for a public hearing presented before a plan may be modified:

(f) *Public Hearing on Plan Modifications.* Pursuant to Section 26-294 the County shall provide public notice and the opportunity for a public hearing for the proposed modification or any reclamation plan previously approved by the County. (emphasis added)

It should initially be noted that public hearing was held when the conditional use permit was approved by Walworth County in 1991. What is at stake here is a modification required by Baker

Enterprises, Inc.'s actions. Baker Enterprises, Inc. could have sought out a different operator to continue mining or could have continued to have Burdick Trucking & Excavating, Inc., as the mine site operator. Instead, Baker Enterprises, Inc. terminated its lease for its personal financial reasons.

Therefore, the question settles into whether or not the owner of the property had a mandatory right to demand a public hearing for the modification of the permit when the modification was created by the property owner's actions and where a public hearing on the reclamation of the site had already taken place. We note initially that the provisions of WCO Chapter 26 non-metallic mining reclamation are promulgated pursuant to the provisions of Chapter 295 of the Wisconsin Statutes and Chapter NR135 of the Wisconsin Administrative Code. The WDNR, which is charged with the interpretation and the individual charged with the enforcement, Tom Portle, clearly indicated on March 18, 2013, that no additional public hearing was required in these circumstances. This is based on Mr. Portle's wide-ranging familiarity with oversight and enforcement of non-metallic mining reclamation plans and their modifications throughout Wisconsin. In fact, Mr. Portle had completed a substantial audit of the Walworth County non-metallic mining reclamation plans as well as the implementation of those plans and the procedures used to administer their mandated authority related to nonmetallic mining reclamation. The County passed that audit with flying colors.

We also note that the ordinances are to be construed liberally in favor of a municipality:

"Courts interpret an ordinance in a reasonable and liberal manner so it can achieve its objective. If the ordinance is within the granted power" *Statutes and Statutory Construction* [1A Norman A. Singer] Section 30:6 at 678 (citing cases including *Black v. City of Waukesha*, 125 Wis. 2d 254, 371 N.W.2d 389 (Ct. App. 1985).

In addition to liberal common sense construction of the ordinance with deference given to Walworth County, we note that the words "may" and "shall" are used differently throughout

WCO Section 26-311(a). Consequently the committee is required to make a common sense determination of whether "may" in fact means "shall" or "shall", in fact, means "may". We submit that even though the word "shall" is used in Section 26-311, it is discretionary with the County in these unique circumstances. It should be remembered that the event causing the necessity for the revised reclamation plan was created by the property owner and that it is the property owner that demands that the reclamation be implemented for its own benefit. However, the Walworth County Ordinance as well as the state statute and regulations clearly indicate that the reclamation is to be determined by a public interest standard and not by a private benefit standard. See, for example, *Sommerfield v. Board of Canvassers*, 269 Wis. 299, 69 N.W.2d 235 (1955):

We have frequently stated that the word "shall" is to be construed to mean "may" where such construction is warranted by other circumstances.

There are numerous examples of how the courts allow the municipality to interpret its own ordinances: When "shall" mean "may" ...

"The courts, in following their well-defined policy of looking o the intent, rather than to the language, have variously held that 'shall' is imperative, is directory, means 'may,' expresses a mandate, either permissive or peremptory, applies to the past, to the future, and to the present." *Statutes & Statutory Construction § 32A:11, at 878*

...

"the use of the word [shall] as a command is now firmly fixed...Frequently, however, the courts find that circumstances, or the context of an act, overcome the usual meaning, and the mandate conferred is held to be merely permissive, rather than imperative. The effect is to make the word 'shall' have no stronger meaning than 'may.'" *Statutes & Statutory Construction § 32A:11, at 880*

...

"May' is generally construed as permissive and 'shall' is generally construed as mandatory, unless a different construction is demande3d by the statute to carry out the clear intent of the legislature. *City of Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963)." *Mucek v. Nationwide Commnc'ns, Inc.*, 2002 WI App 60, ¶ 34, 252 Wis. 2d 426,643 N.IW.2d 98

...

"We have frequently stated that the word 'shall' is to be construed to mean 'may' where such construction is warranted by other circumstances. *Sommerfeld v. Board of Canvassers* (1955), 269 Wis. 299, 69 N.W. (2d) 235; *George Williams College v. Williams Bay* (1943), 242 Wis. 311, 7 N.W. (2d) 891; *Appleton v. Outagamie County* (1928), 197 Wis. 4, 220 N. W. 393." *State ex rel. Werlein v. Elamore*, 33 Wis. 2d 288, 293-94, 147 N.W.2d 252 (1967) (emphasis added).

...

"As this court has previously held, "very often 'shall' in a statute is construed to mean 'may.'" *George Williams College v. Williams Bay*, 242 Wis. 311, 319, 7 N.W.2d 891 (1943); *Sommerfeld v. Board of Canvassers*, 269 Wis. 299, 303, 69 N.W.2d 235 (1955). The word 'shall' 'will be construed as directory if necessary to carry out the legislature's clear intent.' *Cross v. Soderbeck*, 94 Wis. 2d 331, 340, 288 N.W.2d 779 (1980), citing *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 570-71, 263 N.W.2d 214 (1978)." *State v. Hervey*, 113 Wis. 2d 634, 641-42, 335 N.W.2d 607 (1983)

...

It should be noted that the supreme court has held that the word "shall" can be construed to mean "may." *Lanser*, 62 Wis. 2d at 93-94, 214 N.W.2d at 428. "shall" can be construed as being directory rather than mandatory if that construction is necessary to carry out the legislature's clear intent. *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978)." *Town of Nasewaupee v. City of Sturgeon Bay*, 146 Wis. 2d 492, 496-97, 431 N.W.2d 699 (Ct. App. 1988).

BUT SEE, e.g., *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶¶ 32-36, 339 Wis 2nd 125, 810 N.W.2d 465:

The word "may" is ordinarily used to grant permission or to indicate possibility. Accordingly, when interpreting a statute, we generally construe the word "may" as permissive.. By contrast, we presume that the word "shall" is mandatory.

While recognizing that we generally construe the word "may" as permissive, Heritage Farms urges us to nevertheless read the phrase "may recover" in Wis. Stat. § 26.21(1) as "shall recover," in order to carry out the statute's legislative intent. As Heritage Farms points out, this court has occasionally ruled that the word "may" in a statute can properly be construed as mandatory when such a construction is necessary to carry out the intent of the legislature (citations omitted)

With that in mind, we decline to rewrite Wis. Stat. § 26.21(1), as Heritage Farms suggests, by replacing the word "may" with the word "shall." The cases in which this court construed the word "may" in a statute as "shall," or vice-versa, must be understood in context. In each case, the court was interpreting a statutory provision that imposed, usually upon the circuit court or a litigant, a power or

duty to act. The issue then was whether the power or duty to act was discretionary or mandatory. (emphasis added)

CONCLUSION

The foregoing reasons clearly show that Wisconsin law supports the County's common sense interpretation of its own ordinances; it is not a strict construction standard as with a criminal statute but, rather, an administrative rule which is designed to achieve the purposes intended. There is no requirement that the County implement the property owner's demand for a certain reclamation plan. Baker Enterprises, Inc., of course, is free as the owner of the property to make whatever modifications it sees fit in conformity with other laws, rules and regulations.

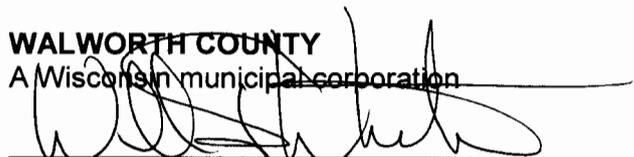
Second, the permit modification to accommodate the Baker Enterprises, Inc.'s early termination of its mineral extraction lease with Burdick Trucking & Excavation did not require an additional public notice or public hearing. This was shown by the consistent efforts by Walworth County to accommodate the property owner as well as to implement the advice of the Department of Natural Resources which has oversight of the non-metallic mining reclamation program.

WHEREFORE, Walworth County respectfully requests that the Land Conservation Committee affirm the sufficiency of the actions of the Land Use and Resource Management Department and to dismiss the appeal brought by Baker Enterprises, Inc.

Dated this 12th day of April, 2013.

WALWORTH COUNTY
A Wisconsin municipal corporation

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