

Introduction

After a hearing and deliberation on Oct 20th, 2025, the Kronenwetter Plan Commission (KPC) unanimously voted to deny Milestone Materials' conditional use application. This decision was based on the failure of the application and other documents and evidence on the record to meet 4 out of the 5 criteria for approval. All 5 criteria must be met before approval is allowed,

Milestone Materials has appealed that decision to the Village Board as per 520-121 (j). The letter stated no specific claims or reason for the appeal.

Basic Rules of Appeal

Consideration of a conditional use application is a **quasi-judicial function** of the KPC, and thus also of the Village Board in considering this appeal.

"Quasi judicial" means that our obligation is every bit as solemn as it would be for **jury duty**. In some respects it is even more regulated because here, each member must be able to legally justify their vote with reasoning as to how they determined the facts, and how those facts applied to the law (the five criteria in Ordinance 520-121 (G)) which has resulted in their decision. This rule applies either way, **whether it is a vote to deny, or a vote to approve**, the member must have a rational reason based on facts and how they apply to the criteria.

The Village Board has not been briefed in their duties or procedure of an appeal process, and they may not be as familiar with the requirements as the KPC is.

In response to President Joling's concerns and request for what I consider to be a legal basis for the Commission's decision, I have prepared this document to the best of my knowledgs from a layman's point of view. This report is intended to be an informative overview as to how I as a Commission member viewed the facts, and how they applied to the criteria in Ordinance 520-121 (G) that resulted in the vote to deny the application.

I do not intend to speak for all of the KPC members, but I expect that based on the discussion at the meeting, their individual votes to deny the application follows very similar reasoning to what I will present here.

Plan Commission

The KPC is made up of people of diverse opinions, experience, and world views who are otherwise (to my knowledge) not associated with each other. They are experienced in performing KPC functions, including CUP requirements. I have no reason to believe that they do not understand their duties or that they take their responsibility lightly.

The Commission addressed the provisions of the village's ordinance and its decision was the result of deliberation and judgment exercised within the range of discretion accorded it in common law. The Commission's determination was reasonable, had a rational basis, and was supported by numerous points of substantial evidence.

Rules and Requirements for Appeal Approving or Denying the Application

The original KPC approval process involved gathering information, evidence, and other fact-finding. In a normal appeal process however, the Village Board is restricted **to considering only the information available to the KPC at the time of its decision**. No additional information should be or should have been introduced to the Board or considered other than that which was in the record on October 20th.

An appeal is **not a complete do-over**, or second swing at the ball for the applicant to present a new

case.

The job of the Village Board in an appeal is to step into the shoes of the KPC with the same information and conditions that it had back at that time, and to see whether or not the Board will reach the same conclusions by applying the same information to the same criteria in the ordinance.

Threats of Litigation

President Joling has expressed concern that a decision that is unfavorable to the applicant might result in litigation against the Village. I strongly disagreed and said I would provide the authorities (case law) that I was referring to in my comments at the KPC meeting about "court cases".

But first, I'll refer to the Planning Commission Handbook put out by the University of Wisconsin Center for Land Use Education. On page 12 of Chapter 1, which talks about decision-making and the role of the lawyer. It says:

"Above all, don't let yourself be bullied by threats of litigation, unconstitutional takings or other bluster that may come your way. Make your decision based upon the law as set forth in your plans and ordinances."

That chapter can be found here

https://www.uwsp.edu/wpcontent/uploads/2023/11/PC1_Introduction.pdf

Regarding the case law that I found as relates to the KPC decision to deny the application, here are the main points that I have found, regarding what the courts have used as a standard:

1. Because municipal jurisdictions have widely different ordinances. The CUP must comply with the requirements of **that particular ordinance criteria** (In our case items 1-5 of 520-121(g))
2. The **burden is on the applicant** to show in their application papers that the proposal is compliant with the local ordinance.
3. The deciding body has **no obligation** to attempt to adjust, or draw out concessions, or otherwise find ways on behalf of the applicant to make an application work. This is the applicant's responsibility.
4. The deciding body has **complete discretion in weighing evidence and determining the credibility** of such.
5. "Substantial evidence" is defined by law as 62.23(7)(de)1.b. "Substantial evidence" means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and **that reasonable persons would accept in support of a conclusion.**"
6. "Substantial evidence" has been defined by the courts as "**less than a preponderance**" but "**more than 'a mere scintilla'** of evidence and **more than 'conjecture and speculation.'**"
7. Public input concerns may be considered **competent "substantial evidence"** even when contrary "expert testimony" exists.
8. Shared personal knowledge or common experience are valid elements of evidence in reaching a decision to approve or deny a CUP application.
9. The courts review local (KPC) decisions with **deference** and the **presumption** that the local body made a proper determination of the facts, and a correct conclusion. In the event of an appeal to the circuit court, it is the applicant's burden to prove otherwise.

If the applicant does not like the Village decision to deny the CUP application, the procedure is for them to then go to the Circuit Court with a petition of Certiorari, which asks for the court to review the Village decision-making process and confirm whether or not it was done correctly.

Certiorari

A circuit court reviewing a CUP denial on certiorari must as standard procedure, consider whether the

administrative body:

- (1) kept within its jurisdiction;
- (2) proceeded on a correct theory of law;
- (3) acted arbitrarily, oppressively, or unreasonably (exercising will instead of judgment); and
- (4) reached a conclusion that reasonably could be made on the evidence.

If any of these fail, the decision can be disturbed.

Quoted from *State v. Outagamie County Board of Adjustment, Jun 29, 2001*;

State Ex Rel. Ziervogel v. Bd. of Adjustment, Mar 19, 2004, and has been repeated in numerous decisions.

In reviewing and determining these four standards, the Circuit Court **must abide by the bullet points 1-9 listed above**, which were established and/or accepted as the standard by the Wisconsin Supreme Court.

What is a "Conditional Use"?

Any use that is listed as "conditional" is a privilege, not a right. Act 67 has made it a statutory right in cases **where it complies with local regulations**, as determined by a local decision-making body like the KPC.

Here are a couple of examples of how the courts have explained it. Emphasis has been added.

"In Wisconsin, and in many states, a conditional use is one that has been legislatively determined to be compatible in a particular area [such as AR zoning], not a use that is always compatible at a specific site within that area. In these states, the decision whether to grant a conditional use permit is **discretionary**. The relevant entity determines whether a particular site will accommodate a proposed particular use. In other states, decision makers have less discretion on requests for a conditional use permit." *Allenergy Corp. v. Trempealeau Cnty. Environment & Land Use Comm. Wisconsin Supreme Court, May 13 2017*

"Conditional uses or as they are sometimes referred to, special exceptions uses, enjoy acceptance as a valid and successful tool of municipal planning . . . [A]s flexibility devices, which are designed to cope with situations where a particular use, although not inherently inconsistent with the use classification of a particular zone, [conditional uses] **may well create special problems** and hazards if allowed to develop and locate as a matter of right in [a] particular zone."

". . . By this device, certain uses (e.g., gasoline service stations, electric substations, hospitals, schools, churches, country clubs, and the like) which may be considered essentially desirable to the community, but **which should not be authorized generally in a particular zone** because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, may be permitted upon a proposed site **depending upon the facts and circumstances of the particular case.**" *STATE EX REL. SKELLY OIL v. COMMON COUNCIL Wisc Supreme Court 1973*

In other words, just because a conditional use such as a sand pit may be allowed in a certain zoning district like agricultural-residential, does not mean that it should create an expectation that it **must** be

allowed in any and all locations in that AR district. A use that is deemed "conditional" does not even necessarily make that use desirable or beneficial to the public interest.

"Conditional use" is a tool to be used at the municipality's discretion, but not unlimited discretion, to protect the public and for the benefit of the public as the case may be. Always based on the terms of the ordinance as applied to the circumstances of that particular location, along with that, the Plan Commission must determine if the **privilege** of granting the conditional use outweighs the **rights** of the neighboring property holders.

It is not intended for granting a private benefit as a favor to someone at the expense of someone else's private detriment or loss, or to grant or deny CUP applications based on the mood of the decision makers on that particular day.

ACT 67

Due to some municipalities' very vague and ambiguous standards, Act 67 was passed to impose the following to Wisconsin Statute 62.23 (7) (de):

1. In this paragraph:

a. "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a city, but does not include a variance.

b. "**Substantial evidence**" means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and **that reasonable persons would accept in support of a conclusion.**

2.

a. If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the city ordinance or those imposed by the city zoning board, the city shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on **substantial evidence.**

b. The requirements and conditions described under subd. 2. a. must be reasonable and, to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal. The applicant must demonstrate that the application and all requirements and conditions established by the city relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The city's decision to **approve or deny** the permit must be supported by **substantial evidence.**

Act 67 had little effect on Kronenwetter, because the the Kronenwetter **ordinance 520 -121 already complied with Act 67**, and the recent KPC process and decision-making effort complied with the ordinance.

I see that on November 12 Mr. Joling sent out information regarding another case (Ottman) dealing with a CUP. That case was a great example for municipalities on **what NOT to do.**

The circumstances in that case were **entirely different** in that situation, than what we are dealing with here with the Milestone application. That case apparently involved confused decision-makers, a more acceptable application, and a somewhat weak, undefined ordinance that did not provide a clearly defined basis for denial. **None of these factors are the case here** with the Milestone application.

One of the documents sent on the 12th quotes the dissent ("losing side" in a court split decision) on the AllEnergy case. There they say that the best way to do the thing that the municipality wants to accomplish, is to **put it in the writing of the ordinances** that the Plan Commission needs to follow.

Fortunately, **this had already been done in Kronenwetter** years ago. Our ordinance with the five criteria to be met, is well designed by being specific enough to protect the public and the village, while still providing plenty of leeway to approve reasonable conditional uses.

Act 67 limited the ability for arbitrary, moody, unfair, or inconsistent decision-making, **but it did not change any of the standards stated in items 1 through 9 above.** Those are still the rules that the KPC has met and acted within, and that the courts support.

Wisconsin Case Law

This is what Mr. Joling seemed to be concerned about - the authoritative basis for the Plan Committee's process, findings, and conclusion.

First, we have this case -

Allenergy Corp. v. Trempealeau Cnty. Environment & Land Use Comm.

Wisconsin Supreme Court, May 13 2017

This well known case was decided a few months before Act 67 was passed into law in 2017. The lead opinion in this case cites a large number of other cases that will support items 1-9 above. The main thing that was changed by the Act was that in the AllEnergy case the Court supported the right of local municipalities to deny CUPs based on vague, undefined reasons like we saw in the Ottman case mentioned above.

Act 67 brought in parameters of "substantial evidence" and caused the municipal ordinances and decision-making to be more defined so the applicant has a more clear definition of the standards that they must meet.

If the facts met the requirements, a CUP could not be denied for frivolous reasons.

Act 67 does not affect the validity and applicability of the first group of quotes below, which are all from the AllEnergy case. These statements express **principles**, so the references made regarding Trempealeau County could also apply to KPC for comparative purposes, if anything were to go to circuit court. The emphasis among all of these has been added:

- "A person aggrieved by the denial of a conditional use permit may commence an action seeking the remedy available by certiorari."
- "In the instant certiorari review, the decision of the Trempealeau County Environment & Land Use Committee is accorded a **presumption of correctness and validity.**"
- "A determination of a local governmental entity represents its will and not its judgment when its action is "arbitrary, oppressive, or unreasonable." An action is "arbitrary o[r] capricious if it is **unreasonable or without a rational basis.**"; "Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is **unreasonable** or does not have a **rational** basis. . . . and [is] not the result of the 'winnowing and sifting' process." (citations omitted)
- "The Trempealeau County Environment & Land Use Committee **applied the factors and considerations set forth in the applicable ordinance** and thus kept within its jurisdiction in denying a conditional use permit to AllEnergy."
- "There is **substantial evidence** in the record to support the Trempealeau County Environment & Land Use Committee's decision denying AllEnergy's application for a conditional use

permit."

- "We disagree with the positions that AllEnergy urges. We conclude:

(A) **By adhering to the Trempealeau County ordinance**, the Trempealeau County Environment & Land Use Committee **kept within its jurisdiction** in denying AllEnergy's application for a conditional use permit in the instant case.

AllEnergy supports its challenge to the Committee's jurisdiction by three arguments. As to these three arguments, we conclude:

(B) Designation of non-metallic mineral mining as a conditional use in the zoning code **does not conclusively establish that the use is in the public interest.**

(C) The proper inquiry is not whether the proposed conditional use carries impacts greater than the adverse impacts ordinarily associated with that use, and

(D) The guidelines in the Trempealeau County ordinance, including the requirement that the Committee consider "**public health, safety or general welfare,**" are constitutional."

- "Our case law has **not accepted...** that a legislative listing of a conditional use equates to a legislative determination that the **use is in the public interest.**"
- "[T]he **presumption** that the **conditional use serves the public interest does not exist in Wisconsin.** . . . The zoning ordinance allows certain uses, provided certain conditions are met. These conditions are not presumed to be met either by judicial fiat or by the terms of the ordinance . . ." (*quoting Delta Biological Resources, Inc. v. Board of Zoning Appeals of the City of Milwaukee*)
- "Thus, our precedent dictates that **no presumption exists that a conditional use is ipso facto consistent with the public interest** or that **a conditional use is a use as of right at a particular site within an area zoned to permit that conditional use.** No compelling reason has been given to justify deviating from Wisconsin precedent and eliminating site-specific flexibility in local zoning matters."
- "An ordinance is presumed valid. **It must be liberally construed in favor of the decision rendered by the local governmental entity.** A party challenging the constitutionality of an ordinance bears a heavy burden to show that the ordinance is unconstitutional beyond a reasonable doubt:"
- Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the local governmental entity, even if there is also substantial evidence to support the opposite decision. Reasonable inferences may be drawn from credible evidence. **If "credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision" supports the decision** of the Trempealeau County Environment & Land Use Committee, **the court will uphold the decision.**
- "Quantitatively, substantial evidence is **less than a preponderance of the evidence, *Smith v. City of Milwaukee***, but **"more than 'a mere scintilla' of evidence and more than 'conjecture and speculation.'"** *Gehin v. Wis. Group Ins. Bd.*
- "Substantial evidence has been defined in the case law as 'that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion.'" (quoting Gehin case)

- "[A]n agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner **shall admit all testimony having reasonable probative value**, but shall **exclude immaterial, irrelevant or unduly repetitious** testimony..."
- The substantial evidence test is a significant hurdle for AllEnergy to overcome because, in applying the test, **this court is deferential to the decision** of the Trempealeau County Environment & Land Use Committee. Certiorari review **accords the decision of the local governmental entity a presumption of "correctness and validity."**
- Finally, in applying the substantial evidence test on certiorari review, a court does not reweigh the evidence. Rather, **we consider only** whether the Trempealeau County Environment & Land Use **Committee made a reasonable decision based on the evidence before it.**" (citations omitted)
- AllEnergy has the **burden of proof** (persuasion) **to demonstrate satisfaction of the criteria** for a conditional use permit.
- If **substantial evidence** supports **any** of the Committee's reasons for denying AllEnergy's application pursuant to the criteria in the ordinance, the court **will affirm the Committee's decision.**
- [I]f we conclude that **any one** of the board's reasons for denying the variances at issue passes certiorari review, we affirm without commenting on the board's other reasons." (quoting *Clark v. Waupaca Cty. Bd. of Adjustment 1994.*)

Similarly, Kronenwetter has 5 criteria in the ordinance, and all of them must be met.

Other Cases for Reference

Here are some other quotes from higher court decisions. Emphasis has been added throughout all of these.

Payne Dolan, Inc. v. Dane County

Wis.Ct.Appeals March 2, 2000)

"..we are satisfied that in Wisconsin it is proper for area residents to testify about the impact they believe a proposed use will have on their general welfare, and that the **weight to be given such testimony lies within the discretion of the zoning authorities.**"

"Unlike the more technical question whether the quarry would pose significant threats to the environment or public health, the adverse impact that unsightly mounds and increased traffic, dust and noise could have on the quality of area residents' lives is clearly **a matter of common experience.** We therefore **reject the contention that all of the neighbors' testimony in this case was incompetent.**

Ottman v Town of Primrose

Supreme Court March 22, 2011

"In situations where the language of a municipality's ordinance appears to be unique and does not parrot a state statute but rather was drafted by the municipality in an effort to address a local concern, **we will defer to the municipality's interpretation if it is reasonable.**"

"A municipality's interpretation of its own ordinance is unreasonable, for example, 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. An interpretation that directly contravenes the words of the ordinance is also unreasonable."

"The court may also be asked to review a municipality's findings of fact and to determine whether the evidence was such that the municipality might reasonably have reached the decision it reached. A certiorari court **may not substitute its view of the evidence for that of the municipality**. On certiorari, **a court will sustain a municipality's findings of fact if any reasonable view of the evidence supports them.**" (quoted from *Kapischke v. Cnty. of Walworth*, 1999).

Navis v. Door County

Wisc Ct of Appeals March 23 2021

"An administrative body proceeds on a correct theory of law when it relies on the applicable ordinances and cases and applies them properly.

As to the demonstration of a rational, nonarbitrary basis for judgment, the administrative body's "reasoning need not be embodied in a written decision as long as it is reflected in a transcript of the proceedings."

As to whether the administrative decision was based upon evidence in the record, we must examine the record for **any** substantial evidence that supports the administrative body's determination.

The **substantial evidence test does not require a preponderance of the evidence**, merely that "reasonable minds could arrive at the same conclusion as the [administrative body]" based on the record before it.

We **may not substitute our judgment** for that of the administrative body **as to the weight or credibility of the evidence** on a finding of fact." (all citations omitted)

"Consistent with the Ordinance, however, **it was well within the Board's discretion to determine how wide a geographical area to consider in evaluating comparable uses.**"

Stop the Ongoing Mine Permit v. Town of Ashford Bd. of Appeals

Court of Appeals June 12, 2019

"Further, we disagree with STOMP that personal knowledge or opinion is an inappropriate consideration."

"The board's findings of fact will be upheld if substantial evidence supports its decision, even if substantial evidence also supports the opposite conclusion." (quoting *CBS, Inc. v. LIRC*).

Kraemer Sons v. Sauk County Adl. Bd. COUNTY ADJ. BD

Wisc Supreme Ct, May 4, 1994

"The Board **did not have the burden of formulating conditions to enable Kraemer to obtain a special exception permit**. A special exception use is only a permitted use when the standards prescribed in the ordinance are met. **The applicant, not the Board, has the burden of showing that the permit meets these standards.** Here, Kraemer did not meet its burden. Once the Board decides to approve an application, ordinance... enables the Board to fashion **additional conditions** to ensure compliance. This provision **does not shift the burden** to the Board to fashion conditions that would enable the applicant to obtain the permit.

State of Wisconsin v. Outagamie County Board of Adjustment

Wisc Supreme Court June 29, 2001

"In applying this standard, a reviewing court is required to defer to the decision of the board unless it is "unreasonable or without a rational basis. . . . Thus, the findings of the board may not be disturbed if **any reasonable view** of the evidence sustains them."

Summary of Case Law

So, that's a lot of information and there is much more out there that reiterates the same precedents. The relevance of it all is that local control of land use through municipal agencies like the **Plan Commission, is strongly supported by the statutes and the courts.**

To simplify, it all boils down to this:

- We have a very good ordinance with reasonable criteria, that meets statutory requirements.
- KPC had plenty of substantial evidence to apply to the criteria in the ordinance.
- The Plan Commission made an unbiased rational decision factually based, and determined that the application failed on 4 out of the 5 criteria.
- We met all of the standards for due process, and I am quite sure also those that would pass a certiorari review if it ever went to court.

Given the facts of the situation, I see **no reason for excessive concern** about being "up to our eyeballs in litigation" or any other inflammatory terms. The evidence that objectively supports denial is abundant, along with the well grounded presumption by the courts that the local Plan Commission is the best judge of evidence, and local matters and concerns.

Part II Review of the Evidence

The Plan Commission Hearing and Meeting

Public Input

The public provided numerous concerns from local residents about noise, dust, truck traffic, safety and property values. Concerns about "blasting" were dismissed by the Commission, as they were not based on fact.

Documented Evidence

The CUP application and lawyer's memorandum were submitted and considered by the Commission. The following are my observations. The other KPC members will have their own that may or may not coincide with these.

I found a number of conflicting statements in the application materials.

- Mining volume is stated at 25,000 yards in one place, then 1,000,000 yards total in another place.
- 10-15 year expected life of mine stated, then 15-20 years stated elsewhere. Based on the above numbers, the math could possibly bring it to 40 years.
- Operations was said to be conducted "a few months per year," but they could also be any months of the year. The application states "January-December", so possibly activity in all months.
- Hours are listed as 7 am to 6pm, and 7 - Noon on Saturday, but maintenance and hauling activity outside of these hours may be necessary. This indicates that there will be rush periods

of high volume, and heavy truck traffic.

- Application states equipment as "excavators, processing equipment & conveyors will be used, and elsewhere it adds front end loaders, rock crushers, and screening. When issues of noise were raised at the meeting, the applicant verbally stated "no rock crushers", and only a tractor with a backhoe will be used for loading. This did not sound realistic or credible, given the volume of digging, sorting, and stockpiling that they were planning.

Given the stated variables of volume of sand and life of the mine, the truck traffic could easily be 3000 loads per year, digging next to and hauling through a residential neighborhood.

The issue of back-up warning beepers was raised as a noise concern. Applicant stated that those would be turned off, but no evidence was provided that OSHA would allow this in an active work place.

So, from the standpoint of the application materials, the information was widely variable, contradictory, and gave the applicant the widest latitude possible. There was not much to speak of in the way of credible evidence to show that this mining operation would be compatible with being immediately next to a single family neighborhood.

Findings

This is the heart of the matter where we apply objective facts to the criteria of ordinance Kronenwetter Code 520-121.G.

The attorney for the applicant provided a memorandum containing their findings of fact. I have considered his findings and have provided my own here in response.

Criteria #1, Applicant's position

(1) Whether proposed conditional use is in harmony with the comprehensive plan, this chapter and other planning.

The proposed non-metallic mine (for sand extraction) is clearly compliant with Village regulations and planning.

First, the subject parcel is zoned agricultural (AR). A non-metallic mine is never a permitted use in any district and is only available as a conditional use in the AR district. This zoning inherently supports a non-metallic mine project on the subject property.

Second, multiple planning documents support a CUP for non-metallic mining.

The Village of Kronenwetter's Maple Ridge Development Concept Plan (2015) was created to evaluate development potential near I-39 and Maple Ridge Road. The Future Land Use map therewith classifies the subject land as "Industrial / Commercial."

The Village of Kronenwetter Comprehensive Plan (2019) offers the following insight into development potential for the subject land:

- The mining / quarrying employment sector has increased rapidly in both the Village and County since 2010. A 207 percent increase in the Village, accounting for 2% of employment. (97) It is a "driver industry" in the Village. (103) The Plan predicted a 27% increase in sector employment for 2017-2027 – among the largest growth rates of all sectors. (110)

- The land use section encourages industrial uses in areas with convenient access to arterial roadways. (127) The Future Land Use Map designates the subject property as Industrial / Commercial. (Map 8)

The Village of Kronenwetter Kowalski Road Interchange Feasibility Study (2023) specifically addressed the region described as Maple Ridge Road and I-39 Interchange Area, which includes the subject land.

The Study listed eight (8) land use assumptions for this Area, which included a “**Non-Metallic Mine – east on Maple Ridge Road.**” This proposed CUP exactly fits that well-defined criteria from 2 years ago. .

Thus, the three (3) plans covering this land area are consistent with, and in fact call for, an industrial land use, including a non-metallic mine, at the subject site.

Criteria #1,

My position in response

First off, the applicant has misquoted criteria #1 above. This omission might have the effect of making his argument seem more acceptable to those not paying attention. The complete, actual wording of the ordinance reads:

1. Is the proposed conditional use in harmony with the Comprehensive Plan, this chapter, and any other plan, program, or ordinance adopted by the Village?

This misquoting of the ordinance is a significant misrepresentation, since for example, the **Kowalski Road Interchange Study** referred to above by the applicant might very loosely be referred to as "planning", but in reality it was **never "adopted" as any kind of plan.** The observations in that study have not been accepted by the Village, and are not really relevant as positive evidence for a sand pit approval.

The applicant states - *"This zoning [currently AR] inherently supports a non-metallic mine project on the subject property."*

This is not true. As cited in case law above, The zoning allows for the **mere possibility** of a sand pit as a conditional use **IF and only IF** it conforms to the ordinance requirements. Sand mining is **NOT** "inherent" to any AR zoned property just because it is listed as a "conditional use".

The applicant is correct when he says *"A non-metallic mine is never a permitted use in any district"*. Mining is actually not "inherent" anywhere in the Village.

Regarding the applicant's reference to the **Maple Ridge Development Concept Plan** - The term "non-metallic" does not even come up in a search of that document.

The **main concept** of the plan says this:

"The **Maple Ridge Area** has the potential to become the **focal point or town center** for the Village of Kronenwetter. The overall concept is to **encourage the development of the area** to become a mixed use development. A mixed use development **featuring retail, commercial, food, and multifamily residential** will attract people to the development."

The idea of a **sand pit in the immediate vicinity of this kind of area runs completely contrary to that development concept and plan.**

Regarding the applicant's reference to the **Comprehensive Plan** and the future **Land Use Map** - Wisconsin Statute 66.1001 (2m) states:

EFFECT OF ENACTMENT OF A COMPREHENSIVE PLAN, CONSISTENCY REQUIREMENTS.

(a) The enactment of a comprehensive plan by ordinance does not make the comprehensive plan by itself a regulation.

(b) A **conditional use permit** that may be issued by a political subdivision **does not need to be consistent** with the political subdivision's comprehensive plan.

So in other words, a Comprehensive Plan just by its existence does not carry a lot of weight in CUP decisions for many municipalities.

However, since our our Ordinance 520-121 (G) **specifically identifies the Comprehensive Plan** as a criteria factor in CUP determinations, it does carry weight for making these decisions in Kronenwetter.

The applicant's point about locating next to arterial roads may be correct, but it is far outweighed by other Comprehensive Plan stipulations.

For example, the designation "Industrial/Commercial" on the Future Land Use Map, and which the applicant calls attention to, is defined in the Comprehensive Plan as:

"Area designated for **concentrated development in an industrial park** (heavy) or business park (light / office) setting."

It does not appear that by definition, a sand pit qualifies as a desired future land use at this location designated for "industrial/ commercial".

The applicant elaborates on discussion about employment at nonmetallic mines,

Employment is not relevant to this criteria #1. The fact is that there would be **just as much employment at a sand mine located in a less intrusive location**, near different arterial road, away from a residential neighborhood and from planned, potential future positive development.

The Comprehensive Plan, which the Plan Commission must consider according to the ordinance, has **land use goals**, and those goals include:

"The Village will make sound land use decisions which strive to **coordinate future growth** and land uses **with infrastructure capabilities and availability.**"

Under that heading it includes:

b. Encourage growth to occur **within the Sewer Service Planning Area**

e. Strive to **avoid allowing conflicting land uses** to be located adjacent to one another

j. Encourage development that **preserves to the extent possible the quality of life that residents enjoy**

A reasonable conclusion based on facts and substantial evidence would be that a sand mine is not compatible with those goals.

The Kronenwetter Kowalski Road Interchange Feasibility Study as mentioned above, was a study not a plan, and it was **never adopted by the Village Board**. There may have been one assumption about a sand pit somewhere east of I-39, but that just goes to show that there are 7 other assumptions more desirable that might locate there as well or instead.

The applicant states - *"Thus, the three (3) plans covering this land area are consistent with, and in fact call for, an industrial land use, including a non-metallic mine, at the subject site."*

I disagree completely, since objectively, out of the "three plans", one plan is in **contradiction to a sand mine**, one study is not a "plan" and has no bearing on a CUP decision, and the Comp Plan only states that industrial uses should be near main roads, which are in many the village locations.

The facts of the matter taken as a whole, cannot reasonably be construed to conclude that a vertical sand mine is "called for" or even acceptable in this area that seeks positive development.

Another point is that the proposed sand mine is **not** in harmony with **ordinance 382-1** Public Nuisances.

If this sand mine was to be allowed in this location, being as it is immediately next to single family residences, it is not speculation, but a reasonable expectation that mining operations and hauling would create an ongoing noise, exhaust, and dust nuisance that would "substantially annoy, injure, or endanger the comfort, health, repose, or safety of the public" since those neighbors on small lots are right next to the mine.

Approval of the CUP application would in effect impose an unnecessary nuisance upon this neighborhood.

A few words regarding the term "development" and it's meaning.

Under Wisconsin Chapter 66 General Municipality Law, is sub-chapter XI "**Development**" At 66.1101 "Promotion of Industry; industrial sites" it states:

"(1) It is declared to be the policy of the state to **encourage and promote the development of industry** to provide greater employment opportunities and to **broaden the state's tax base to relieve the tax burden of residents and home owners**. It is recognized that the availability of suitable sites is a prime factor in influencing the location of industry but that existing available sites may be encroached upon by the development of other uses unless protected from encroachment by purchase and reservation. It is further recognized that cities, villages and towns have broad power to act for the commercial benefit and the health, safety and public welfare of the public."

This statute encourages municipalities to purchase property and reserve it for industrial or commercial projects that will increase the tax base.

Under 66.1103 (2) Definition, (K) defines "Project" and "industrial project". This defines what the state considers as "**development**" that supports the policy in (1) above.

Mining and logging are **not included** in the lengthy list. They are **not considered "development"** that will increase the tax base, which is the stated goal of this sub-chapter, and also one of the goals of this village.

Vertical mining (going down, rather than leveling hills) is not considered development, but instead actually **inhibits long-term positive development**. It is a practical matter of common knowledge and shared experience that future building cannot reasonably take place where there is 40 feet of water under it, as this CUP plan calls for.

Approval of this application would run contrary to State policy that encourages development at the municipal level.

Criteria #2, Applicant's position

The proposed conditional use does not result in a substantial or undue adverse impact on nearby property, the character of the neighborhood, environmental factors, traffic factors, parking, public improvements, public property or rights of way, or other matters affecting the public health, safety or general welfare.

Yes, within one mile radius existing business consists of 2 truck repair centers, one that is 24 hours, cold storage, I 39/Maple Ridge Rd Interchange, manufacturing companies along with numerous other commercial businesses

Will meet all Village Ordinances, DNR permits, and Marathon County permits

This use will not impact the use or enjoyment of other property in the area

This use has the ability of creating water storage and removing adjoining property from the FEMA Flood Map

Criteria #2

My position in response:

Once again the applicant has omitted key elements of the ordinance. The text of the ordinance actually reads like this:

"The proposed conditional use does not, in its proposed location and as depicted on the required site plan, result in a substantial or undue adverse impact on nearby property, the character of the neighborhood, environmental factors, traffic factors, parking, public improvements, public property or rights-of-way, or other matters affecting the public health, safety, or general welfare, either as they now exist or as they may in the future be developed as a result of the implementation of the provisions of this chapter, the comprehensive plan, or any other plan, program, map, or ordinance adopted by the village?"

The underlined parts, omitted by the applicant, include very relevant stipulations, and as we can see the omission of which has a significant effect on how his argument is viewed.

The character of a rural residential neighborhood is **nothing** like, nor is it compatible with the proposed mining operation.

Resident concerns about the noise, smoke, dust and traffic is credible and realistic. Shared human experience regarding the sound and effect of trucks, heavy equipment and the wind's effect on dry sand is substantial evidence that a sand mine will negatively impact the character of this residential neighborhood and the quality of life for those residents.

A large open hole in the ground and/or berms of dirt and security fencing bordering single family property can lead a reasonable person to conclude that the **character of the neighborhood** has changed in a very significant, adverse way.

Traffic will be negatively affected in this residential neighborhood. One million yards of sand mined and removed in 15 years is over **4000 large truckloads per year**. A reasonable person would conclude that this would be an "adverse traffic factor" in a residential neighborhood. Resident concerns about the noise, smoke, and traffic is credible and competent. This can be confirmed by simply asking yourself if **you** would be happy with an operation like this setting up next to **your** home.

A one mile radius selected by the applicant is hardly an objective or fair metric. As the caselaw states, it is **the Plan Commission that determines what "nearby property" means, not the applicant.** Since notices are sent to residences within 500 feet, this seems to be a more reasonable radius, since these are the people most negatively affected. Even more relevant are the residents that are **immediately next to the proposed mine.** Their right to the quality of life that their property has provided for them cannot fairly be sacrificed in favor of a newcomer's privilege of engaging in a noisy, disruptive conditional use.

The residents in these areas have provided credible input regarding "**a substantial or undue adverse impact on nearby property, the character of the neighborhood, environmental factors, traffic factors, or other matters affecting the public health, safety or general welfare.**"

Common sense and shared experience tells us that the noise of heavy equipment and rock crushers, or the constant drone of dredge pumps are going to negatively impact the quality of life for those people in the neighborhood.

Property owners, especially home owners rely on the Plan Commission to act fairly in protecting their rights to enjoy their home and maintain a quality of life that is their reasonable expectation.

The applicant states - *"This use will not impact the use or enjoyment of other property in the area"*

This is a pure assumption and conjecture on his part, and without basis. It is patently false in light of neighboring residents' concerns based on common knowledge and experience. The **applicant is not competent** to know whether or not neighbors' enjoyment of life has diminished, and to what degree.

"This use has the ability of creating water storage and removing adjoining property from the FEMA Flood Map"

There has been no evidence provided to support this claim, and it appears to be speculation.

The part that was omitted by the applicant is very significant:

"The proposed conditional use does not, in its proposed location ... result in a substantial or undue adverse impact on nearby property... either as they now exist or as they may in the future be developed ...

It should be obvious to an objective, rational person that the removal of 11-12 acres of land to a depth of 45 feet, and which will fill up with water, will have a **significant adverse impact** on the future development of those 11 acres

This one fact alone, as applied to this criteria should cause it to fail.

The resulting body of water with its 45 degree side slope can be expected to create an attractive nuisance and drowning hazard.

Criteria #3

Applicant's position

(3) Whether proposed conditional use maintains the desired consistency of land uses, intensities and impacts for the environs of the subject property.

Yes, the current zoning is Agriculture (AR) with future zoning being industrial/commercial. This conditional use will not impede the development of surrounding properties. The existing development pattern, as described above, with heavy commercial and manufacturing land uses, is consistent with a sand quarry.

This development could ignite development. For example, in the Maple Ridge Rd development plan Site 4 was identified as potential multifamily homes. This potential development would be to overlook a beautiful body of water, upon site reclamation, created through the approval of this CUP.

Criteria #3

My position in response:

Caselaw states that the applicant must provide **substantial evidence** to show that their conditional use will meet the criteria, just as evidence is needed to deny it. **The Plan Commission has authority to determine which side is more credible.**

The factual reality here and now is that the "consistency of land uses" in **that immediate area is in fact residential**, and as for the future we have already looked at the development plans for that area which are **residential/commercial** and potentially a **light industrial/commercial business park**. The criteria in the ordinance is intended to protect residents who are living on their property as a matter of right, from losing the peace and repose that they have been accustomed to, due to the improper granting of a CUP privilege.

Here, the applicant merely makes baseless "blue sky" statements without facts to support their position.

The applicant claims *"This development could ignite development."*

Again, we have the use of the term "development" having two different meanings in the same sentence.

A rational conclusion is that if a sand mine is a "development" then the end goal of **what they are "developing" is an 11 acre pond**. They are **"developing" an irreversible loss of property value** year after year, until there is little to no value left, and remaining that way basically forever or until the next Ice Age reshapes the land. This point can hardly be argued against.

Aside from that issue, the applicant's premise seems to be **speculation upon speculation**. First, that there will be multifamily units rather than commercial development built to the west of this sand pit. Second, whether or not anyone in the area will find this pond "beautiful" is questionable, not to mention that *"upon site reclamation"* would be **15-20 years from now**.

In the mean time the mining operations would continue, and it is doubtful that any apartment builder or dweller would appreciate the noise and dust any more than the current local residents do.

Criteria #4

Applicant's Position

(4) Whether the proposed conditional use is located in an area that will be adequately served / not a burden on public agencies.

Yes, this development will not be a burden. This site will be accessed by Maple Ridge Rd, Kronenwetter Drive and Beranek Rd. The most recent PASER rating for Beranek Rd is a 4, Good and Maple Ridge is 5, fair surface aging, structural sound.

The proposed access is from the existing driveway on Maple Ridge Road. Applicant will provide a 50 foot minimum hard surface driveway at this location adjacent to the roadway. In the event that there would be access to Benarek Road on the north, and since Benarek Road is gravel surfaced, applicant would agree to maintain that section to Kronenwetter Drive (see below). Applicant would also agree to maintain an approximately 1,000 foot section of Maple Ridge from the driveway going west (see below).

Criteria #5 Applicant's Position

(5) Whether the potential public benefits of the proposed conditional use outweigh the potential adverse impacts, after taking into consideration any requirements to ameliorate such impacts.

Yes, having locally sourced sand of this quality for the production of hot mix asphalt helps the public and private sector with development costs. The neighboring properties will benefit from the end use of this project. The limited processing at the proposed site, and the reasonable conditions per the Application and the Zoning Code, will adequately ameliorate any perceived adverse impacts.

Criteria #5 My Position

For the third time, the applicant has omitted relevant text from the ordinance. The original actually read like this:

"Do the potential public benefits of the proposed conditional use outweigh potential adverse impacts of the proposed conditional use, after taking into consideration the applicant's proposal and any requirements recommended by the applicant to ameliorate such impacts?"

Again, the applicant provides conjecture and opinion that creates a picture that is **180 degrees opposite** of what an objective, reasonable person would conclude, given the reality of this proposal.

This is exactly what Act 64 was intended to prevent. Being a two-edged sword, the substantial evidence standard of Act 64 applies to both approval and denial of a CUP.

The applicant's claim that the neighboring properties will actually benefit by a sand mine next door is not credible when viewed in the face of numerous neighbors explaining how their quality of life will be negatively impacted.

The ordinance states: "**...the applicant's proposal and any requirements recommended by the applicant to ameliorate such impacts**" does not outweigh the adverse effects to the neighborhood that are inherent to a sand mine being located in a residential area.

If this CUP would have been approved, there is no doubt of the private benefits and that it would be a lucrative boon to the applicant. We like to see businesses thrive and prosper.

However, objectively, there seems to be no apparent public benefit to this proposal whatsoever, let alone any benefit that could outweigh the adverse impacts to the neighboring residents, the Village or the public in general.

Conclusion

Given the statutes, Act 64, the quality of our Ordinance 520-121 (G), and the multitude of common law examples of the higher courts' trust and support of local decision-making, I believe the Plan Commission's decision to this CUP application is decidedly correct and secure.