

January 12, 2025

Planning Commission Members

Attn: Daniel Van Holland, Zoning Administrator

Email: dvanholland@greenfieldmn.gov

City of Greenfield

7738 Commerce Circle

Greenfield, MN 55373

Dear Members of the Planning Commissioner,

I represent nearby property owners and ask that you (i) deny the asphalt plant as part of the proposed conditional use permit, (ii) deny the recycling of concrete, cement, and other materials, and (iii) impose reasonable conditions on the remaining activities that are specific, enforceable, and sufficient to protect the use of nearby properties. The proposed CUP is harmful to neighboring properties, even with the currently proposed conditions. Allowing asphalt production and materials recycling will enable the mine to metastasize into a permanent site for waste and material stockpiling, recycling, processing, and asphalt production. Simply, I am asking that you follow Minnesota law and the Greenfield zoning ordinance and adopt findings to erect sensible guardrails on the activities at the Crow Pit Mine to enable co-existence with surrounding property owners and reduce the enforcement burden on the City.

Legal Framework and Standards

ZONING BASICS FOR CONDITIONAL USE PERMITS

Cities regulate land uses to protect the public and prevent negative impacts from on one property from affecting neighboring properties in the community. (Minn. Stat. 462.357, subd. 1). Conditional uses require special zoning authorization because of inherent nuisances, problems, hazards or location issues inherently associated with the proposed use. (*Super America Group, Inc., a Division of Ashland Oil, Inc. v. City of Little Canada*, 539 N.W.2d 264 (Minn. App. 1995)).

Cities have broad authority to deny a CUP application. (*Zylka v. City of Crystal*, 167 N.W.2d 45, 49 (1969)). A city may also deny a proposed conditional use when it negatively impacts the health, safety, and general welfare. (*Super America* at 267). Cities may only grant a CUP if the CUP applicant meets each and every requirement in the zoning ordinance and ensure that conditions are imposed that sufficiently mitigate the negative impacts to the surrounding area. If the negative impacts can be prevented with conditions, only then can a CUP can be granted. Neighborhood comments based on lived experiences cannot be disregarded. (*Super America* at 267).

The “extraction of sand, gravel, or other materials” can be allowed with a CUP in the rural residential district. (Code § 152.050). Greenfield adopted its CUP requirements in §§ 152.023-.025 of the zoning code. (See Exhibit 1). The CUP applicant must meet each requirement, and the planning commission and city council must also determine whether or not additional conditions or restrictions are necessary to protect the health, safety, comfort, and general welfare of the public. (Code § 152.024). This is a high-burden for the CUP applicant to meet.

ENVIRONMENTAL PERMITS FROM OTHER JURISDICTIONS

State law requires the applicant to acquire a variety of environmental permits and approvals from other jurisdictions and agencies. Importantly, an approval granted by one jurisdiction does not mean that approvals will be granted by other jurisdictions and the applicant must separately meet the requirements of both local zoning laws and state environmental laws even where there is some overlap in the processes. (*White Bear Rod and Gun Club v. City of Hugo*, 388 N.W.2d 739, 743-44 (Minn. 1986)).

This means that related environmental approvals do not replace your authority and obligation to independently apply and enforce the Greenfield zoning ordinance and the applicant must still independently satisfy the city zoning requirements even if it has completed an EAW process, acquired de-watering and emissions permits, or any other permit or approval from other jurisdictions.

For example, an approved EAW with non-EIS determination only means that the *anticipated* levels of pollution and impact fall below the EIS threshold to *foreseeably predict significant* environmental impacts, which is most often found for uses like power plants, chemical facilities, heavy industrial production, etc. This does not mean, however, that the proposed mining, asphalt production, and material recycling activities will not cause harms to the health, safety, comfort, and general welfare of the surrounding community and your analysis is independent of the technical environmental regulations.

FIRST IN TIME IS NOT A FACTOR IN CUP DECISIONS.

Whether one property owner or use was first in time at a location relative to neighbors is not a relevant factor when considering conditional uses. The law is based upon harmony among land uses and aims to prevent activities from negatively affecting neighbors and the community. This makes sense, since cities want all property owners to make use of their lands, but don't want negative impacts to reach beyond the property boundary and infringe upon the ability to use and develop other properties.

The Asphalt Plant

The City should deny the asphalt plant from the proposed CUP for the Crow Pit mine because it is a nonconforming use that is not allowed by the current zoning code and has been abandoned by more than a decade of nonuse. Moreover, an asphalt plant will cause substantial harm to surrounding property owners and will prevent the orderly development of land for decades to come.

ASPHALT IS NOT A LAWFUL USE UNDER THE ZONING ORDINANCE AND IS NOT ACCESSORY TO AGGREGATE MINING

The zoning ordinance does not allow for asphalt production. (Comments by planning staff at December 10, 2024 planning commission meeting; Code § 152.050). Therefore, approving a new asphalt plant violates the current zoning ordinance, is inconsistent with the 2040 comprehensive plan, and would not be lawful.

Additionally, an asphalt plant cannot be shoehorned into the CUP as an accessory use. The zoning ordinance requires accessory uses to be both subordinate and customarily incidental to the principal use. (Code § 152.006). For example, a shed erected to store equipment indoors or a washer to clean the aggregate would be accessory uses. Here, an asphalt plant is an independent use that can be done anywhere and is merely convenient to locate with a gravel mine. The requirements under city code cannot be met and the asphalt plant must be denied in the rural residential zoning district.

NONCONFORMING USE RIGHTS TO OPERATE AN ASPHALT PLANT HAVE BEEN TERMINATED

Most importantly, any right to operate an asphalt plant under prior CUPs is expired and no longer valid. This is because (i) an asphalt plant is not a permitted use under the City zoning code, and (ii) the asphalt plant was removed from the property over 15 years ago. That makes any previously existing right to operate an asphalt plant a nonconforming use under both state law and City zoning ordinance.

The law is clear that a nonconforming use is abandoned through removal and nonuse by the permit holders. Minnesota Statutes § 462.357, subd. 1e states that any nonconforming use may be continued unless “the nonconformity is discontinued for a period of more than one year.” Similarly, the City zoning ordinance § 152.036 (C)(3) states “In the event a non-conforming use of any building or premises is discontinued for a period of one (1) year, the use of the same shall thereafter conform to the regulations of the district in which it is located.”

Minnesota case law is equally clear that the asphalt use has been lost. Nonconforming uses are allowed to be continued until 1 year after such time as they are removed or discontinued. (*Hooper v. St. Paul*, 353 N.W.2d 138, 140 (Minn. 1984)). *Actual use* of the nonconformity, not a mere intention to use the nonconformity, is the determining factor in securing the nonconforming use right. (*Hawkinson v. Itasca*, 231 N.W.2d 279, 304 Minn. 367 (Minn. 1975)). Moreover, Minnesota law purposefully intends for nonconforming uses to be phased-out over time because it allows for the orderly future development and land consistent with local zoning codes and comprehensive plans. (*Hooper* at 140).

Without a doubt, the property owner does not have any current right to operate an asphalt plant on the property. Photo evidence from Hennepin County aerials photos show that the former plant has not existed on the site since 2006 and testimony from the current permit holder and applicant admits that during its 4 years of ownership that it (i) has never operated an asphalt plant, (ii) has never constructed an asphalt plant on the property, (iii) has never considered operating an asphalt plant, (iv) has no plans to operate an asphalt plant, and (v) does not own an asphalt plant.

I am asking that you deny the asphalt plant and remove it from the proposed CUP because it is not an allowed use under the current zoning ordinance and previously existing nonconforming use rights have been abandoned and are permanently terminated.

Recycling Activities

The applicant has historically imported construction materials like cement, concrete, and others for recycling, reduction, or processing. This is not allowed in the rural residential district and is a nonconforming use. The applicant has not conducted these activities during 2024, which has resulted in over 1 year of nonuse. Therefore, the nonconforming use rights are terminated. Additionally, the recycling use is not accessory to aggregate mining. Finally, it is also unlawful to expand or intensify the use by adding additional operating days. The recycling use should be removed from the CUP.

RECYCLING OF CEMENT, CONCRETE, AND OTHER MATERIALS IS NOT ALLOWED UNDER THE ZONING CODE

As stated in Code §152.050, “recycling, reduction, or processing” is allowed only within the Industrial zoning district as an accessory use and it is not allowed in the rural residential district. As noted on page 1 of the staff report, the mining, sorting, and washing of aggregate is the primary use at the Crow Pit mine. Recycling is a *non-primary use* on the property and, similar to asphalt production, the recycling of

cement, concrete, and other materials is neither subordinate or customarily incidental to “extraction of sand, gravel, or other materials,” as required for accessory uses in the Greenfield zoning code. It is a dirty and noisy business operation that relies upon materials, and crusher machinery, both of which are hauled onto the site from other locations. This is unlawful in rural residential.

NONCONFORMING USE RIGHTS TO OPERATE A RECYCLING USE HAVE BEEN TERMINATED

Similar to the asphalt plant, the prior CUPs make recycling a nonconforming use on the property. However, there was no aggregate mining in 2024 and no recycling activities, crushing, or processing during 2024 and that more than 1 year has passed without operating the nonconforming recycling use. Any prior rights are terminated by removal or discontinuance. (*Hooper* at 140). Intent to use is not a relevant factor in preserving nonconforming use rights. (*Hawkinson*). Just like the asphalt plant, the applicant has lost the right to conduct recycling, reduction, and processing on the property because it has not met the nonconforming use requirements in state law and city zoning ordinance.

NONCONFORMING USE RIGHTS CANNOT BE EXPANDED OR INTENSIFIED OVER PRIOR CUPS

The proposed CUP actually seeks to *increase* the amount of recycling activity conducted on the property, but Minnesota law does not allow a nonconforming use to be expanded. (Minnesota Statutes § 462.357, subd. 1e). Under City ordinance, expansion includes any enlargement or an increase in the activity. (Code § 152.036(C)). At the December 10, 2024 planning commission meeting, the applicant stated that operation of the crusher was previously limited to a single period each year of less than 20 days, and that the crusher had never needed to be operated for a longer period. Allowing recycling of concrete and other materials to be expanded to two periods of 20-days each year not only violates the current code, but is an unlawful expansion of a nonconforming use.

Additionally, the existing usage is already harmful to neighbors and an increase would be worse. The record includes testimony from neighbors that being subjected to several weeks of constant crushing has a profoundly negative impact on mental health, enjoyment of the property, and inability to conduct work in the home. Stronger conditions would be required to protect surrounding owners from the harms.

Allowing the applicant to expand and intensify the cement recycling and crushing operation creates a pathway to ensure that the mine will never close because it provides the ability to generate revenue independent of mining aggregate. This will diminish property values and prevent orderly development of surrounding property for decades and possibly forever. In the event the City attempts to revive the terminated nonconforming use, the City should not approve a CUP that will more than double the number of days and instead should restrict to the previous use of a single period of 18-days.

Conditions

A number of the proposed conditions need improvement in order to ensure that the surrounding area is not harmed from the activities on the mining property. The goal is to protect the ability for residents to enjoy their respective properties while allowing the owner to operate its business and making the City's regulatory burden as easy as possible. Certain conditions are too ambiguous and will be difficult to enforce due to their lack of specificity, deadlines, and indefinite requirements. Others are simply too lenient and will not adequately protect neighboring properties from negative impacts. Remember, the conditions must be sufficient to mitigate the negative impacts or else the CUP cannot be granted and the conditions must be designed to be enforceable otherwise they will be meaningless.

For example, condition #7 should require any outdoor storage, which is generally prohibited, to be fully screened from neighboring properties and rights of way, 200 feet from property lines, and limited to only equipment and materials used for aggregate mining on the site. Also, prohibit all vehicles from queueing on any City roads, particularly during the hours prior to opening of the pit each day. \$100 fines should be levied when vehicles fail to adhere to traffic laws and the prohibitions on the usage of Harff Road, northern Greenfield Road, and of jake brakes, which the permit holder can then pass on to the 3rd party violator through private contract. Additionally, the overall conditions should expressly impose penalties including revocation for violations. Further, hours of operation should be reduced to limit activity from 7am-5pm on Monday-Friday. The City should also include a 3-strike policy to revocation of the CUP.

Also, any promises or representations made by the applicant to staff or to the public are not enforceable unless they are included as conditions in the CUP if they are to be enforceable. (*Upper Minnetonka Yacht Club v. Shorewood*, 770 N.W.2d 184, 189 (Minn. App. 2009)). This means that the applicant can make promises during public meetings, but that the City cannot enforce those promises unless they are specifically included within the required conditions of approval. Therefore, any “good neighbor” promises that have been made must be included as conditions to the CUP.

I have included a list of reasonable conditions on EXHIBIT 2 that should be included in the CUP.

Conclusion

The mining activity, asphalt plant, and recycling activities will impose harmful noise, vibration, dust, light, and impact wildlife and water quality in the surrounding areas. These, along with the odors from an asphalt plant and the destruction of the scenic views from upon and across the Crow River will have an irreparable negative impact on property values resulting in financial loss to both the residents and to the City by way of reduced property tax value. The activities will prevent nearby residents from enjoying their properties during key times of the evening and weekends, to say nothing of the impact throughout the workday.

You all expressed a number of concerns during the December 10, 2024 planning commission meeting. As discussed in this letter, the applicant has allowed its rights to the asphalt plant and recycling operation to terminate. With regard to the aggregate mine, please consider this decision as though you live adjacent to the site and remember the testimony from the surrounding property owners. Remember that the applicant must meet all the requirements in the zoning ordinance, environmental approvals by other jurisdictions are independent of your role here, and that you have the authority to impose conditions that will actually mitigate the negative impacts. Imposing effective conditions will also reduce the need for enforcement of the CUP by the City. Again, I ask that you deny the asphalt plant and recycling operation and impose stronger conditions that are necessary to ensure the residents can live in harmony with the Crow Pit Mine for decades to come.

Sincerely,

s/Jacob M. Saufley

Jacob M. Saufley, Attorney at Law

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Cc: John Thames, Greenfield City Attorney

Brad Scheib, HKGi

EXHIBIT 1

§ 152.023 PROCEDURES AND REQUIREMENTS FOR CONDITIONAL USE PERMITS.

- (A) **Include a site plan.** Unless otherwise specified in this chapter, an application for a conditional use permit shall include a site plan. The site plan shall be drawn to scale showing topography with a contour interval of not greater than

356

2 feet and shall include the following information:

- (1) Details of the proposed site development including identification and advertising signs, jurisdictional wetland, lakes and waterways locations, exterior finish, and front elevations of buildings, roads, adjacent roads, driveways, parking spaces, storage areas, sidewalks, trails and walkways, locations of wells and on-site sewage treatment systems, dimensions of the lot, lot area, yard dimensions and elevations;
 - (2) Preliminary landscaping plans, including the size of trees and shrubs proposed and fences, landscaping and retaining walls;
 - (3) A soil survey prepared by a registered geotechnical engineer;
 - (4) Preliminary grading erosion control and plans for stormwater drainage systems prepared by a registered civil engineer, registered architect or registered landscape architect sufficient to drain and dispose of all surface water accumulation with the area; and
 - (5) On-site sewage system location.
- (B) **Alteration and amendment; periodic review.** Any change involving structural alterations, enlargement, intensification of use or similar change not permitted by the conditional use permit issued shall require an amended conditional use permit. An amended conditional use permit application shall be administered in the same manner similar to that required for a new conditional use permit.
- (C) **Revocation.** In the event that the applicant violates any of the conditions set forth in the conditional use permit, the City Council shall have the authority to revoke the conditional use permit in accordance with the Minnesota Administrative Procedures Act, being M.S. Chapter 14, as it may be amended from time to time.

§ 152.024 CONDITIONAL USE PERMIT CONDITIONS AND RESTRICTIONS.

- (A) In permitting a new conditional use or the alteration of an existing conditional use, the City Council may impose, in addition to standards and requirements expressly specified by this chapter, additional conditions which it considers necessary to protect the best interests of the surrounding area health, safety, comfort and general welfare or the community as a whole.
- (B) These conditions may include but shall not be limited to the following:
- (1) Increasing the required lot size or yard dimensions;
 - (2) Limiting the height, size or location of buildings;

357

- (3) Controlling the location and number of vehicle access points;
- (4) Increasing the road width;
- (5) Increasing the number of required off-street parking spaces;
- (6) Limiting the number, size, location or lighting of signs;
- (7) Requiring diking, fencing, screening, landscaping or other facilities to protect adjacent or nearby property;
- (8) Designating sites for open space;
- (9) Increasing on-site sewage system requirements; and
- (10) Requiring provision of urban services including central sewer.

§ 152.025 STANDARDS FOR GRANTING A CONDITIONAL USE PERMIT.

In granting a conditional use permit or altering an existing conditional use permit, the City Council shall require the applicant to demonstrate that the proposed use meets all of the following criteria.

- (A) The conditional use shall not adversely affect the health, safety, morals, and general welfare of occupants of surrounding lands.
- (B) The proposed use shall not have a detrimental effect on the use and enjoyment of other property in the immediate vicinity for the purposes already permitted or on the normal and orderly development and improvement of surrounding vacant property for uses predominant in the area.
- (C) The conditional use shall not lower property values or impair scenic views in the surrounding area.
- (D) Existing roads and proposed access driveways and roads shall be adequate to accommodate anticipated traffic.
- (E) Sufficient off-street parking and loading space as required by this chapter shall be provided to serve the proposed use.
- (F) The proposed conditional use can be adequately serviced by required on-site sewage treatment and a sufficient area of suitable soils for on-site sewage treatment shall be available to protect the city from pollution hazards.
- (G) The proposal includes adequate provision for protection of the natural drainage system and natural topography.
- (H) The proposal includes adequate measures to prevent or control offensive odor, fumes, dust, noise or vibration so that none of these shall constitute a nuisance.
- (I) The proposed conditional use is consistent with the comprehensive plan of the city.

EXHIBIT 2

Proposed Amendments to the Conditions Proposed in Draft CUP Resolution

Current Number	Proposed change
New	Clarify that the conditions and use of terms applicant, owner, operator, or similar are equally applicant to any person or entity that owns, operates, or otherwise conducts activities on the property.
New	Require the 9.5 acre area subject to the 2006 CUP to be reclaimed and its use for stockpiling terminated subject to requirements stated in that 2006 CUP.
New	Site plan shall be provided to show layout of current site conditions and elevations, including roads, loading areas, turnaround loops, aggregate processing areas, etc.
6	Remove authority for Operator to haul materials related to asphalt plant to property
7	Any materials and equipment stored outdoors shall be fully screened from view from adjacent properties and rights-of-way and at least 200 feet from property boundary, which his consistent with city code requirements for commercial activities.
8	Clarify that “...The Operator will be required to continue to <u>continuously</u> meet the noise standards and monitoring standards...”
11	Reduce the Monday-Friday operating hours to 7am-5pm
13	If not removed from the CUP, then clarify that the crushing of recycled cement or other imported materials shall be limited to a single annual period of 18 days. Delete references to asphalt or asphalt production..
17	Dust control using water shall be performed multiple times each day
New	The entire haul road shall be paved to mitigate fugitive dust
20	Delete entirely
23	(1) Change the current MN-DOT seed mixture to one with native mix. (2) Require berms to be at least 15 feet in height
New	Require mining along the western edge to be completed prior to any other area in Phase 2 to ensure that berms are constructed as quickly as possible
25	Lighting from vehicles and equipment must not shine onto neighboring properties.
34	Add language to require the survey to be performed before CUP can be issued and establish a course of action if raptors are located in the survey area.
New	Impose \$100 fine per occurrence for any vehicle traffic that violates the “Traffic” conditions. This fine must be paid by the operator but can be passed onto the 3 rd party violator.
43	Require reclamation to: (1) occur on areas of Phase 1 and Phase 2 when aggregate mining is complete; (2) begin within six months of aggregate depletion and reclamation to be complete within 24 months following depletion of aggregate; (3) be immediately started on the 9.5 acres of land referenced in the 2006 CUP and completion of reclamation within 12 months.
New	Submit and obtain the requisite materials for the required substantial alteration permit
New	Incorporate all comments made by applicant to ensure the offers become enforceable