

FINAL DECISION OF THE TOWN OF CLYMAN BOARD OF ZONING APPEALS TO ISSUE A CONDITIONAL USE PERMIT FOR CONSTRUCTING AND OPERATING BY UNITED LIQUID WASTE RECYCLING, INC. OF A WASTEWATER TREATMENT PLANT AT THE N2797 HIGHWAY 26 SITE THAT IS OWNED BY TRACY BROS., LLC AND FOR APPLICATION OF TREATED AND UNTREATED WASTEWATER MEETING THE DESCRIPTION OF WIS. ADMIN. CODE § § NR 214.05 AND NR 204.03(55) AT AGRICULTURAL SITES IN THE TOWN OF CLYMAN WHETHER OWNED BY PERMITTEE OR LEASED FOR THAT PURPOSE.

The Town of Clyman (the "Town") Town Board (the "Board") adopted, with few changes, the Conditional Use Permit ("CUP") described above as recommended by the Town's Plan Commission and conditionally granted that CUP to United Liquid Waste Recycling, Inc. ("ULWR") and Tracy Bros. (jointly, the Permittees). The Permittees disputed numerous terms and conditions of the conditionally issued CUP and appealed those disputed terms and conditions pursuant to the Clyman Zoning Ordinance ("CZO") and Wis. Stat. § 68.11. The Permittees' appeal was assigned by the Board to the Board of Zoning Appeal (the "BZA").

After conducting a public hearing, the BZA conducted a public meeting, principally taking comments from the Permittees (represented by their consultant and/or counsel) and the public generally regarding the need for or content of numerous conditions of the Board-issued CUP. With the agreement of the Permittees additional public meetings were held as well as negotiations involving the counsel for the Town and the Permittees. These negotiations, while not open to the public, were held among counsel for the Town and the Permittees, a

representative of the BZA and a principal and employee of the Permittee to facilitate a better understanding of the Permittee's business and operational constraints – many of which were not previously disclosed in the Plan Commission/Town Board process – and to expedite modifying the terms and conditions of the Board-issued CUP to reflect those constraints, respect the role of WDNR in regulation of the Permittees' operations and remain faithful to the Board's overall goals for the CUP. The results of the initial negotiations were presented to the BZA and the public at a public meeting on October 28, 2008 and posted shortly thereafter on the Town's website. Because the negotiations were incomplete as of October 28, the negotiators conferred twice thereafter, producing a Revised CUP that was mailed to the BZA members on November 24, 2008 and posted on the Town's website on November 25, 2008.

Each paragraph of the Revised CUP was announced for and opportunity for discussion by the BZA and the public was provided at a public meeting held on December 3, 2008. As a result of the discussion, changes were made to the Revised CUP. Thereafter, by ballot the BZA voted three (3) to two (2) to issue the Revised CUP including those changes agreed to at the meeting. (A copy of the Revised CUP, as amended, is attached hereto.) The BZA through the Findings of Fact, Conclusions of Law and Order that follow, hereby renders its Decision pursuant to CZO § 15.8 consistent with that vote.

FINDINGS OF FACT

1. The BZA held a public hearing on August 19, 2008 to take testimony under oath. Three witnesses gave testimony, all in support of the Permittee's objections to the Board-issued CUP. Besides the audio recording of the hearing, the record includes six exhibits.

2. The issues at the public hearing and much of the discussion during the public meetings involved: (i) whether and how some of the terms and conditions of the Board-issued CUP negatively affected the Permittees' legitimate business practices, their ability to compete with rivals in the landspreading business and, arguably their ability to comply with the requirements of the Wisconsin Pollutant Discharge Elimination System ("WPDES") permit issued to ULWR by the Wisconsin Department of Natural Resources ("WDNR") and/or WDNR code provisions and simultaneously satisfy the terms and conditions of the Board-issued CUP; and (ii) whether and how those disputed terms and conditions could be modified to meet the Board's intent to protect the Town's residents from nuisance conditions, particularly odor, should the proposed wastewater treatment system ("WTS") not function as designed or for the land application of liquid wastes if conducted in disregard of the public's health, safety and welfare.

3. The Permittee has specified the locations of the storage and treatment structures as follows:

The anaerobic lagoons will be situated on a parcel approximately 9.575 acres. The legal description is as follows: Commencing at the east ¼ Corner of said Section 32; thence N.89 41' 47"W. along the

south line of the NE ¼, 1905.88 feet to the Point of Beginning; thence continuing N.89 41'47"W. along said south line, 391.52 feet; thence N24 00'00" E., 248.98 feet; thence N.4 54'29"E., 1100.81 feet to the north line of the South ½ of the NE 1/4 ; thence S.89 42'59" E. along said north line, 253.08 feet; thence S.0 39'36" W., 220.38 feet; thence S.48 27'28" E., 72.66 feet; thence S.5 46'52"W., 1056.40 feet to the Point of Beginning. This parcel is owned by Tracy Bros. LLC.

The aerobic lagoon will be situated on a parcel approximately 40 acres. The legal description is as follows: Commencing at the South ¼ of said Section 32, said point being the place of beginning; thence North 89 34'34" West, 24.75 feet along the South line of the Southwest ¼ thence north 01 06'44" East, 1319.58 feet; thence South 89 50'56 East, 24.75 feet; thence North 01 06'44"East, 1319.70 feet along the West line of the Southeast ¼; thence South 01 06'46" West, 2639.79 feet; thence North 89 39'44" West along the South line of the Southeast ¼, 647.78 feet to the place of beginning. This parcel is owned by Tracy Bros. LLC.

4. The Permittee advised that ULWR will be the operator of the WTS but that the property on which the WTS will be located is now owned by Tracy Bros. LLC. Based on information provided by the Permittee's counsel, the Equalization Tank and Activated Sludge Tank and possibly other or all treatment structures and devices that comprise the WTS will be owned by Tracy Bros. LLC.
5. The land on which the WTS is located is currently zoned AG; but is proposed to be rezoned AB, either of which classification allows a WTS as a conditional use. The land in the Town where land application of the liquid wastes covered by the Revised CUP is allowed is zoned AG.
6. The Permittee has stipulated as follows regarding the operational volume of the storage and treatment devices/structures that comprise the WTS.

Anaerobic Lagoons:	3.8 million gallons, each
Aerobic Storage Lagoon:	18.5 million gallons
Equalization Tank:	1.5 million gallons
Activated Sludge Aeration Tank:	0.96 million gallons

7. The construction of the WTS has been the subject of a Plan Approval by WDNR, including through the letter of Rick Reichardt of the WDNR to Jason Tracy dated September 16, 2006. This Plan Approval has lapsed and needs to be reinstated before construction of the WTS may commence.

8. The operation of the WTS will, upon its construction, be subject to the terms and conditions of WPDES permit numbered WI-0061514-02-0, issued to ULWR that became effective on July 1, 2008 with an expiration date of September 30, 2012. Since the Board conditionally issued the CUP, certain conditions of the WPDES Permit have been modified by WDNR at the ULWR's request or through the administrative appeal process initiated by ULWR. To achieve consistency between the CUP and the WPDES Permit – which the BZA understands was the Board's intent, some provisions of the Board-issued CUP needed to be amended. The Revised CUP has made these amendments.

9. The Revised CUP allows the Permittees, on a timetable that accommodates seasonal constraints on construction and start-up/shakedown needs, to construct and operate a WTS comprised of: a tank (referred to in the CUP as an equalization tank ("EQ")) for the receiving and mixing of the wastes; two in-ground lined and covered impoundments (lagoons) for the anaerobic treatment of mixed wastes ("ALs"); a tank for the aerobic treatment (waste activated sludge) of

the effluent from the anaerobic lagoons; a concrete pad with a pole supported roof for the winter storage (and spreading during the spring) of the sludge (solids) produced by the activated sludge process; and, an open-to-the-air lagoon for the storage and aerobic treatment of the liquid effluent from the activated sludge tank, referred to in the CUP as the Aerobic (or Storage) Lagoon. The purpose of the WTS is to reduce the odors of the influent wastes in order to eliminate nuisance conditions during storage and upon landspreading.

10. ULWR's proposed use of anaerobic treatment and the variability of source and strength of Industrial Wastes to be accepted at the WTS presents the substantial likelihood that during the initial months of WTS operation the anaerobic process, in particular, will not function as designed, requiring adjustments in operation. Recognizing this, the BZA has determined with the help of the Town's Engineer and ULWR's environmental consultant, that the design parameters proffered during the Plan Commission process are not necessarily appropriate benchmarks of satisfactory operation of the WTS and that flexibility in establishing the operating parameters is needed, the latter especially during the shakedown process. The BZA finds that twelve (12) months of initial operation, with the flexibility of a possible additional three months, is a reasonable shakedown period. The BZA finds it is reasonable and necessary to allow the parameters by which proper operation of the WTS will be determined to be set in the future through consultation between wastewater treatment specialists.

11. Because of the uncertainty in the initial effectiveness of the WTS, it is also reasonable and necessary to limit the volume of waste which ULWR may accept during the first year of the CUP to the amount specified by ULWR's environmental consultant as the WTS's design capacity and to require a system for measuring influent and effluent volume and chemical constituency. Recognizing that empirical data may support a change in the volume maxima, the limitation in volume may be amended depending on the success or failure of the Permittee's operation of the WTS, subject to the ultimate oversight of the WDNR.

12. The WPDES requires all fields used for landspreading under the WPDES permit to go through the WDNR approval process. The WPDES Permit is also written to allow ULWR to accept, treat and dispose of municipal sewage sludge if future application is made and approval for such disposal is granted by WDNR. The intent of the Board-issued CUP and the Revised CUP was and is, respectively, to adopt a procedure that recognizes WDNR's expertise and respects that agency's decision on what agricultural fields in the Town meet WDNR landspreading criteria, subject to the public process of CZO § 6.5. The Revised CUP achieves these goals.

13. The BZA finds that in the interest of protecting groundwater from leaks from the in-ground lagoons that a leak detection system include groundwater monitoring devices and that the Permittees' election to use monitoring wells in lieu of lysimeters is reasonable. The BZA further finds that, with the oversight of the

wells' placement by the WDNR, the Town's Engineer, and ULWR's consultant a three-well system should suffice.

14. During the public hearing/meeting process, the BZA was advised through the efforts of the Town's Engineer that estimated costs of remediation of the WTS, should ULWR abandon it, and the state or federal government would not proceed to require cleanup under CERCLA or Wis. Stat. § 292.11, likely would be \$720,000 rather than the \$1.5 million estimated during the Plan Commission process. Likewise, the Permittees advised the BZA that maintaining a bond in either amount for the life of the WTS would be a great financial strain and likely not even available because there would be no fixed end date associated with the bond. For these reasons, the BZA finds that it is reasonable and necessary to lower the amount of financial surety required to \$720,000 and to permit the Permittees to establish a surety through mortgages. The BZA accepts as necessary to allow construction of the WTS that the Town accept second position on mortgages whose total value well exceeds the \$720,000 estimate, thereby allowing first mortgages to secure construction of the WTS.

15. The BZA finds that for protection of the health, safety, welfare and general good order of the Town, it is reasonable and necessary that the Town have knowledge of the wastes accepted, their degree of treatment and the means and locations of their disposal. Although the Revised CUP streamlines by consolidating the reporting requirements of the Board-issued CUP, it still requires the Permittees to submit copies of specified reports provided to WDNR pursuant

to the WPDES. The BZA finds that this information will assist the Town in fulfilling its duty to the public to regulate operations that, if not properly conducted, may produce nuisance conditions. The BZA finds that providing the Town copies of reports sent to WDNR is not overly burdensome to the Permittee.

16. An Operation and Maintenance Manual ("O&M Manual") for the WTS is required under ULWR's WDNR-issued Plan Approval. In addition, a new land application management plan ("LAMP") will be required for the Permittees' land application. By adding a provision to the O&M Manual requiring inclusion of procedures to be taken when the WTS does not function as designed, as the Revised CUP does, the combination of the O&M Manual and LAMP will be the functional equivalent of the Emergency Action Plan ("EAP") required under the Board-issued CUP.

17. The BZA finds that the combination of a new provision on random site inspection/sampling and the revised provision on site inspections related to complaints reasonably provides the Town the ability to verify compliance with this CUP.

18. To ensure as much as reasonably possible that the WTS will be operated with sufficient skill to utilize the anaerobic process to proper advantage in odor reduction, the BZA finds it is appropriate to require that the WTS operator hold the degree of certification required by the WDNR and that an operator with such level of skill be immediately available, if not on site, to troubleshoot twenty-four hours of the day.

19. The BZA finds it appropriate to establish hours of operation for land application but allow for certain identifiable exceptions, some of which accommodate the needs of the Town's farming community. The Revised CUP provision on days and hours of operation takes into account both the needs of the persons who experience the sounds or sights of the landspreading in the Town and, the service needs of ULWR's waste-sources, those of the farmers who allow their fields to be used for disposal and possible storage capacity concerns.

20. Under the Revised CUP, the Permittees are only allowed to spread treated effluent or make direct application of wastes on lands in the Town that are zoned AG and approved for such by WDNR and for which the landowner (or lessee) has given written approval to landspread and the approvals are on file with the Town, except for those fields used for landspreading prior to the first effective date of the CZO – the latter constituting legal nonconforming uses and which may maintain such status. In recognition of this regulatory distinction, and the uniqueness of land application and use, the BZA has appended Exhibits A and B to the Revised CUP and agreed that the status as nonconforming use (Exhibit A sites) and CUP-sites (Exhibit B) is retained unless discontinued for more than 24 months. Post issuance amendments to Exhibit B will be needed to delete the Witte Farm and possibly others where owner approval was not or has not yet been given in the form of Exhibit D.

21. The BZA finds that specifying a system which logs written and timely complaints of the public and documents the complainant's evidence as well as

provides for investigation by a representative of the Town is prudent and protects the public interest. The Revised CUP amends the Board-issued complaint process but retains its basic principles.

22. The Board issued the CUP to the Permittees on the condition that they pay pursuant to CZO § 13.5 the fees and expenses of the CUP-issuing process, estimated by the Plan Commission to reach \$50,000 by the conclusion of the process. Since that estimate, the Town has incurred additional expenses, including through the extended BZA process. Because the Permittee disputes the propriety of that assessment and the amount (initially assessed and any assessed for the BZA process), the BZA finds it is reasonable to compromise the matter and to assess some of the additional expenses associated with the BZA process by increasing the previously assessed amount but also by allowing payment in installments of the new assessed total, subject to revocation of the CUP upon default.

23. Most, if not all, of the changes to the Board-issued CUP made through the BZA appeal process do not constitute decisions in favor of the applicant in that they reject or undermine the Board's decision or intent but rather are changes taking into account facts not disclosed to either the Plan Commission or Board or, in some cases, taking into account the impracticability of a requirement, such as the bonding requirement.

24. The BZA finds that through the hearing/meeting/negotiating process the resulting Revised CUP: streamlines the CUP by reducing the number of its provisions from 65 to 44; accommodates the Permittee's legitimate business needs;

respects the WDNR's role in the regulation of wastewater treatment and land application of wastes; protects the public interest; and, retains, in all important respects, the Town's enforcement discretion.

CONCLUSIONS OF LAW

1. The Town has previously adopted village zoning powers pursuant to Wis. Stats. § 60.62 and exercises those powers through the CZO and CUPs granted thereunder to protect and promote the health, safety, welfare, morals, aesthetics, prosperity and overall quality of life for all the Town's residents and property owners. The CZO provides for an appeal of a CUP pursuant to a hearing/meeting process such as that conducted by the BZA.
2. Pursuant to CZO § 15.4, the BZA is authorized to ". . . reverse, affirm, wholly or partly, modify the requirements appealed from and may issue or direct [issuance] of a permit."
3. Construction and operation of the WTS will involve new structures and new uses of the land approvable under CZO § 4.6(3)(d) or § 4.9(3)(1)1., as conditional uses in either an AG or AB District, respectively.
4. Disposal of the WTS's effluent or direct application of untreated Industrial Wastewater on agricultural land within the Town, pursuant to the WPDES approval process, constitutes uses subject to conditional approval under CZO § 4.6(3)(q) if such uses were established or substantially increased after March 20, 2000.

5. The CZO charges the Town through its CUP process with the protection of the ground and surface water within the Town as well as the abatement of offensive odors. The BZA concludes that the CUP revised through the hearing/meeting process retains those protections initially established through the Board-issued CUP and balances those protections with the Permittee's operational or other business needs brought to the BZA's attention through the hearing/meeting/negotiating process.

6. The Permittee challenged the validity of numerous terms and conditions of the Board-issued CUP on the ground that they were preempted by state law. The BZA concludes that the Permittees have not carried their burden on these challenges. The BZA further concludes that as a matter of law it has enforcement authority and discretion on wastewater treatment and disposal matters complementary and supplementary to those of WDNR.

7. The Town, pursuant to its zoning and police powers over conditional and other uses, is authorized to adopt and enforce as its own, the terms or conditions of a Wisconsin Pollutant Discharge and Elimination System ("WPDES") permit for any facility in the Town. Nonetheless, the Town's complementary authority with WDNR or its authority supplementary thereto poses unique compliance and enforcement issues, which the BZA concludes it is authorized to address through a detailed description of the enforcement situations that the Town may encounter. Accordingly, the Revised CUP provides a detailed enforcement process.

8. The BZA concludes that the fees assessed under the Revised CUP for monitoring compliance, road repair, special services, and equipment and professional fees (including but not limited consultants and attorneys) are pass-throughs and, as such, do not constitute taxes. Nonetheless, the BZA has concluded that for the protection of the Permittee's use, it is appropriate to set criteria for assessing costs such as for road repairs and purchases of specialized equipment and to limit the dollar amount payable by the Permittee for professional fees.

9. Pursuant to its zoning power over conditional uses and other uses, the BZA concludes it has the authority to impose conditions such as hours of operation as well as other conditions not in conflict with the WPDES permit or WDNR administrative code. Nonetheless, the BZA concludes that it is lawful and appropriate to grant some exceptions identified in the CUP where there are benefits to the Town's farmers or provide flexibility to address certain operational or competitive business concerns, but do not, in the BZA's judgment, represent substantial detriments to the Town's residents.

10. Not all fields fall within the Town's conditional use authority under CZO § 4.6(3)(q). As a consequence, it is appropriate to identify through Exhibit A of the CUP those fields which constitute legal nonconforming uses.

11. The Town has the authority pursuant to CZO § 13.6 to require the posting of sureties to complete the WTS and carry out remedial actions in the event the

Permittees abandon the WTS and default on their obligation to implement fully the O&M Manual.

12. The Town has the authority to assess and condition issuance of a CUP upon payment of fees and costs incurred through the CUP process. The BZA concludes the payment total and installment option provided by the Revised CUP are reasonable and conform to the spirit and purpose of the CZO.

13. The BZA concludes that under the terms of the CZO it has authority to vary from the twelve (12) month limit on use discontinuance in view of the unique circumstances associated with land application of WDNR regulated wastes and that extending such limit to twenty-four months is prudent, reasonable and protective of the Town's time resources.

14. CZO § 15.3(3), which calls for a supermajority "to decide in favor of the applicant on any matter upon which the Board is required to pass, or to effect any variation to the provision of the [CZO]," was adopted under the authority Wis. Stat. § 62.23(7)(e)9. That statutory provision has been repealed and replaced with Wis. Stat. § 62.23(7)(e)3m, which provides that a board of appeals, such as the Town of Clyman Board of Zoning Appeals, "may take action . . . by majority vote of the members present."

15. This Board concludes, upon the advice of counsel, that the repeal of § 62.23(7)(e)9 and its replacement with § 62.23(7)(e)3m authorizes the BZA to take action by simple majority vote, notwithstanding the text of CZO § 15.3(3) and the use of the word "may" in § 62.23(7)(e)3m – that word referring to the

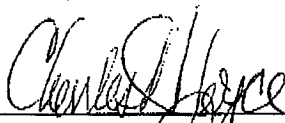
BZA's discretion to act, not to the retention of discretion to require a supermajority threshold. This Board also concludes, upon the advice of counsel, that this interpretation of the effect of § 62.23(7)(e)3m upon CZO § 15.3(3) harmonizes with the simple majority applicable under Wis. Stat. § 68.11.

16. If regulated according to the terms of the attached CUP and compliance therewith is maintained by the Permittee, the standards of CZO § 6.2 will be met because: the Town's residents and property owners will benefit by proper operation of the WTS; landspreading of permitted wastes on property approved for that purpose by WDNR will benefit the land in the Town; and, the Town will be provided through the Revised CUP's terms and conditions (or lawful amendments thereto) with adequate oversight and enforcement discretion with respect to the Permittee's operations in the Town.

ORDER

The BZA hereby issues the attached CUP to ULWR/Tracy Bros. LLC for construction and operation of a WTS as a conditional use under the CZO, further subject to reapproval by the WDNR. The BZA also issues the CUP to cover the disposal sites that have received approvals from WDNR under the WPDES permit process (subject to amendment of Exhibit B as described in paragraph 20 of the Findings) and to establish an approval process for future land application sites, consistent with the CZO.

Dated this 6th day of December, 2008



Chuck Joyce, Chair
Town of Clyman Board of Zoning Appeals