



Red Cliff Band of Lake Superior Chippewa Indians

88455 Pike Road

Bayfield, WI 54814

Phone: 715-779-3700 Fax: 715-779-3704

Email: redcliff@redcliff-nsn.gov

August 16th, 2021

VIA ELECTRONIC MAIL

zoning@bayfieldcounty.wi.gov

Bayfield County Board of Adjustment
PO Box 58
117 East 5th Street
Washburn, WI 54891

RE: Red Cliff Band of Lake Superior Chippewa Comments on Kristle Majchrzak's Appeal of the Denied Conditional Use Permit to Bayfield County's Board of Adjustments

Boozhoo Chair Kim Sturm,

The Red Cliff Band of Lake Superior Chippewa (henceforth Miskwabekaang) respectfully submits the following comments regarding Kristle Majchrzak's (henceforth the Applicant or Appellant) appeal of Bayfield County Planning and Zoning Committee's (henceforth Zoning Committee) denial of the Applicant's Conditional Use Permit application (henceforth the Application) for a proposed project to extract water from an artesian well in Herbster, Wisconsin near the Bark Bay Sloughs and the shores of Anishinaabeg Gitchigami (Lake Superior) with the intention of processing it offsite to be sold as bottled water. The proposed project is within 1842 ceded territory and would likely impact aki (land) and nibi (water) ceded by our people in the 1842 Treaty of LaPointe.¹ Miskwabekaang has retained and exercises stewardship responsibilities of our inawemaaganag (relatives), which the others might call "natural resources", across the ceded territories upon which meaningful exercise of Treaty Rights is based. The Board of Adjustments has requested briefs addressing three issues: **1)** Whether the Board of Adjustments has jurisdiction to decide a matter involving water usage, based upon the concurrent exemption in Bayfield County Ordinance, **2)** Does the appellant need a conditional use permit if it is determined that the Board of Adjustments does not have jurisdiction, **3)** If it is determined no conditional use permit is needed what, if anything is left to be done. Miskwabekaang has thoroughly reviewed the Application documents and the Applicant's briefs. We have the following comments:

On the Matter of Concurrent Exemption in Bayfield County Ordinance

The Applicant's briefs assert that the concurrent jurisdiction exemption precludes the County from considering potential impacts from the storage and removal of artesian well water from the property. We disagree. Bayfield County Zoning Code 13-1-21(b)(6) defines the Concurrent Jurisdiction Exemption as: "A permit under this Chapter may not be required where the Wisconsin Department of Natural Resources (DNR) has concurrent jurisdiction, and

¹ 1842 Treaty of LaPointe, October 4, 1842

the substantive concerns of this Chapter are addressed and resolved by issuance of a permit under the authority of that regulatory agency.” The substantive concerns of the relevant chapter of the county zoning law have not been addressed or resolved in any manner whatsoever, let alone by the issuance of a permit. Wisconsin Department of Natural Resources’ (henceforth WDNR) authority under NR 812 (Well Construction and Pump Installation) is limited to concerns over the safe and proper installation of a well. In fact, there was no “issuance of a permit under the authority” of the WDNR. The applicant and/or a contractor needed to provide notification to the WDNR and have an approved contractor install the well, but no permit was ever issued. The WDNR’s involvement was to ensure that a well was safely installed. Bayfield County still has jurisdiction in considering the topic of water usage (and corresponding impacts) since no WDNR permit was issued addressing this concern. The appellants’ efforts to urge the County to interpret the concurrent jurisdiction exemption in such a way is both unreasonable and unsupported by law. It should be disregarded.

On the Matter of Whether a Conditional Use Permit is needed if the Board of Adjustment does not have Jurisdiction

Clearly a conditional use permit is required here. The properties in question are both zoned R-RB Residential-Recreational Business. Zoning Code 13-1-61(e) defines this zoning district as “intended to provide for permanent or seasonal residential development and associated recreational use”. Extracting water to have it transported offsite to be bottled and sold is not residential or “associated recreational use”, which creates the need to receive a Conditional Use Permit (henceforth CUP) for the project to move forward. Additionally, the Applicant’s submission of the Application shows that the Applicant recognizes the County’s authority and the Applicant’s need of a CUP for the proposed project. A CUP is required whether or not a Concurrent Jurisdiction Exemption is issued for the water usage, though water usage is not outside of the Board of Adjustments’ jurisdiction.

Zoning Code 13-1-61(a) addresses the various classifications of uses. This includes a Permissible Uses chart by zoning district. Under this section:

the “letter ‘c’” in the chart “means that the use is allowed as a conditional use and may be permitted in the zoning district only if a conditional use permit is granted... If the space is blank, it means that the use is not permitted in that zoning district. For uses not included on this list, application shall be made to the Planning and Zoning Committee for interpretation”

The Permissible Uses chart does not explicitly include a facility that stores water to be transported offsite for bottling purposes. As such, this proposed project should require a CUP application be submitted to the Zoning Committee. The Permissible Uses chart lists two uses that are closest to this project. The first is *Beverages (Wholesale & Storage)*, which isn’t defined in Zoning Code 13-1. Although not defined, the Applicant plans to store artesian water in onsite tanks to then be moved offsite for bottling. This constitutes the “storage” of “beverages”. *Beverages (Wholesale & Storage)* is left blank under the R-RB column meaning “the use is not permitted in that zoning district”. The other Permissible Use listed in the chart that has similarity to the proposed project is a *Bottling Plant*, which is defined under Zoning Code 13-1-4(a)(4d) as:

“a building or facility where beverages, including water, are put into containers for distribution. (Not including a dairy farm, local farm produced unfermented fruit juices, or other permitted facilities authorized under provisions contained in this Ordinance.”

Miskwabekaang recognizes that the proposed project does not include individual bottles of water being filled onsite. The proposed project does, however, call for a beverage (water) to be placed into containers (tanks) for distribution (to a facility in Superior, Wisconsin). The Application should be reviewed under a *Bottling Plant* given the intention of Kristle KLR and the similarities between the proposed project and the similarities in the Zoning Code’s definition of a *Bottling Plant*. Similar to the *Beverages (Wholesale & Storage)* use, the *Bottling Plant* use also is not allowed under the R-RB zoning classification. This means that neither of these uses are allowed in R-RB zoning districts.

The Applicant chose not to apply for a CUP under the two best fitting uses, *Beverages (Wholesale & Storage)* or *Bottling Plant*. Rather, the Applicant’s Application was for “Irrigation Facilities, Canals, Dams, Reservoirs, etc.” uses. Zoning Code 13 does not define “irrigation facilities”, “canals”, “dams”, or “reservoirs”. Other Wisconsin codes do provide a definition for “irrigation”. ATCP 29.01(22) defines “irrigation” as “the application of water to

land, crops or plants in order to supply the water needs of plants or to promote plant growth.” SPS 381.01(136s) defines “irrigation” as “the application of water to the root zone of plants or plantings.” Neither of these definitions fit with the proposed project and the Applicant’s use of the withdrawn water. This classification in the Permissible Use chart does, however, allow for a CUP in the R-RB zoning districts. This allowance is likely why the Applicant intentionally applied for a CUP under a use that doesn’t reflect the proposed project. This selective and self-serving interpretation of County zoning law should be rejected. The CUP should be denied since the proposed project does not fit under the “Irrigation Facilities, Canals, Dams, Reservoirs, etc.” use. Any CUP application that is submitted under the wrong use or is lacking required application documents should be considered incomplete and denied.

An additional factor that makes the Application incomplete is the absence of an Environmental Impact Analysis (henceforth EIA) per Zoning Code 13-1-42(c). Zoning Code 13-1-42(a) states that an EIA would “inform public decision makers and private individuals of the environmental and economic effects of actions that have been proposed, increase the exchange of information among interested parties, lead environmentally and economically sound projects, and be used as a planning tool for broad aspects of decision making.” Should a Bayfield County entity determine that the proposed project is allowable for a CUP; despite Miskwabekaang’s concerns, a CUP application should require an EIA. Zoning Code 13-1-42(b) lists several land uses that would require an EIA and includes nonmetallic mining. Zoning Code 13-1-4(a)(39) defines mining as “all or part of the processes involved in the extraction and processing of mineral materials”. Zoning Code 13-1-4(a)(38) defines a “mineral” as “a naturally occurring element or combination of elements, metallic or nonmetallic, that occur in the earth in a solid, liquid or gaseous state, but shall not include soil.” Water (dihydrogen monoxide) meets this definition since it is a “combination of elements”, which the proposed project would extract from the ground and process offsite. Should the Bayfield County Board of Adjustment or a different county entity determine that the proposed project doesn’t fit under any of the Uses Requiring an EIA, Miskwabekaang asks that one still be required. The proposed project does not fit under any of the Permissible Uses that allow for a CUP on a property zoned R-RB. It would be negligent for a CUP to be issued without an EIA. The project types listed in Zoning Code 13-1-42(b) have a spectrum of environmental impacts. The MSA Artesian Well Installation Report (henceforth MSA Report) indicates that the well at issue has an approximate flow rate of 1.8 million gallons per year (or 3.45 gallons per minute). If this flow rate is consistent and the Applicant plans to continuously store the water all of this water would permanently be removed from the aquifer. Without a comprehensive environmental review there is no way of knowing about negative impacts to the environment. Proceeding in such a manner would be irresponsible. The MSA Report also states that “the well was installed in winter when a majority of recharge areas are frozen and flow rates are generally lowest, it is likely that flow rates from the well may increase during periods of increased filtration.” This allows for even more water to be removed from the aquifer. Without an EIA to determine the impacts, the Applicant cannot definitively state that only the Applicant’s properties are reliant on the aquifer, nor cannot it be definitively stated that this water removal will not impact any of our relatives such as swimmers, crawlers, flyers, and so many others. No claims of sustainability can be verified without meaningful environmental review.

Additionally, attached is Red Cliff Treaty Natural Resources’ concerns and questions dated April 13th, 2021, that should be addressed in an EIA. Any such environmental review should consider the cultural impacts the proposed project has on Miskwabekaang in addition to the environmental and economic considerations listed in Zoning Code section 13-1-42. This EIA should be developed after the collection of at least two years of baseline data on flow rates from the existing artesian well, other wells that share the aquifer, and the surface and subsurface waters that are downstream from the proposed project site. The EIA should also look at how relatives, both human and non-human, that rely on those downstream waters would be impacted by the proposed project. WDNR involvement and Concurrent Exemption may be reconsidered should the baseline data collection indicate that the Applicant periodically reaches the High Capacity Well threshold based on seasonal increases to the flow rate.

On the Matter of Whether no Conditional Use Permit is required, what is left to be done

As stated above, Miskwabekaang does not believe the proposed project can legally proceed without a Conditional Use Permit from Bayfield County.

We urge the Bayfield County Board of Adjustment to uphold the Zoning Committee’s decision to deny this incomplete Application due to a lack of information within the application and a lack of environmental impact analysis.

We remain committed to protecting nibi (water), aki (land), and air of our current and ancestral homelands for our people and the generations to come. Preserving the environment means preserving our treaty rights and our traditional life ways. Miigwech (thank you) for the opportunity to submit comments. Questions and follow-up can be directed to Linda Nguyen, Red Cliff Environmental Director, at linda.nguyen@redcliff-nsn.gov or 715-779-3650.

Sincerely,

Christopher Boyd, Tribal Chairperson
Red Cliff Band of Lake Superior Chippewa

Cc: Red Cliff Tribal Council
Chase Meierotto, Treaty Natural Resources Administrator
Linda Nguyen, Environmental Director
Marvin Defoe, Tribal Historic Preservation Office