

# MEMORANDUM

## DEPARTMENT OF COMMUNITY DEVELOPMENT/PLANNING DIVISION

TO: City Council

FROM: Carlos Espinosa, Assistant City Planner

DATE: November 28, 2012

SUBJECT: Biesanz Nonconformity Agreement

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This memo is meant to introduce Council to a draft “nonconformity agreement” between the City and Biesanz Stone Company in preparation for the December 3, 2012 Pre-Council meeting. The agreement addresses the quarry’s future expansion and reclamation plans. The framework for the agreement was reviewed and approved by the Planning Commission on June 25, 2012. The analysis on the following pages provides background information and an attached copy of the draft agreement. In summary, the agreement establishes the following:

1. Future excavation shall not occur closer to Knopp Valley or WE Valley residential properties than existing, or occur in designated areas outside residential setbacks (see page 12 of analysis for a map).
2. An Environmental Assessment Worksheet (EAW) is required for sand excavation outside the existing (2011) quarried footprint.
3. A maximum depth of mining is established at an elevation of 975 feet (depth of 2011 excavation).
4. Hours of operation for mining and associated activities shall be 6 a.m. to 10 p.m. Monday through Friday, and 8 a.m. to 5 p.m. Saturdays and Sundays. This is the maximum time window for mining and associated activities. Typically, hours of operation are much shorter.
5. Outdoor operating equipment shall be equipped with white noise alarms or other noise muffling devices to reduce backup beeping noises normally associated with equipment operating in reverse.

## **Biesanz Nonconformity Agreement Memo to City Council**

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6. All trucks departing the site will be properly loaded and covered. Any spillage of sand or other material shall be cleaned up by the Company at the direction of the City Manager.
7. Moisture testing of uncovered sand stockpiles is required to ensure a minimum moisture content of 1.5%.
8. All permits shall be placed on file with the City.
9. A copy of the quarry's most recent fugitive dust control plan shall be placed on file at the City.
10. A mine plan shall be produced showing existing and proposed future excavation.
11. A reclamation plan shall be produced. A performance bond equaling 110% of the estimated cost of the reclamation shall be filed.
12. Yearly updates on the progress of the excavation plan and reclamation plans shall be submitted to the City.
13. Changes to the excavation and reclamation plans that exceed the terms of the agreement must be approved by the City Council.

These stipulations are in addition to existing City, State, and Federal regulations that Biesanz Stone Company currently complies with. The Company concurs with the agreement as summarized above. Staff will give a presentation and answer questions about the agreement at the Pre-Council meeting. A representative of Biesanz Stone Company will also attend the meeting. It is staff's intent to discuss the agreement at the Pre-Council meeting before bringing it to a regular Council meeting at a later date.

# Biesanz Stone Company Analysis

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## History of Site

### Uses Prior to Frac Sand

The Biesanz quarry has produced Biesanz stone and various aggregate products (i.e. sand, gravel, and crushed stone) since 1904. The quarry was located in Winona Township prior to being annexed into the City on January 22, 1996. The mining section of the property was zoned A-G (Agricultural) on October 21, 1998. The stone cutting and processing section of the property was zoned M-2 (General Manufacturing) at the same time.

### How Frac Sand Use was Established

In spring 2011, the Biesanz quarry began blasting to reach frac sand located in the Jordan sandstone formation. By fall 2011, the Biesanz quarry began extracting “frac” sand. The sand was accessed by blasting in an already excavated for Biesanz

stone and other aggregate products. The location of the blasting for frac sand is shown below in an image from 2011:



The Biesanz quarry was “grandfathered in” as a legal nonconformity when A-G zoning was applied in October 1998 (see Nonconforming Status/CUP Applicability Section). This “grandfathered” status means that the quarry has been allowed to mine stone and aggregate products (including sand) despite not having a CUP as required for new extraction activities. The fact that the quarry does not have a CUP is the reason a nonconformity agreement is recommended to address the quarry’s future operations (see Recommendation Section).

## Current Sand Operations

### General Description of Sand-related Activity

Mined sand from the Biesanz quarry comes from the Jordan sandstone formation. In order to reach the frac sand, blasting through 40-50 feet of material (fractured limestone, sand/rock) has occurred. Once the Jordan formation is reached (and a softer layer of sandstone is extracted from the top of the formation), lower level blasts are utilized to break up deeper sandstone. When the sand is mined, it has a 5-15% moisture content. At the mine site, the sand passes through an initial screener before being sent to a washing site at 6930 West 5<sup>th</sup> Street in Minnesota City or to 370 West Second Street for shipping.

A simplified description of the mined material and remaining bedrock geology is below:

50' - 100' Oneota Dolomite – Removed from top of mine previous to frac sand  
10' Biesanz Stone – Removed previous to frac sand

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40' - 50' Sand/Rock Material (Overburden/Aggregate) – Removed to reach frac sand  
30' - 40' Jordan Sandstone (Usable frac sand) – Removed for use as frac sand

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**150' – 200' of material excavated**

60 - 80' Jordan Sandstone (Un-usable for frac sand) – Remaining  
50' – 75' St. Lawrence Siltstone – Remaining  
140' – 180' Franconia Sandstone – Remaining  
45 – 60' Ironton and Galesville Sandstone to Winona valley elevation  
180' to Winona/Goodview water source (Mt. Simon aquifer)

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**475' – 575' of bedrock remaining to Mt. Simon public water source**

As shown above, 60 -110 feet of material had been removed prior to the blasting to reach frac sand in spring 2011. Since then, approximately 40-50 feet of sand/rock material has been blasted through to reach the Jordan Sandstone formation. Only the top 30 – 40 feet of the Jordan formation has been excavated. Below this depth, the sandstone is not usable as frac sand.

Although it is an important source of water in western Winona County, the Jordan bedrock formation is not a significant source of groundwater in the Winona (City) area adjacent to the Mississippi River Valley. In this area, the Jordan bedrock formation is generally dewatered because the valleys have drained the aquifer of its water and cut off most of its regional recharge. Water for the City of Winona and Goodview instead comes from wells that reach into the Mt. Simon aquifer located 500 feet below the bottom of the Jordan formation. Thus, accounting for mining activity which has already occurred, quarrying at Biesanz remains more than 500 feet away from the Mt. Simon public water source. The potential for contamination of the Jordan aquifer from excavation at Biesanz is minimal for the following reasons:

- No chemicals are used in the extraction of frac sand.
- The quarry is required to implement Best Management Practices designed to reduce the potential for water pollution as part of its MNG490000 water permit from the MPCA (see description on page 7).
- The direction of water drainage from the mine is immediately toward the Mississippi river valley or through springs and seeps along the adjacent valleys. It is unlikely to be able to flow west/south toward Jordan groundwater resources.
- According to geologic maps, there is not a high probability of karst landforms in the quarry area.
- In the Hillsdale township area to the west of the quarry, the Jordan formation is not able to support new private wells constructed according to the State Well Code. New private wells must go deeper to find adequate sources of water. Existing water

wells are generally low yield multi-aquifer wells and are unlikely to be affected by the mine's operations because of the non-westerly direction of groundwater flow.

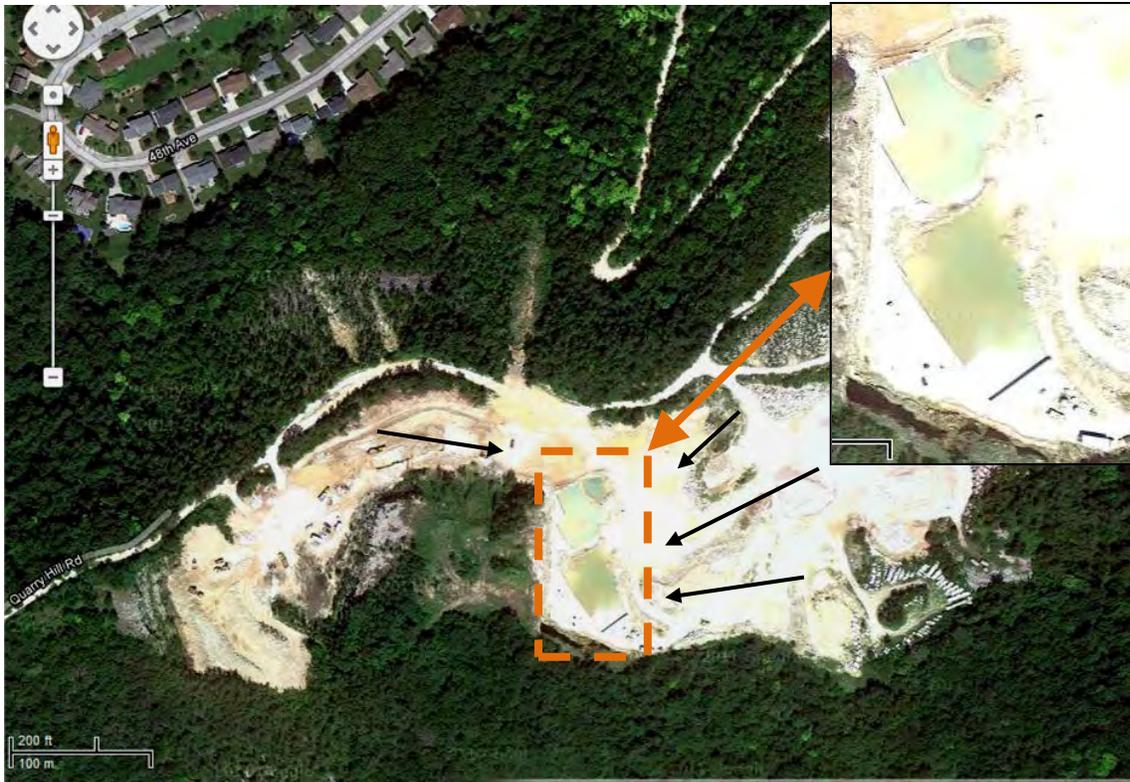
### Habitat and Wetlands

The 1996 "Natural Communities and Rare Species" map produced for Winona County by the Minnesota County Biological Survey shows no rare species or animal aggregations in the Biesanz quarry excavation area. The map does show an oak forest natural community to the north and east of the existing excavation area. However, there is no planned excavation in these locations (see Future Excavation Section).

There is no indication of wetlands in the excavation area of the Biesanz quarry. The potential for impacts to wetlands on adjacent properties is addressed in the following excerpt from Biesanz's MPCA stormwater permit:

"If the site has any stormwater discharges with the potential for significant adverse impacts to a wetland, the Permittee [Biesanz] must demonstrate that the wetland mitigative sequence has been followed."

The mitigative sequence includes avoiding impacts, minimizing unavoidable impacts, and potential wetland replacement. The potential for such adverse impacts to wetlands is reduced by a site drainage design which directs all water runoff from the quarry toward the center of the excavation area as shown on the next page:



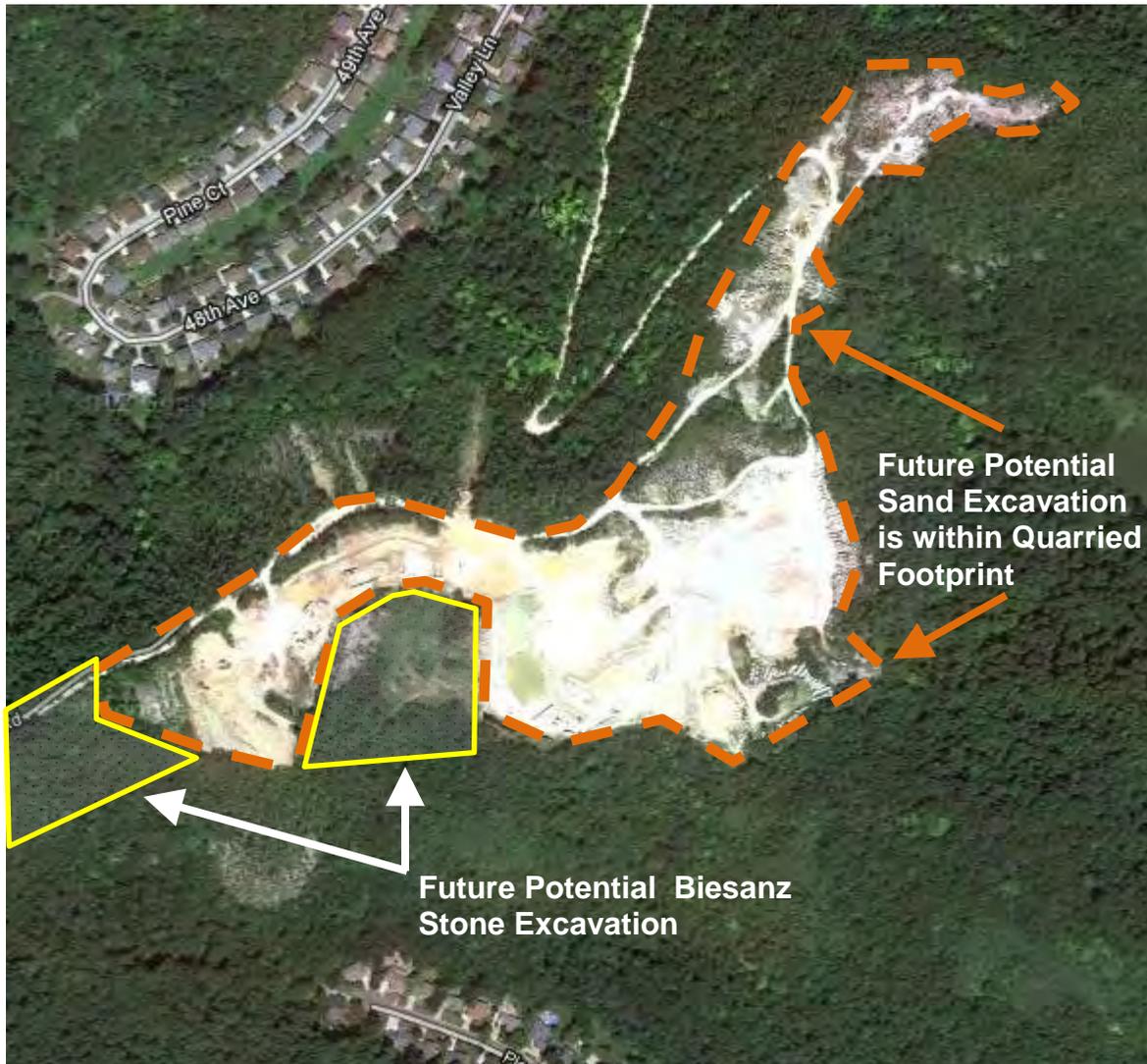
### Number of Sand Trucks and Destinations of Trucks

Depending on the day, the maximum number of sand trucks that exit the quarry ranges from 40-120. From the quarry the sand is either transported to Minnesota City via Highway 14/Pelzer and 5<sup>th</sup> Street (6<sup>th</sup> Street in Goodview) or to 370 West Second Street via Highway 14, Pelzer, and Riverview Drive. These roads are designated truck routes and have general 2007 traffic volumes ranging from 5,000-9,000 ADT (Average Daily Traffic). However, the same roads have the capacity to carry general volumes of 15,000 ADT (one-lane roads) to 30,000+ ADT (two lane roads – e.g. Pelzer). Thus, the sand generated truck traffic from Biesanz - while it may be noticeable - generally represents a small fraction of the traffic which can be handled by these roads.

There have been questions about the ability of the intersection of Seminary Drive and Highway 14 to handle the trucks entering and exiting the Biesanz quarry. While the intersection is not ideal, it is the historic entrance/exit point for the quarry, additional “trucks entering” signage has been posted for motorists, and trees have been trimmed and removed by MnDOT near the intersection to help improve sight lines. Unilaterally ordering additional improvements to the intersection is not possible because the City does not have jurisdiction over the roads at the intersection. While the City may provide input (because the quarry is in City limits), additional improvements to the intersection are under the jurisdiction of MnDOT and Winona County/Hillsdale Township.

## Future Excavation

Potential areas for future excavation are shown below. Additional detail will be provided in a mine plan. Future excavation will maintain existing minimum setback distances from neighboring residential properties and not occur in designated areas (see Recommendation Section).



## State and Local Regulations that Apply

### Zoning

As stated above, the mining area of the Biesanz quarry was zoned A-G Agricultural in 1998. Despite the mine not having a CUP, it is in the correct zoning district for a mine. Any future mines in the City would also be limited to the A-G zoning district.

## Comprehensive Plan

The 1997 Comprehensive Plan designates the future land use of the Biesanz Quarry as General Industrial. General Industrial is defined as: “Areas for manufacturing, processing and other activities that may have impacts offsite, and are generally isolated from other uses or buffered from them. Often contiguous to industrial riverfront, but less river-dependent. Sites should have direct access to major regional transportation facilities.” As such, the quarry is in-line with the future land use guidance provided in the City’s Comprehensive Plan.

## Air - Permits Held and Dust Plan Followed

Air permits related to mining are attached to the equipment brought into the mine. These permits require the machinery to be operated in a manner that reduces the creation of dust.

A dust mitigation plan may be required by City Code. The quarry does have such a plan and a copy has been provided to the City. The plan addresses potential dust creating activities at Biesanz such as:

- Haul roads/traffic on limestone roads - A water truck is available whenever dust generating activities are occurring, vehicle speeds are limited to 15 mph.
- Drilling for blasting - Areas surrounding drilling generally have substantial natural barriers such as hillsides or dense foliage.
- Blasting - Blasting will not occur when winds consistently exceed 25 mph, blasting will not occur within 750 feet of a residential property when winds consistently exceed 15 mph.

In addition, the sand has a 5-15% moisture content when mined. When sand has a moisture content above 1.5%, a minimal amount of dust (from the sand) is created by activities such as extraction, screening, and transportation.

## Water - Permits Held and Best Management Practices Followed

Biesanz holds a MNG 490000 permit from the MPCA which regulates storm water/water runoff from the mining site. The MNG 490000 permit covers a number of water-related requirements including:

- 1) Limits on stormwater and wastewater discharges
- 2) A response procedure for spills or leaks
- 3) Sampling of stormwater runoff recorded twice annually and sent to the MPCA.

In addition, the quarry is required to produce and adhere to a Pollution Prevention Plan which identifies Best Management Practices (BMPs) that eliminate or minimize potential sources of water pollution. The Pollution Prevention Plan is required to address the following activities:

- Excavation
- Crushing/screening
- Overburden, waste and products stockpiles
- Raw material and final product storage
- Waste products
- Sediment washing
- Material loading/unloading
- Areas where spills and leaks may potentially contribute pollutants to stormwater
- Vehicle and equipment maintenance, washing, and fueling

A copy of this plan has been filed with the City.

### Performance Standards

The City has performance standards for noise, dust, vibration, fire and explosion hazard, radioactivity, smoke, odors, glare, and liquid and solid wastes. Although all standards apply to the mine, those for noise and dust are probably most applicable to frac sand excavation activities. The performance standard for vibration does not apply to blasting because that activity is covered by separate blasting regulations in Chapter 63 of the City Code.

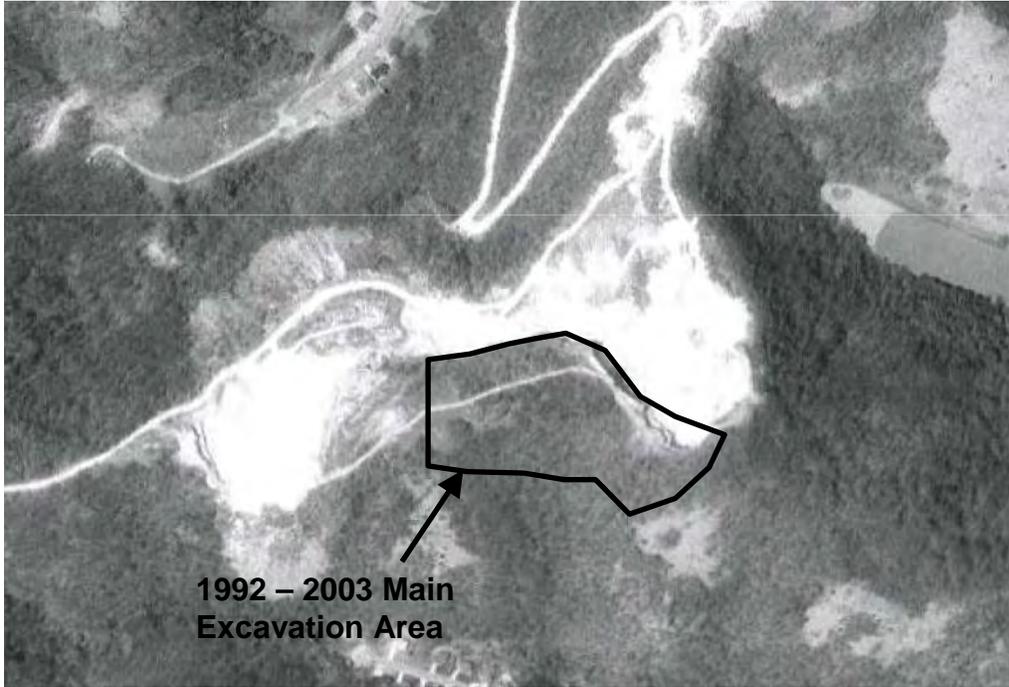
The performance standard for noise requires a significant reduction in noise travelling across the mine's property lines between the hours of 10 p.m. and 7 a.m. (i.e. the mine is required to be much "quieter" at night). This regulation still applies although the proposed nonconformity agreement stipulates that hours of operations will be 6 a.m. to 10 p.m. Monday through Friday, and 8 a.m. to 5 p.m. Saturdays and Sundays.

The performance standard for dust requires all activities to comply with state law and stipulates that a dust control plan may be required by the City. As stated previously, the quarry's dust control plan has been provided to the City.

### Nonconforming Status/CUP Applicability

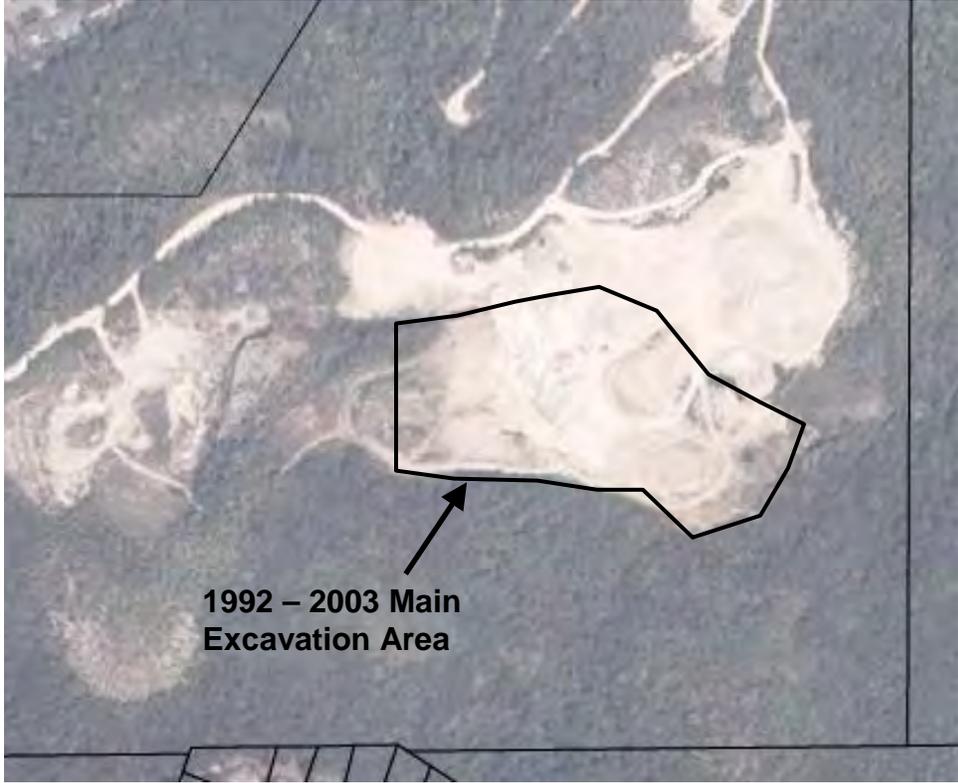
According to City Code, "Extraction Pits" are a conditional use in an Agricultural (A-G) zoning district. The existing mine property is in an A-G district, but does not have a CUP. This means the quarry was "grandfathered" when the quarry was zoned A-G in October 1998. "Grandfathered" is a term for a legal use that does not comply with zoning regulations (also known as a nonconformity). In October of 1998, Biesanz was "grandfathered in" as a legal nonconformity. The closest aerial photo prior to this date is from 1992:

1992



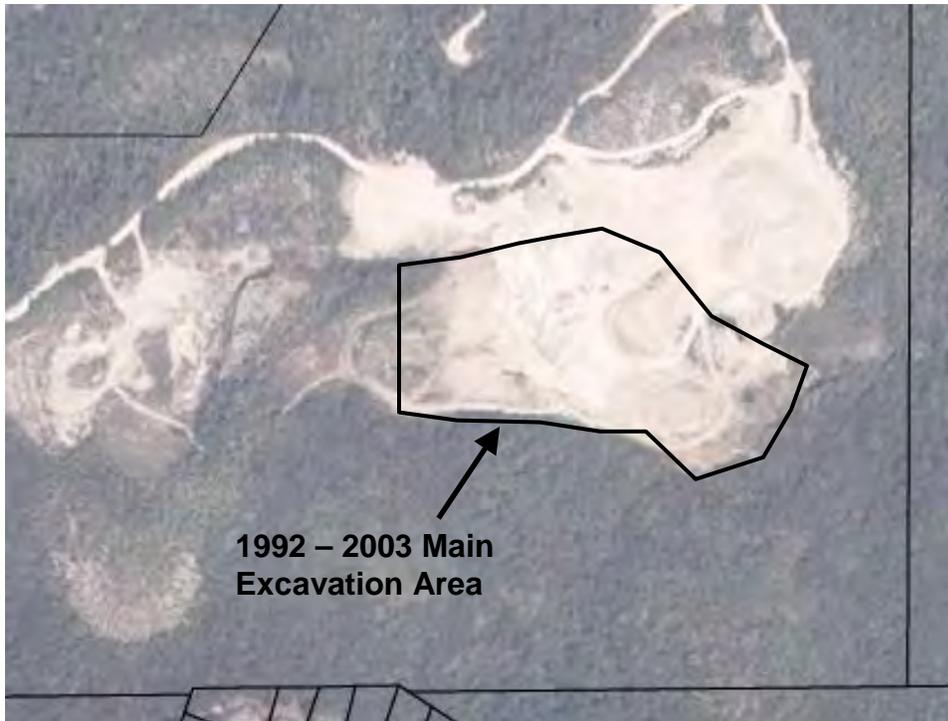
In 2003, the mine had the footprint below. Note the main area of excavation expansion (also shown on the 1992 photo above):

2003



Now, comparing the 2003 image and main excavation area with a 2011 image and the current frac sand excavation area:

2003



2011



These photos show that between 1992 and 2003, the mine expanded to include the area currently being excavated for frac sand. Thus, the 2011 excavation for frac sand occurred in an area which had already been mined for other products. Nonetheless, the quarry became a nonconformity in October 1998. According to City and state statutes, being “grandfathered in” as a nonconformity means that the use can continue, but not expand. However, mines are a unique land use (a “diminishing asset”) that must expand in order to continue at all. As a result, despite being a nonconformity, Biesanz can legally expand (on the same property) without triggering a CUP. In order to regulate expansion of the mine, staff recommends a “nonconformity agreement” be entered into with Biesanz Stone Company (see Recommendation Section).

### Additional Equipment

For the purpose of the sand processing and transportation facility CUP adopted in March 2012, “expansion” was defined as including:

- 1) Addition of new equipment
- 2) Increase in land area of use
- 3) Expansion onto a new site

“Addition of new equipment” was included in this definition to exemplify a prohibited expansion for sand processing and transportation facilities. However, the Biesanz quarry is a different type of use (i.e. extraction – diminishing asset vs. processing/transportation – non-diminishing asset). The difference is that additional and different types of equipment are essential to the operation of the mine. If the equipment example were attached to the quarry, it could not continue to operate in its legal grandfathered status – which is to excavate stone and aggregate products.

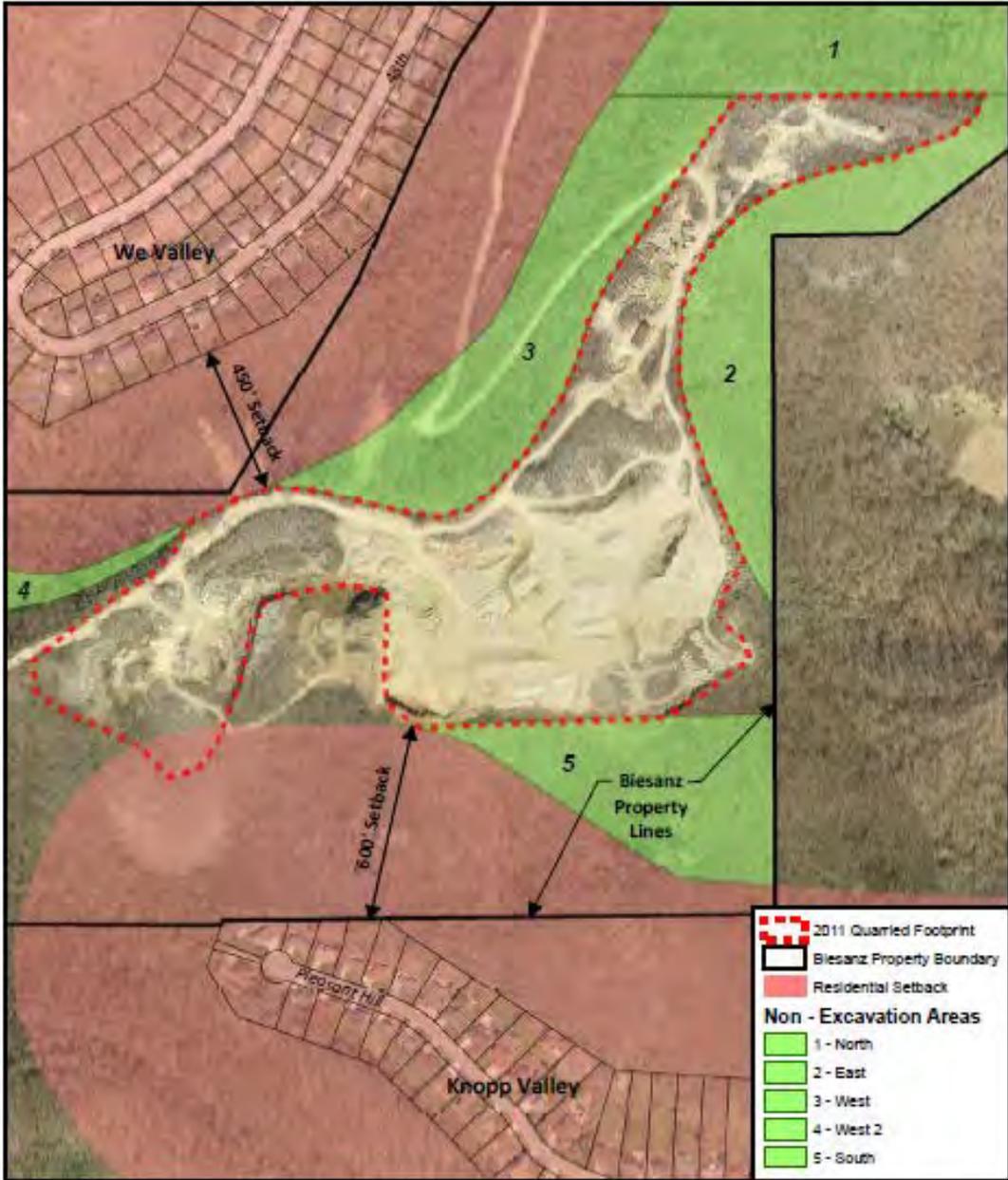
### **Recommendation – Nonconformity Agreement**

Minnesota State Statutes 462.357 Subd. 1e (b) states that *a municipality may, by ordinance, permit an expansion or impose upon nonconformities reasonable regulations to prevent and abate nuisances and to protect the public health, welfare, or safety.* To accomplish this, a “nonconformity agreement” between the City and the Biesanz Stone Company is recommended to regulate expansion of the mine. Such an agreement is recommended instead of a Conditional Use Permit because it is more flexible than a generic CUP (and thus a better fit for an existing grandfathered use). Given the above described regulations which already apply to the quarry, the following stipulations have been incorporated into the draft agreement (attached):

- 1. Future excavation shall not occur closer to Knopp Valley or WE Valley residential properties than existing, or occur in designated areas outside residential setbacks

As shown in the map below, future excavation will not be permitted in the red or green areas:

## Proposed Non-Excavation Areas Outside Residential Setbacks We Valley and Knopp Valley



2. An EAW is required for sand excavation outside 2011 quarried footprint

An EAW is required for sand excavation outside the 2011 quarried footprint as shown on the previous map (red dotted line).

3. A maximum depth of mining shall be established at an elevation of 975 feet

Excavation shall not occur below an elevation of 975 feet. This is the approximate elevation of excavation which occurred in 2011.

4. Hours of operation for mining and associated activities shall be 6 a.m. to 10 p.m. Monday through Friday, and 8 a.m. to 5 p.m. Saturdays and Sundays

These hours represent the maximum time window for mining and associated activities. Typically, hours of operation for mining are much shorter. Performance standards for noise would still apply to the mine. If needed, the operator may submit a plan for extended hours as a special exception. The City and the operator must agree on the extended hours.

5. Outdoor operating equipment shall be equipped with white noise alarms or other noise muzzling devices to reduce backup beeping noises normally associated with equipment operating in reverse.

6. All trucks departing the site will be properly loaded and covered. Any spillage of sand or other material shall be cleaned up by the Company at the direction of the City Manager.

7. Moisture testing of uncovered sand stockpiles shall be required.

Moisture testing will ensure that uncovered stockpiles of sand have a moisture content of greater than 1.5%. The 1.5% requirement is used in most permits by the MPCA and has been recommended for approval by the Planning Commission.

8. Permits shall be placed on file

Current site permits shall be placed on file at the City of Winona. This includes the MPCA MNG490000 Nonmetallic Mining and Associated Activities permit, and the Pollution Prevention Plan required as part of this permit.

9. A fugitive dust plan shall be placed on file

A copy of the quarry's most recent fugitive dust control plan shall be submitted to the City of Winona.

10. A mine plan shall be produced

A plan which contains the following information shall be submitted to the City of Winona:

- Existing state:
  - Map of 2012 excavated area with contour lines at (5) foot intervals
  - Depths of current excavation

- Existing vegetation
- Existing drainage
- Existing wells
- Planned excavation:
  - Future excavation areas at 4600 Goodview Road mapped with contour lines at (5) foot intervals
  - Approximate timing of future excavation areas
  - Approximate depths of future excavation

11. A reclamation plan shall be produced

A reclamation plan shall be prepared by the Company and the Company's expense and submitted to the City not more than 12 months after the effective date of the agreement. The plan will include a land use/cover plan equal to the actual land use/cover types that existed on the Property prior to the onset of excavation operations.

In addition, a performance bond equaling 110% of the estimated cost of reclamation for a period equal to the life of the quarry plus two years shall be filed to ensure that the reclamation plan is completed as proposed. Other requirements of the plan are listed in Attachment A.

12. Yearly updates on the progress of the excavation and reclamation plans shall be submitted to the City along with the notification and community meeting requirements of City Code Section 63.25 (Blasting Requirements).

13. Changes to the excavation and reclamation plans that exceed the terms of the agreement must be approved by the City Council.

14. Continued compliance with City, State, and Federal regulations is required.

The agreement will remain in effect for 15 years and will renew automatically in terms of five years unless notice is given by the City or the Company. Other details are provided in Attachment A.

Attachment:

- A) Proposed Nonconformity Agreement

(Top 3 inches reserved for recording data)

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**NONCONFORMITY AGREEMENT  
BY AND BETWEEN  
THE CITY OF WINONA, MINNESOTA  
AND  
BIESANZ STONE COMPANY**

THIS AGREEMENT (the “Agreement”) is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2012, by and between the City of Winona, a Minnesota municipal corporation (the “City”); and Biesanz Stone Company, a corporation under the laws of the State of Minnesota (the “Company”), whose principal address is 4600 Goodview Road, Winona, MN 55987, (collectively the “parties”).

**RECITALS**

WHEREAS, the Company is the owner of certain real property within the City located at 4600 Goodview Road, Winona, MN 55987 (the “Property”); and

WHEREAS, the Property is legally described in Exhibit A, which is attached hereto and incorporated herein by reference; and

WHEREAS, the Company operates a quarry and industrial sand excavation operation on the Property. The word excavation as used herein is generally defined as removing by digging out, and industrial sand is generally defined as provided in SIC code 1446 – covering establishments engaged in operating sand pits and dredges, and in washing, screening, and otherwise preparing sand for uses other than construction; and

WHEREAS, the Company has produced Biesanz stone and various aggregate products such as sand, gravel, and crushed rock, on the Property since 1904; and

WHEREAS, the Property was annexed to the City of Winona on January 22, 1996 and thereafter has been operated as a legal nonconformity under applicable law; and

WHEREAS, the City owns certain streets and rights-of-way within the City limits on which trucks are operated to access Company's quarry and industrial sand excavation facility (the "Facility"); and

WHEREAS, the Facility is located in close proximity to significant residential development within Knopp Valley in the City and WE Valley in the City of Goodview, which developments were created after establishment of the Company's operations on the Property; and

WHEREAS, Minn. Stat. § 462.357, subd. 1e and the City Code of the City of Winona, Section 43.32 (f) authorize the City to impose upon any nonconformity reasonable regulations or conditions to prevent and abate nuisances and to protect the public health, welfare, or safety; and

WHEREAS, City Code of the City of Winona, Section 43.32 (f) provides that such reasonable regulations or conditions may be imposed by the City on a nonconformity through a recordable instrument approved by the City Council, including a nonconformity agreement, or otherwise by permit or order of the City Council; and

WHEREAS, the City and Company desire to establish reasonable regulations and conditions through this nonconformity agreement to protect the public health, welfare, and safety.

## **AGREEMENT**

NOW, THEREFORE, in consideration of the mutual covenants expressed herein, the receipt and sufficiency of which are hereby acknowledged, the City and Company hereby agree as follows:

1. RECITALS. The foregoing recitals are made a part of this Agreement by reference.
2. PROPERTY. The Company is the owner of certain real property located at 4600 Goodview Road, Winona, MN 55987 in the City, which real property is legally described in Exhibit A. This agreement shall not apply to operations occurring on that portion of the property shown on Exhibit B attached hereto provided no extraction activities occur in this area (the "exempted area").
3. PURPOSE. Pursuant to Minn. Stat. § 462.357, subd. 1e and the City Code of the City of Winona, Section 43.32 (f), the purpose of this Agreement is to

establish reasonable regulations and conditions through this Agreement to protect the public health, welfare, and safety.

4. REGULATIONS AND CONDITIONS. The following regulations and conditions shall apply:
  - a. Excavation operations on the Property shall observe a minimum 600 foot setback from existing platted residential property lines in Knopp Valley and a 450 foot setback from existing platted residential property lines in WE Valley as depicted in Exhibit C, attached hereto.
  - b. Excavation on the Property shall not occur in designated areas outside residential setbacks specified above as depicted in Exhibit C.
  - c. An EAW shall be required for sand excavation that will occur outside the 2011 quarried footprint as depicted in Exhibit C.
  - d. A maximum depth of excavation shall be established at an elevation of 975 feet.
  - e. Hours of operation for excavation and associated activities (including screening, crushing, and trucking of excavated material) on the nonexempt portion of the Property shall be 6 a.m. to 10 p.m. Monday through Friday, 8 a.m. to 5 p.m. Saturday, and 8 a.m. to 5 p.m. Sunday to minimize off-site impacts to residents. The operator may submit a plan for extended hours as a special exception. The City and the operator shall agree on the extended hours prior to commencement of related activity.
  - f. Onsite outdoor operating equipment shall be equipped with white noise alarms or other noise muffling devices (as allowable and approved by the Mining, Safety and Health Association – MSHA) to reduce backup beeping noises normally associated with equipment operating in reverse.
  - g. All trucks departing the site will be properly loaded and covered in accordance with state law and local ordinances before leaving the site to minimize to the greatest extent possible sand or other material or debris being deposited on any streets, public rights-of-way or private property located within the City. Any spillage of any sand or other materials by trucks from site operations shall be cleaned up by the Company at the direction of the City Manager, and the Company shall reimburse the City for the costs and expenses incurred by the City due to any extra street sweeping made necessary in the judgment of the City Manager to clean up spillage attributable to site operations.
  - h. The Company shall conduct moisture testing or air quality monitoring to ensure hazardous levels of dust are not being created by industrial sand.

If moisture testing is conducted, such testing shall occur in accordance with the procedure in Exhibit D. If air quality monitoring is conducted, such monitoring shall be completed in correspondence with the MPCA and according to applicable state regulations.

- i. Any applicable local, state, or federal permits shall be obtained and placed on file at the City with the City Clerk on an ongoing basis for the term of this Agreement. This includes the MPCA MNG490000 Nonmetallic Mining and Associated Activities permit, and the Pollution Prevention Plan required as part of this permit. Such permits shall be submitted to the City within 30 days of the effective date of this Agreement or within 30 days of any renewal or new permits, as applicable.
- j. A copy of the quarry's most recent fugitive dust control plan shall be placed on file at the City with the City Clerk within 30 days of the effective date of this Agreement. The fugitive dust control plan shall comply with City Code Section 43.33(e).
- k. An excavation plan shall be prepared by the Company at the Company's expense and submitted to the City not more than 12 months after the effective date of this Agreement. The Company's mine plan submitted to the City shall contain the following:
  - i. Existing state:
    1. Map of 2012 excavated area with contour lines at (5) foot intervals
    2. Depths of current 2012 excavation
    3. Existing vegetation
    4. Existing drainage
    5. Existing wells
  - ii. Planned excavation:
    1. Future excavation areas at 4600 Goodview Road mapped with contour lines at (5) foot intervals
    2. Approximate timing of future excavation areas
    3. Approximate depths of future excavation

1. A reclamation plan shall be prepared by the Company at the Company's expense and submitted to the City not more than 12 months after the effective date of this Agreement. The Company's reclamation plan submitted to the City shall contain the following:
  - i. Reclamation shall be complete within one (1) calendar year after the operation of the Facility on the Property ceases. The reclamation plan shall specify a systematic approach to land reclamation for the excavation site on the Property, including phases and schedule for reclamation. The reclamation plan shall include maps which show:
    1. Final grade at site showing elevations and contour lines at five (5) foot intervals.
    2. Location and type of non-invasive species of vegetation to be replanted.
    3. Location and nature of any structures to be erected in relation to the end use plan.
  - ii. The reclamation plan shall include a land use/cover plan equal to the actual land use/cover types that existed on the Property prior to the onset of excavation operations on the Property.
  - iii. Areas intended for post-excavation agricultural uses must include approval by Winona County Soil and Water Conservation District for best management practices.
  - iv. Within a period of three (3) months after the termination of an operation, or within three (3) months after abandonment of such operation for a period of six (6) months, or within three (3) months after expiration of a permit, all buildings, structures and plans incidental to such operation shall be dismantled and removed by, and at the expense of, the excavation operator last operating such buildings, structures and plants.
  - v. The following standards shall apply to the reclamation plan:
    1. When the post-excavation land use includes a body of water, all excavation shall be made to a water producing depth not less than 5 feet below the bow watermark. A slope no steeper than 3:1 shall be created to allow for a safe exit.

Excavation may also be graded or backfilled with non-toxic, nonflammable and noncombustible solids, to

ensure (a) that the excavated area shall not collect and permit to remain therein stagnant water or (b) that the surface of such area which is not permanently submerged is graded or backfilled as necessary so as to reduce the peaks and depressions thereof, so as to produce a gently running surface that will minimize erosion due to rainfall and which will be in substantial conformity to the adjoining land area.

Final reclaimed slopes covered by topsoil or topsoil substitute material may not be steeper than a 4:1 horizontal to vertical incline, unless demonstrated based on site-specific engineering analysis performed by a registered professional engineer. All areas in the extraction pit site where topsoil or topsoil substitute material is to be reapplied shall be graded or otherwise prepared prior to topsoil or topsoil substitute material redistribution to provide the optimum adherence between the topsoil or topsoil substitute material and the underlying material.

2. Topsoil Redistribution for Reclamation: Topsoil or topsoil substitute material shall be redistributed in a manner which minimizes compacting and prevents erosion. Topsoil or topsoil substitute material shall be uniformly redistributed except where uniform redistribution is undesirable or impractical. Topsoil or topsoil substitute material redistribution may not be performed during or immediately after a precipitation event until the soils have sufficiently dried.
3. Vegetation shall be restored by appropriate seeding of grasses or planting of shrubs or trees in all parts of such extraction area where such area is not to be submerged under water.
4. Assessing Completion of Successful Reclamation:
  - a. The criteria for assessing when reclamation is complete shall be specified in the reclamation plan. Criteria to evaluate reclamation success shall be quantifiable.
  - b. Compliance with the re-vegetation success standards in the approved reclamation plan shall be determined by:

- i. On-site inspections by the City of Winona or its agent;
    - ii. Reports presenting results obtained during reclamation evaluations including summarized data on re-vegetation, photo documentation or other evidence that the criteria in the reclamation plan have been met; or
    - iii. A combination of inspections and reports. In those cases where the post excavation land use specified in the reclamation plan requires a return of the excavation site to a pre-excavation condition, the operator shall obtain baseline data on the existing plant community for use in the evaluation of reclamation success pursuant to this section.
  - c. Re-vegetation success may be determined by:
    - i. Comparison to an appropriate reference area;
    - ii. Comparison to baseline data acquired at the excavation site prior to its being affected by excavation; or
    - iii. Comparison to an approved alternate technical standard.
  - d. Re-vegetation using a variety of plants indigenous to the area is encouraged.
- vi. A performance bond equaling 110% of the estimated cost of reclamation for a period equal to the life of the quarry plus two years shall be filed.
- m. Yearly updates on the progress of the excavation plan and reclamation plans shall be submitted to the City along with the notification and community meeting requirements of City Code Section 63.25. All plan updates shall be placed on file at the City with the City Clerk.
- n. Changes to the excavation and reclamation plans that exceed the terms of this Agreement must be approved by the City Council.



## 10. REMEDIES.

- a. Corrective Orders. The City may issue a notice of violation and order that specifies the action to be taken to remedy a default and the time period for curing the default.
- b. Remediation and Reimbursement. In the event the Company fails to perform any of its obligations under this Agreement, including, but not limited to, maintenance of and restoration/reclamation of the Property, the City may, but shall not be required to, perform such obligations at Company's expense. Before performing Company's obligations, the City shall give Company at least 30 days written notice unless the City determines that threats to health, safety, welfare or property require a shorter notice period. The Company shall reimburse the City for all expenses incurred for materials, contractors, engineers, attorneys and other consultants in connection with performing Company's obligations within 30 days of billing therefor. City shall have the right to assess and certify for collection with property taxes any unpaid charges levied against the Company for which payment has become delinquent.
- c. Legal Action. The City reserves the right to commence legal action to enforce the terms of this Agreement and seek remedies which include: termination of the Agreement for a default, specific performance of the obligations under this Agreement, penalties and/or damages in an amount determined by the court, and/or injunctive relief.

11. PRESERVATION OF REMEDIES. The remedies provided herein shall not be exclusive of other remedies. A failure by the City to take action on any past violation(s) shall not constitute a waiver of the City's right to take action on any subsequent violation(s).

12. LEGAL FEES. The Company agrees to pay the City reasonable attorney's fees, to be fixed by the Court, in the event that the City is the prevailing party in a suit or action brought to enforce the terms of this Agreement.

13. RIGHTS RUNNING WITH THE LAND AND RECORDING. Until this Agreement is terminated as provided for herein, the terms and provisions of this Agreement shall be binding upon and accrue to the benefit of the heirs, grantees, representatives, successors and assigns of the parties hereto and shall be binding upon all future owners of all or any part of the Property and shall be deemed covenants running with the land. Reference herein to the Company or owners of the Property, if there be more than one, shall mean each and all of them. This Agreement, at the option of the City, shall be placed on record so as to give notice hereof to subsequent purchasers and encumbrances of all or any part of the Property and all recording fees shall be paid by the City. The regulations and conditions contained in this Agreement shall be enforceable by

the City and the City has the right to sue for and to obtain an injunction or other relief available at law or in equity to prevent breach hereof or to enforce the performance or observance hereof. The Company further warrants that the owners have authorized the Company to engage in nonmetallic excavation on the Property and to enter into this Agreement. The Company and the persons signing for the Company warrant that the Company has the full right and authority to enter into this Agreement.

14. RIGHT TO INSPECT. The Company hereby grants to the City, its agents, representatives, employees, officers and contractors, a right of entry to access all areas of the Property reasonably necessary to perform any and all work and inspections necessary to take any necessary corrective actions. The City will provide the Company with reasonable notice prior to exercising its rights hereunder, except in the case of an emergency.
15. NOTICES. Any notice provided for or permitted under this Agreement will be treated as having been received (a) when delivered personally, (b) when sent by confirmed facsimile or (c) three (3) days following when sent by certified mail, to the party to be notified, at the address set forth below, or at such other place of which the other party has been notified in accordance with the provisions of this Section.

- a. If to the Company, at:

Darrell Stahlecker, CEO  
Biesanz Stone Company, Inc.  
4600 Goodview Rd  
Winona MN 55987

- b. If to the City, at:

City Manager  
Winona City Hall  
207 Lafayette Street  
Winona, MN 55987

Such notice will be treated as having been received upon actual receipt if actual receipt occurs earlier than as provided in clauses (a) through (c) hereof.

Any party may change its address for notice purposes by giving notice in writing, stating its new address, to any other party. Commencing on the tenth (10th) day after the giving of notice, the newly designated address shall be that party's address for the purposes of all approvals, communications, demands, notices, or objections permitted or required to be given or served under this Agreement.

## 16. GENERAL TERMS.

- a. **Voluntary and Knowing Action.** The parties, by executing this Agreement, state that they have carefully read this Agreement and understand fully the contents thereof; that in executing this Agreement they voluntarily accept all terms described in this Agreement without duress, coercion, undue influence, or otherwise, and that they intend to be legally bound thereby.
- b. **Authorized Signatories.** The parties each represent and warrant to the other that (1) the persons signing this Agreement are authorized signatories for the entities represented, and (2) no further approvals, actions or ratifications are needed for the full enforceability of this Agreement against it; each party indemnifies and holds the other harmless against any breach of the foregoing representation and warranty.
- c. **Modifications/Amendment.** Any alterations, variations, modifications or amendments of the provisions of this Agreement shall only be valid when they have been reduced to writing, and signed by an authorized representative of the parties.
- d. **No Partnership, Joint Venture, or Fiduciary Relationship.** Nothing contained in this Agreement shall be interpreted as creating a partnership, joint venture, or relationship of principal and agent between the parties.
- e. **Governing Law.** This Agreement shall be deemed to have been made and accepted in Winona County, Minnesota, and the laws of the State of Minnesota shall govern any interpretations or constructions of the Agreement without regard to its choice of law or conflict of laws principles.
- f. **Records—Availability and Retention.** Pursuant to Minn. Stat. § 16C.05, subd. 5, Company agrees that the City, the State Auditor, or any of their duly authorized representatives at any time during normal business hours and as often as they may reasonably deem necessary, shall have access to and the right to examine, audit, excerpt, and transcribe any books, documents, papers, records, etc., which are pertinent to the accounting practices and procedures of Company and involve transactions relating to this Agreement. Company agrees to maintain these records for a period of six years from the date of termination of this Agreement.
- g. **Data Practices.** The parties acknowledge that this Agreement is subject to the requirements of Minnesota's Government Data Practices Act, Minnesota Statutes, Section 13.01 et seq.
- h. **No Waiver.** Nothing in this agreement shall be construed to waive any immunities or limitations to which the City is entitled under Minn. Stat. Chapter 466 or otherwise. Except as expressly set forth herein, the

Company does not waive and shall not be deemed to have waived any right or remedy relating to use or occupancy of the Property. No waiver by any party to this Agreement of any condition or of any breach of any provision of this Agreement will be effective unless in writing. No waiver by any party of any such condition or breach, in any one instance, will be deemed to be a further or continuing waiver of any such condition or breach or a waiver of any other condition or breach of any other provision contained in this Agreement.

- i. Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision. Any invalid or unenforceable provision shall be deemed severed from this Agreement to the extent of its invalidity or unenforceability, and this Agreement shall be construed and enforced as if the Agreement did not contain that particular provision to the extent of its invalidity or unenforceability.
- j. Entire Agreement. These terms and conditions constitute the entire Agreement between the parties regarding the subject matter hereof. All discussions and negotiations are deemed merged in this Agreement.
- k. Headings and Captions. Headings and captions contained in this Agreement are for convenience only and are not intended to alter any of the provisions of this Agreement and shall not be used for the interpretation of the validity of the Agreement or any provision hereof.
- l. Survivability. All covenants, indemnities, guarantees, releases, representations and warranties by any party or parties, and any undischarged obligations of City and Company arising prior to the expiration of this Agreement (whether by completion or earlier termination), shall survive such expiration.

*[Signature page to follow]*

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

Address:

4600 Goodview Road  
Winona, MN 55987

COMPANY: **BIESANZ STONE COMPANY**

By: \_\_\_\_\_  
Darrell Stahlecker  
Its: President and CEO

Address:

207 Lafayette Street  
Winona MN 55987

CITY: **CITY OF WINONA, MINNESOTA**

By: \_\_\_\_\_  
Jerome S. Miller  
Its: Mayor

(CORPORATE SEAL)

By: \_\_\_\_\_  
Monica Hennessy Mohan  
Its: City Clerk

## EXHIBIT A

### **Legal Description of the Property**

The South Half of the Southwest Quarter (S ½ of SW ¼) and also all those parts of the North Half of the Southwest Quarter (N ½ of SW ¼) and of Government Lot Two (2), Section Nineteen (19), Township One Hundred Seven (107) North, of Range Seven (7), West of the Fifth Principal Meridian, Winona County, Minnesota as lies Easterly of a line described as follows:

Commencing at the Northeast corner of said Lot 2, Section 19, Tp. 107, Rg. 7, (which said corner is 80 rods more or less North of the center of said Section 19, to a monument designating the intersection of the North and South center section line with the East and West Quarter Quarter section line); thence South 34° 15' West 474.5 feet to a point on the South line of Goodview Road 10 feet, more or less, West of the intersection of the South line of Goodview Road with the West line of Quarry Road; thence Northwesterly along the Southerly line of Goodview Road to a point which is 12 feet in perpendicular distance from the line first mentioned; thence Southwesterly to a point which is located as follows:

Commencing at the Northeast corner of Lot 2, Section 19, Tp. 107, Rg. 7, (which said corner is 80 rods, more or less, North of the center of said Section 19, to a monument designating the intersection of the North and South centerline with the East and West Quarter Quarter section line); thence South 34° 15' West 474.5 feet to the point on the South line of Goodview Road as heretofore described; thence along the same line projected 231.5 feet to a point in the Quarry Road; thence Westerly a distance of 12 feet in perpendicular distance from the line last mentioned to a point, being the point to be located as aforesaid; thence Southwesterly to a point on the North line of the NE ¼ of the SW ¼ of Section 19, Tp. 107, Rg. 7, 10 feet West of the Quarry Road (said point being about 330 feet East of the Northwest corner of said NE ¼ of the SW ¼ of Section 19, Tp. 107, Rg. 7; thence Southwesterly to a point on the South line of the NW ¼ of the SW ¼ of Section 19, Tp. 107, Rg. 7, 220 feet West of the Southeast corner thereof.

Also, Government Lot Three (3), Section Nineteen (19), Township One Hundred Seven (107) North, of Range Seven (7), West of the Fifth Principal Meridian, Winona County, Minnesota, except three (3) tracts described as follows:

1. Beginning at the Southwest corner of the SE ¼ of the NE ¼ said Section; thence extending in a Westerly direction 142.35 feet; thence Northeasterly to a point 306 feet North of the Southwest corner of the SE ¼ of the NE ¼, said point lying on the South line of what is known as Goodview Highway; thence South 306 feet to place of beginning.

2. That part of said Government Lot 3, Section 19, Tp. 107, Rg. 7, lying East of the intersection of the public highways commonly known as "Goodview Road" and "Cross Road to Bluff" that runs from Minnesota Trunk Highway No. 3

across the SE ¼ of the NE ¼ of said Section 19 to said "Goodview Road" and more particularly described as follows, to-wit:

Beginning at the intersection of the Northeasterly line of said Goodview Road with the West line of the SE ¼ of the NE ¼ of said Section 19; thence running North on and along the West line of said SE ¼ of NE ¼ of said Section a distance of 160 feet, more or less, to its intersection with the Southeasterly line of said "Cross Road"; thence Southwesterly a distance of 160 feet, more or less, along and on the Southeasterly line of said "Cross Road" to where it intersects the Northeast line of said "Goodview Road"; thence Southeasterly along and on the Northeasterly line of said "Goodview Road" to place of beginning.

3. Beginning at the Southeast corner of said Lot 3 and running West on the South line thereof a distance of 142.35 feet; thence Northeasterly to a point on the East line of said lot 306 feet North of place of beginning; thence Northwesterly 450 feet which is the place of beginning; thence Southwesterly 200 feet; thence turning at a right angle Northwesterly 150 feet; thence at a right angle Northeasterly 200 feet; thence Southeasterly 150 feet along the road to the place of beginning.

Also, Beginning at the center of Section Nineteen (19), Township One Hundred Seven (107) North, of Range Seven (7), West of the Fifth Principal Meridian, Winona County, Minnesota; thence South along the North-South Quarter line of said Section 19 a distance of 500 feet; thence Easterly at a deflection angle to the left of 91° 39' a distance of 313 feet; thence Northeasterly at a deflection angle to the left of 34° 23' a distance of 470 feet; thence Northerly at a deflection angle to the left of 20° 00' a distance of 260 feet, more or less, to the East-West Quarter line of said Section 19; thence West along the East-West Quarter line of Section 19 to the place of beginning.

Excepting therefrom, all that part of Government Lot Two (2) and the North Half of the Southwest Quarter (N ½ of SW ¼) of said Section Nineteen (19), lying West of the following described line:

Commencing at the Northeast corner of said Government Lot 2; thence South 34° 15' West 474.50 feet through a one half inch iron pipe monument in the centerline of Goodview Road to a point on the South line of Goodview Road distant 10.00 feet, more or less, West of the intersection of the South line of Goodview road with the West line of the Old Quarry Road; thence North 55° 45' West along said South line of Goodview Road 12.00 feet to the point of beginning of the line to be described; thence South 34° 15' West a distance of 231.50 feet; thence South 32° 21' West to a point on the North line of the NE ¼ of the SW ¼ of said Section 19, said point being 10.00 feet, more or less, West of the West line of said Old Quarry Road; thence South 22° 37' West to the South line of the NW ¼ of the SW ¼ of said Section 19 and there terminating. For the purposes of this description the North line of the NW ¼ of said Section 19 has an assumed bearing of North 85° 51' 07" East.

Also excepting therefrom, WE Valley Estates First Addition and WE Valley Estates Subdivision 2A, according to the plats thereof on file and of record in the office of the County Recorder, Winona County, Minnesota.

Also excepting therefrom, that part of the Government Lot 3, Sec. 19, Tp. 107, Rg. 7, Winona County, Minnesota, as shown as Parcel #1 on the Plat designated as Winona County Highway Right-of-Way Plat No. 2129 on file and of record in the Office of the County of the County Recorder in and for Winona County, Minnesota.

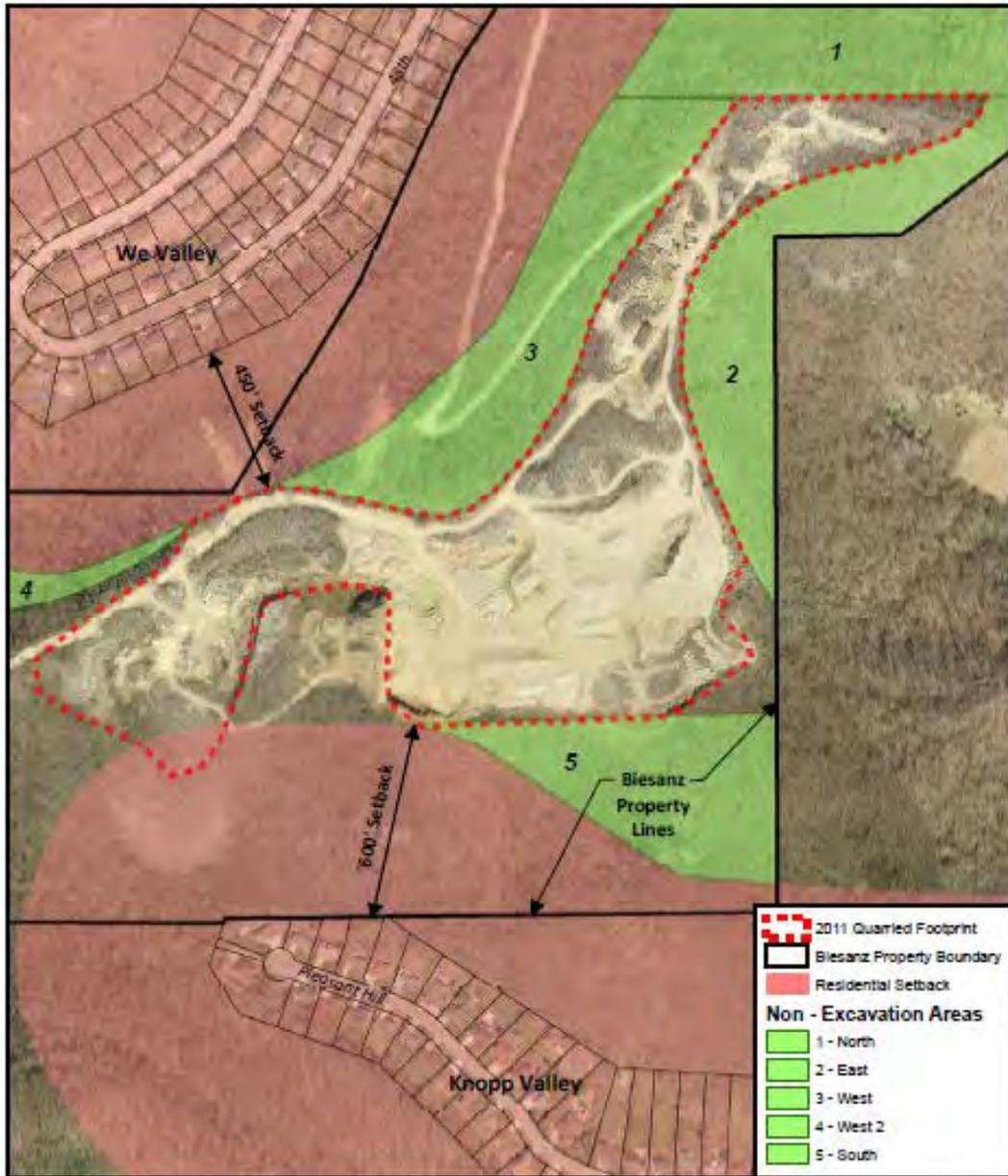
**EXHIBIT B**  
**Exempted Area of the Property**



# EXHIBIT C

## Map of Non-Excavation Areas and 2011 Excavation Footprint

### Proposed Non-Excavation Areas Outside Residential Setbacks We Valley and Knopp Valley



This map was compiled from a variety of sources. This information is provided with the understanding that conclusions drawn from such information are solely the responsibility of the user. The GIS data is not a legal representation of any of the features depicted, and any assumptions of the legal status of this map is hereby disclaimed.

0 250 500 1,000 Feet

Map date October 2012  
Aerial photography from Spring 2008

## EXHIBIT D

### **Moisture Testing Procedure**

#### **City of Winona Moisture Testing Procedure**

**The intent of moisture testing is to ensure that particulates (specifically crystalline silica) are not being emitted into the ambient air in hazardous quantities. Moisture testing is meant to be a low-cost, proactive alternative to air quality monitoring. Air-quality monitoring may be substituted for moisture testing. Such monitoring should be completed in correspondence with the MPCA and according to applicable state regulations. Moisture testing is not required for fully enclosed processing, stockpiling, or transportation facilities or equipment. If testing already occurs, results sent to the City of Winona may be used to fulfill the requirement for moisture testing. The general moisture testing procedure is below:**

- 1) Test once weekly when operating. Test sand in each uncovered stockpile and in one uncovered railcar (if present). Test mid-day (11 a.m. -1 p.m.) and mid-train (after sand has been disturbed). Moisture content must be greater than or equal to 1.5%.
- 2) Use American Society for Testing and Materials (ASTM) method numbers D 2216-92 or D 4643-93 (or equivalent).
- 3) If three consecutive weekly tests at a single location show moisture contents greater than or equal to 1.5%, weekly testing is no longer required until the source of sand changes. The City may still conduct random tests of moisture content.
- 4) If a single test shows a moisture percentage less than 1.5%, re-test the next day between 11 a.m. and 1 p.m. If the re-test is greater than or equal to 1.5% continue with weekly tests. If the re-test shows a moisture percentage less than 1.5%, re-test again the next day. If three consecutive tests at a single location show moisture contents less than 1.5%, a moisture addition device must be utilized to wet sand prior to processing or loading.
- 5) The operator shall keep records of each moisture test used to satisfy the requirements above. The records must summarize the method used, results, date, time, initials of person performing test, and the source of sand. If appropriate, provide a map of sampling locations. Submit all information to the City of Winona monthly or upon completion of number three above.