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STATE OF MINNESOTA

COUNTY OF OLMSTED

DISTRICT COURT

THIRD JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Court File #55-CV-15-6531

Wilmar Investments, LLC,

Plaintiff,

vs.

Cascade Township,

Defendant.

AMENDED MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case concerns Wilmar Investments, LLC's attempt to convert what has been primarily agricultural land in section 11 of Cascade Township into a large rock pit. The land at issue is located not far from the south branch of the Zumbro River in an area just north of the city limits of Rochester. The parcels at issue are surrounded by residential developments. Some residences are located within 20 feet of the parcels that Wilmar proposes to convert to a large hard rock mining operation. The proposed project would include drilling, blasting with explosives, and rock crushing on parcels that have never seen such activity or on which such activities have not taken place for decades. The proposed mining operation would, according to the estimates of Wilmar's tenant, Mathy Construction, last for 50-100 years, result in the extraction of 30-60 million tons of material, and leave a large artificial lake when the project is completed.

In September 2014, Wilmar sought a zoning change that would allow this project to move forward. The zoning change was denied by the Township Board. No appeal was taken

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from the township board's decision. Instead, Wilmar filed this lawsuit, contending that it is a legal non-conforming use not subject to zoning requirements.

The declarations that Wilmar seeks are properly denied as a matter of law, because the status of legal non-conforming use only applies to parcels of land on which the non-conforming use was occurring at the time of the adoption of land use controls in 1971. Further, any mining activity that has occurred on the parcels located in section 11 has been discontinued and lost any legal status it had as a result of this discontinuance of use. Finally, the doctrine of diminishing assets, the legal doctrine Wilmar relies on in seeking its declaration, being an exception to the general rule that non-conformities not be expanded, should not be applied in a situation where Wilmar is proposing a large hard rock mining operation that will have substantial negative effects on adjacent property owners. The requested declaratory relief is properly denied.

STATEMENT OF DOCUMENTS RELIED ON

1. Affidavit of Kenneth Bayliss with attachments
2. Affidavit of Roger Ihrke
3. Affidavit of David Derby
4. Affidavit of Lenny Laures
5. Affidavit of Charles Wallace
6. Declaration of Alex Conzemius, with report

STATEMENT OF ISSUES

1. Whether Plaintiff's claimed legal non-conforming use may be expanded to adjacent parcels of land.
2. Whether there has been a discontinuance of mining activities such that the section 11 parcels have lost any legal non-conforming status they might have had.
3. Whether the Court should apply the well-recognized three-prong test applicable to the evaluation of cases involving the diminishing assets doctrine.

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4. Whether application of the three-prong test applicable to diminishing assets cases requires the Court to grant judgment for the Township.

STANDARD OF REVIEW

Summary judgment is proper if there is no genuine issue of material fact and a party is entitled to judgment as matter of law. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993); see Minn. R. Civ. P. 56.03. No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1989)). The court determines genuine issues of material facts viewing the evidence in the light most favorable to the nonmoving party. Fabio, 504 N.W.2d at 761. "When the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." DLH, Inc., 566 N.W.2d at 71. A bare allegation is insufficient to establish a genuine issue of material fact concerning an unlawful end. Dunham v. Roer, 708 N.W.2d 552, 572 (Minn. Ct. App. 2006). Here uncontested facts demonstrate that Cascade Township is entitled to judgment as a matter of law.

STATEMENT OF UNDISPUTED FACTS

Cascade Township is located just north of the City of Rochester and is split into two pieces by the city. Affidavit of Roger Ihrke, ¶ 1. This case concerns land owned by Wilmar in sections 11 and 14 of Cascade Township. The land at issue is depicted in a parcel map that shows the boundaries of the individual parcels in sections 11 and 14:

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Affidavit of Kenneth H. Bayliss, Exhibit 1, Parcel Map. The section 11 and section 14 properties are separated by 55th Street. Id. Since 2000, Cascade Township has had zoning authority over the area in question. Ihrke Aff., ¶ 1. Before 2000, Olmsted County had zoning authority over areas within Cascade Township. Id.

Section 14, the section south of 55th Street and just south of section 11, includes a rock quarry that has been run by Rochester Sand and Gravel for several decades. Rochester Sand and Gravel was a business, including land, that was sold to the current owners of Wilmar, Mark Hindermann and William Fitzgerald. William Fitzgerald Deposition, p. 15, l. 16, Bayliss Aff., Ex. 16. In 1998, Wilmar, a company owned by Hindermann and Fitzgerald, entered an Aggregates Lease Agreement with Mathy Construction. Lease, Bayliss Aff., Ex. 2. The lease provided Mathy exclusive rights to mine a number of parcels of land. Id. at p. 1. The leased

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parcels included not only the section 14 parcels, the south area where Rochester Sand and Gravel had historically conducted its hard rock mining operations, but also north areas located in section 11, where Mathy had conducted some extraction of sand and gravel, but no quarrying of bedrock. Id. at p. 15, Lease Ex. A; Fitzgerald Depo., p. 8, l. 12-p. 9, l. 2; Atterholt Depo., p. 7, 8-13, Bayliss Aff., Ex. 17.

The hard rock mining conducted in section 14 has left several large pits that are clearly visible on aerial photos. USDA Photos, Bayliss Aff. Ex. 3; Olmsted County GIS Photos, Bayliss Aff. Ex. 4. Hard rock mining in section 14 ceased in 2013 and that there has been no hard rock mining on section 14 since that time. Fitzgerald Depo., p. 19, l. 19-23; Laures Aff. ¶ 4. Mathy's Rochester Sand and Gravel Division does have continuing operations on section 14, including, product storage and sales, an asphalt plant, and a building that houses Mathy's local business operations. USDA photos, Bayliss Aff., Ex. 3; Olmsted County GIS Photos, Bayliss Aff., Ex. 4.

The Section 11 Parcels

There are six section 11 parcels referenced in the Complaint. The location of these parcels can be determined by reviewing the maps with property line overlays. Individual Parcel Maps, Bayliss Aff. Ex. 5. This memo ascribes the following monikers for ease of reference: parcel 74.11.43.080430 (the t-shaped parcel) Bayliss Aff. Ex. 5, p. 1; parcel 74.11.44.030911 (the square or rectangular parcel), Id. at p. 2; parcel 74.11.14.030899 (the right side of "the hat"), Id. at p. 3; parcel 74.11.13.075989 (the left side of "the hat"), Id. at p. 4; parcel 74.11.13.075927 (the cul-de-sac), Id. at p. 5; and parcel 74.11.41.030917 (the abandoned road), Id. at p. 6.

The T-Shaped Parcel and Its Historic Mining Activity

The T-Shaped parcel is a parcel that has been predominantly agricultural in use, but has also seen historic mining activity. Until a very recent road construction project that will extend

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55th Street, the parcel has consisted predominately of plowed agricultural fields. USDA Photos, GIS Photos, Bayliss Aff. Exs. 3 and 4. Several buildings, including a residence, were located on the southern end of the parcel with outbuildings. Id. A 1958 aerial photo shows that there was some mining activity on a parcel to the southwest of the T-shaped parcel, but that there was little evidence of mining activity on the T-shaped parcel. Bayliss Aff. Ex. 3, 1958 photo. By 1964, mining activity proceeded north and into the T-shaped parcel on its west side. Id. at 1964 photo. Visible changes along the northwest part of the parcel continued through the 1970's and 1980's with several large manmade ponds being created near the river. Bayliss Aff., Ex. 3, 1971, 1975, 1987. After 1991 no deep excavations of any size appear to have been created on the parcel. Id. at photos from 1996-2013.

Wilmar and its tenant Mathy agree that there has been no recent bedrock mining on the section 11 parcels—which would include the T-shaped parcel. Fitzgerald Depo., p. 8, l. 12-p. 9, l. 2; Atterholt Depo., p. 7, 8-13. They contend however, that at times topsoil and gravel have been removed from the parcel and the aerial photos bear out their assertion that some of this activity has taken place. Photos from 2002 reflect that a loop road was built on parts of the parcel and that areas of the north part of the parcel were scraped of topsoil. Bayliss Aff. Ex. 3, 2002 photo. Since 2006 these areas appear to have remained the same, with the only notable changes being that vegetation has been taking over these areas. Id. at 2006-13 photos.

As one might expect, the lease between Wilmar and Mathy, with payments based on royalties, required that Mathy keep careful records of minerals that were extracted from the leased property. Bayliss Aff. Ex. 2, p. 1-4. Mathy provided Wilmar with royalty figures on an annual and sometimes monthly basis. Beginning in 2004, Mathy kept records that separated extractions from the southern part of the pit, with its substantial limestone, sand, and gravel

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operations, from the northern pit, where extractions were of sand and gravel. Mathy's North Pit Mining History, Bayliss Aff. Ex. 6. Mathy's records reflect that while there were sand and gravel extractions in section 11 in connection with a series of projects between 1998 and 2003—something shown by the aerial photos—extractions between 2004 and 2007 dropped off to virtually nothing. Id.; Bayliss Aff. Exs. 3 and 4. Mathy did not separate out the north pit entries until 2004. Atterholt Depo., p. 10-11. Once the system kept track of extractions form the northern pit, Mathy's records reflect the following amounts being extracted from that area the pit in 2004-2008:

Year	Tons Extracted
2004	22
2005	22
2006	22
2007	22
2008	160.99

Bayliss Aff. Ex. 6. Wilmar and Mathy concede that 22 tons would be approximately one truckload of sand or gravel. Perry Atterholt Depo., p. 34, l. 3-6. Mathy provided ticket inquiry reports that further explained the 2004-08 extractions from the northern site. Mathy Ticket Report Summary, Bayliss Aff. Ex. 7. These reports show the following extractions from the northern pit:

Ticket No.	Date	Customer	Product	Quantity (Tons)
5162004	12-31-04	Rochester Sand and Gravel	Pit Run	22
5162005	12-31-05	Rochester Sand and Gravel	Pit Run	22
5162006	7-31-06	Rochester Sand and Gravel	Pit Run	22
12317	12-14-07	Milestone Materials	Pit Run	22

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Id. For four consecutive years Wilmar and Mathy contend that their extraction of sand and gravel amounted to a single truck removing always the same amount, 22 tons. Id.; Atterholt Depo., p. 31-34. And it appears from the records that this was a New Year's Eve ritual, because the 2004 and 2005 truckloads both consisted of sand and gravel being dug up from frozen ground. Bayliss Aff., Ex. 7; Atterholt Depo. p. 31-34. Curiously, the ticket numbers for the 2004 through 2006 extractions are consecutive ticket numbers. Bayliss Aff. Ex. 7; Atterholt Depo. p. 31-34. Mathy's Vice President, Perry Atterholt, testifying as a corporate representative, was unable to explain this apparent irregularity and testified that it could be a plugged number, one just added by Mathy's accounting department. Atterholt Depo., p. 32, l. 9-p. 33, l. 16.

An earlier letter from Atterholt made it clear that there were long periods of time when there was little in the way of any mineral extractions from the north portion of the property. Atterholt Letter, Bayliss Aff. Ex. 8.

Mathy's records make it clear that there were four periods of more than one year during which no product was removed from the northern pit. No extractions took place between July 2006 and December 2007. Ticket Report Summary; Atterholt Letter.

Another gap of more than one year took place in 2008-2009. A 2008 extraction, though not noted at all on the list of extractions from the northern pit, is memorialized by a separate document. Mathy Ticket Report Summary, p. 2. This extraction took place on September 12, 2008. The extractions noted for 2009 are reflected by tickets on September 21, 2009, more than a year later. The same is true of activity in 2010-11 and 2011-12, where materials were not extracted for more than a year. Id.

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The lack of activity on the T-shaped parcel is borne out by review of the annual GIS photos taken by Olmsted County. These show no evidence of any activity at all between 2002 and 2009. See Olmsted County GIS Photos, 2002-09, Bayliss Aff., Ex. 4.

The Square or Rectangular Parcel

This parcel is in the southeast corner of the property at issue. Unlike what is reflected in the T-shaped parcel, aerial photos show no evidence of any mineral extraction from this parcel. It appears to have been farmed continuously from 1958 to the present. USDA Photos; Olmsted County GIS Photos, Bayliss Aff. Exs. 3 and 4. Wilmar owner Fitzgerald agreed that during the time of his ownership up to 1998 there was no mineral extraction from this parcel. Fitzgerald Depo., p. 23, l. 13-23.

The Right Side of the Hat

This parcel sits atop the T-shaped parcel and extends across the river in points. Bayliss Aff. Ex. 5, p. 3. The area is in places heavily vegetated and shows no real evidence of mineral extraction. USDA Photos; Olmsted County GIS Photos, Bayliss Aff. Exs. 3 and 4. While there may have been some material removed from this parcel prior to 1998, no material has been removed from this parcel since 1998. Fitzgerald Depo., p. 24, l. 18-20; p. 25, l. 10-12.

The Left Side of the Hat

This parcel also sits atop the T-shaped parcel and extends into the river. Bayliss Aff. Ex. 5, p. 4. It appears that there was some mineral extraction in this small area decades ago, but there has been little change to this parcel after 1975 other than the changes which were likely caused by the great summer floods of 1978. USDA Photos; Olmsted County GIS Photos, Bayliss Aff. Exs. 3 and 4. It does appear that the course of the Zumbro was at one point restored, perhaps in association with flood control projects. Id. Fitzgerald believed that it was possible that some

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materials were removed from this area after 1998, but was not sure. Fitzgerald Depo., p. 25, l. 13-19.

The Cul-de-Sac

Some of the properties in section 11 that were owned by Wilmar have been sold for real estate development in a subdivision called Oak Meadow Second Subdivision. Deposition of Mark Hindermann p. 17-20, Bayliss Aff., Ex. 18. After Wilmar sold this property for real estate development purposes, a paved cul-de-sac in the platted subdivision remained in Wilmar's ownership. Bayliss Aff., Ex. 3, p. 5; Fitzgerald Depo., p. 22, l. 9-19. Plaintiff now concedes that this parcel should not be subject to a declaratory judgment. Id. at p. 22, l. 9-24. As a consequence, the Court should order that his parcel not be subject to any declaratory judgment.

The Abandoned Road

Two strips of land that were formerly a road, but are now abandoned, are found on the east side of the north portion of the T-shaped parcel. Bayliss Aff., Ex. 5, p. 6. These tiny parcels have not been the site of any noticeable mining activity. USDA Photos and Olmsted County GIS Photos, Bayliss Aff., Exs. 3 and 4. Plaintiffs have not pointed to any mineral extraction from these areas.

Land Use Regulation Applicable to Parcels in Dispute

The parcels in dispute were originally subject to the land use regulation of Olmsted County. By Resolution passed and adopted on December 16, 1969, the Olmsted County Board of Commissioners adopted land use regulations that applied to the unincorporated parts of the county. Resolution, Bayliss Aff., Ex. 9. The section 11 properties at issue in this case were located in the "AG District." County Zoning Map, Bayliss Aff., Ex. 10. The ordinance was duly published in the Rochester Bulletin prior to the December 1969 meeting. Ordinance, Bayliss Aff. Ex. 11. Although first published in December 1969, the resolution approving it was recorded on

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August 26, 1971, so it will be referred to as the 1971 ordinance. The 1971 ordinance required that all land in the county be used in conformity with the provisions of the ordinance:

> Section 3.01 COMPLIANCE REQUIRED
>
> No land, building or structure or part thereof shall hereafter be erected, altered, constructed, reconstructed, maintained, used or occupied except in conformity with the provisions of this ordinance.
>
> Section 3.15 EXCAVATING OF MINERAL MATERIAL
>
> The use of land for the excavation for commercial purposes of mineral material or removal of top soil shall be subject to the following regulations:
>
> (a) The piling of overburden or strippings shall be done in such a manner that will allow mowing and/or spraying equipment to control noxious weeds.
> (b) Sloping and/or grading which shall not be less than three (3) foot horizontal to one (1) foot vertical shall be required except in quarries. . . .
> (c) When any excavation is to be less that one hundred (100) feet from the exterior boundary line of the land . . . or less than 300 feet from a dwelling or farmyard located on adjacent property, a special exception permit shall be required.

1971 Olmsted County Land Use Ordinance, Section 3.15, Bayliss Aff. Ex. 11, p. 1-2. The ordinance created several different zones, including the AG zone, which is the zone relevant here. See Id. Art. II, section 2.01, Bayliss Aff., Ex. 11, p. 2. Article IV of the ordinance created the rules pertaining to AG zone property. Id. at p. 3. Uses permitted in the AG zone did not include gravel pits or mining operations. Id., Article IV, section 4.01, p. 3. However, the ordinance did provide that the mining of sand and gravel was allowable with a special use permit. Id., Art. IV, section 4.02(e), p. 4. The ordinance also set forth detailed procedures for obtaining special use permits Id. Art. XV, section 15.05, p. 6. Cascade Township is not aware of Wilmar or its predecessors or successors ever obtaining a special use permit under the 1971 ordinance. Wilmar has not produced any such permits in response to discovery in this case. Bayliss Aff. ¶ 14. In fact, it is Wilmar's position that their operation does not require any such special authorizations of any kind.

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The 1971 Ordinance also contained some very specific provisions related to non-conforming uses.

> Section 3.24 NON-CONFORMING USES, LAND. The non-conforming use of land where a structure thereon is not so employed and existing at the time this ordinance becomes effective, may be continued provided:
>
> 1. The non-conforming use of land shall not in any way be expanded or extended either on the same or adjoining property.
>
> 2. That if the non-conforming use of land, existing at the time the ordinance became effective, is thereafter discontinued or changed, then the future use of such land shall be in conformity with the provisions of this ordinance.

Id., Article III, Section 3.24, p. 1.

Minnesota law permits townships to exercise zoning authority by adopting zoning provisions that supplant county zoning provisions. Minn. Stat. § 394.33, subd. 1. Cascade Township determined to exercise such authority and adopted its zoning ordinance in May 2000. Ihrke Aff. ¶ 1.

The requirement that non-conforming uses that are discontinued for a period of more than one year must comply with the requirements of the ordinance is one that has passed through successive versions of the Olmsted County zoning ordinance and was also adopted in nearly identical form:

> G. Use, Discontinuance: In the event that a non-conforming use of any structure or structure and land is discontinued for a period of one (1) year, the use of the same shall conform thereafter to the uses permitted in the district in which it is located.

Cascade Township Zoning Ordinance, Section 1.28, page 10, Bayliss Aff., Ex. 12.

Wilmar's and Mathy's Bedrock Mining in Section 14 and the Nature of Bedrock Mining

Wilmar's and Mathy's activities in the south area in section 14 have included hard rock mining and the quarrying of bedrock. The progress of this activity through the years is clearly visible in aerial photographs that depict the south pit located in section 14. USDA Photos and

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Olmsted County GIS Photos, Bayliss Aff., Exs. 3 and 4. The mining and processing of bedrock is an intensive activity that is far removed from simple removal of surface materials. The activities that come with bedrock mining include:

- The removal of topsoil to expose the bedrock
- Drilling to install explosive blasting charges
- Blasting with explosives
- Multiple stages of rock crushing to reduce boulders to smaller rock
- Separating and screening of materials
- The washing of materials
- Stockpiling of materials
- Removal by dump trucks

Deposition of Pat Peterson, p. 28-35, Bayliss Aff., Ex. 19. The process involved is a loud one and involves the use of a great deal of heavy equipment. Id., Peterson Depo. p. 28-35; Hindermann Depo., p. 29-33.

Hard rock mining in the section 14 quarry stopped several years ago. Fitzgerald contends that bedrock has not been mined at the quarry for approximately three years. Fitzgerald Depo., p. 19, l. 19-23.

Mineral Extraction in Section 11

Before the 1998 lease to Mathy, the only place where Rochester Sand and Gravel both mined and processed rock was in the south portion of the property south of 55th Street. Fitzgerald Depo., p. 17, l. 25. Although there is a quarry depicted on a diagram that Wilmar at one point prepared, that quarry has not been used since the 1970's. Fitzgerald Depo., p. 8, l. 12-p. 9, l. 2.

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Wilmar principal Fitzgerald is not aware of any blasting or rock crushing taking place on the section 11 parcels since 1998 when the lease was entered into. Fitzgerald Depo., p. 19, l. 5-11.

Pat Peterson, a Mathy Construction manager, testified that the bedrock extraction operation that took place took place in the south part of the property, south of 55th Street. Peterson Depo., p. 35, l. 7-10. He also testified that the operations north of 55th Street involved mostly pit runs and strippings. Peterson Depo., p. 35, l. 11-14. Similarly, Mathy Vice President Perry Atterholt agreed that historically the extraction of bedrock has taken place in the quarry south of 55th Street. Atterholt Depo., p. 7, 8-13.

The excavations from section 11 are noted in the records to be "pit runs." Pit runs are the removal of materials directly from the land without processing. Atterholt Depo., p. 16, l. 16-20.

The Proposal to Mine North of 55th Street on the Section 11 Parcels

This case arises from Wilmar's initiative to conduct bedrock mining in the area north of 55th Street. The reserves are thought to be 50-100 year reserves and involve mining for 50-100 years. Atterholt Depo., p. 53, l. 4-16; Hindermann Depo., p. 47, l. 21-p. 48, l. 1. Mathy's proposal to open up a bedrock mining quarry in section 11 would include estimated reserves of 30 to 60 million tons of bedrock. Andrew Peters Deposition, p. 17, l. 24-p. 18, l. 2, Bayliss Aff., Ex. 20; Hindermann Depo., p. 48, l. 2-5 That amount of material would represent approximately two million truckloads of material. Peters Depo. p. 18, l. 3-15. The excavations that would result from this bedrock mining would proceed down as much as 140 feet. Peters Depo., p. 18, l. 16-p. 19, l. 2. Mathy has told the DNR that the bedrock mining operation will use four billion (4,000,000,000) gallons of water per day. EAW, Bayliss Aff., Ex. 21, p. 3.

Because the proposed project in section 11 might have environmental impacts, Mathy went through the environmental review process and obtained a declaration that no Environmental

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Impact Statement would be required. In conjunction with this process, Mathy revealed the truly massive scope of the project that it proposes. The Environmental Assessment Worksheet, included figures that show a cross section of the material that would be excavated. North Quarry Cross-section, Bayliss Aff., Ex. 13. An exhibit produced by Mathy during depositions shows that at 900 feet, the planned excavations would at some locations proceed to a level about 130 feet below the current elevations in section 11. Mathy Cross-section Diagram, Bayliss Aff., Ex. 14. The giant hole in the ground that will remain after excavation is concluded in 50-100 years, which will fill with groundwater, is depicted in a diagram that Mathy submitted to the DNR. Reclamation Plan, Bayliss Aff. Ex. 15.

Nearby Residential Properties

The Hallmark Terrace residential development, a development of what appears to be about 100 homes, is located just to the east of the square or rectangular parcel. USDA Photos; Olmsted County GIS Photos, Bayliss Aff., Exs. 3-4. The homes in the development come within 16 ½ feet of the property line. Hindermann Depo., p. 38, l. 15-19. It appears there are about twenty trailer home style residences immediately next to the common property line and approximately 100 residences in all in the development. Hindermann Depo., p. 69, l. 3-18.

A photograph taken from the road in Hallmark Terrace shows just how close the residences in Hallmark Terrace are to Wilmar's section 11 properties and the proposed project site. Conzemius Declaration, Report, p. 4, bottom photo.

As noted above, at one point Wilmar sold some of its land holdings to give rise to residential development in the area surrounding the section 11 parcels. Wilmar developed the Oak Meadow Second Subdivision, which on its southern boundary abuts the river and the area that would be part of the proposed hard rock mine. Hindermann Depo. p. 17-20; Fitzgerald Depo., p. 22, l. 9-19; Parcel Diagram, Bayliss Aff. Ex. 5, p. 5. The homes on the north side of the

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proposed project site are at an elevation that is dramatically higher than the current level of the section 11 parcels. Conzemius Report, p. 3. The difference in elevations from the residences to the floor of the proposed quarry after completion of bedrock mining could be in excess of 200 feet. Id. Even now, before any excavation has taken place, those owning property in this subdivision look directly down at the proposed pit. See Conzemius Report, p. 2, top photograph.

The Effect of the Project on Adjoining Residential Properties

The proposed hard rock mining project, as posited to the DNR, has been reviewed by Cascade Township's retained expert, Alex Conzemius. Conzemius, an experienced land use planner, notes that the type of project being proposed is generally incompatible with nearby residential use:

> Widely accepted planning practice has accepted that gravel mining and residential properties are incompatible and should not be located next to each other. Gravel mining operations lead to erosion, sedimentation, siltation, noise, dust, odors, and traffic. These disturbances are incompatible to residential land uses.

Conzemius Report, p. 1. Conzemius notes that although the DNR did not require an environmental impact statement to be undertaken, it did find that the activity would have negative effects on the surrounding properties. Id. p. 2-3. Conzemius concludes that mitigating measures, even if taken, could not eliminate the effects on the properties to the north. Id. at 3. His report also notes the proximity of the Hallmark Terrace properties and that the proximity of this development to the property line increases the impacts caused by mining activity. Id. Conzemius concludes that the proposed project would adversely affect the adjoining properties:

> The proposed expansion of mining into Section 11 is incompatible with the surrounding community and the community Comprehensive Plan. The existing non-conforming uses in Section 14 have been allowed to continue, but expanded mining activities into Section 11 would create incompatible uses. Mitigation could not eliminate the impacts that would result if the proposed mining operation were allowed in Section 11. Based on best planning practices and established rules and laws, the expanded mining operations should not be allowed. The land

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> use that Wilmar proposes would result in substantially different and adverse impacts on the neighborhood.

Id. at 6.

The Conzemius Report simply states what common sense suggests: intensive mining, with its blasting operations, drilling, rock crushing, sorting, and stockpiling operations, are incompatible with the enjoyment of adjacent residential living.

LEGAL ARGUMENT

I. BECAUSE A NON-CONFORMING USE MAY NOT BE EXPANDED TO ADJACENT PARCELS ON WHICH THE NON-CONFORMING ACTIVITY HAS NOT TAKEN PLACE, WILMAR AND WILMAR'S TENANT MAY NOT EXPAND ACTIVITIES ON TO THE SECTION 11 PARCELS.

Until about three years ago, Wilmar's tenant, Mathy, conducted bedrock mining operations on the southern part of the section 14 properties. These activities stopped about three years ago when Mathy stopped mining bedrock from its south quarry. Fitzgerald Depo., p. 19, l. 19-23. Wilmar now seeks a declaration that it can conduct bedrock mining on all the section 11 parcels. Such an expansion of nonconforming use to adjoining parcels is not allowed.

The Cascade Township Zoning Ordinance specifically prohibits the expansion of non-conforming activities to adjacent properties. In fact, it prohibits all expansions of non-conforming uses: "The non-conforming use of land shall not in any way be expanded or extended either on the same or adjoining property." Cascade Township Zoning Ordinance, Section 1.28, Bayliss Aff., Ex. 13. Ordinarily, such a direct statement would end all discussion: any expansion of a mined pit would be an expansion, so all activity must stop.

Wilmar contends, however, that the Minnesota Supreme Court's decision in Hawkins v. Talbot, 80 N.W.2d 863, 865 (Minn. 1957), a case which applied the judicially-created "diminishing assets" exception to expanding non-conforming uses involving excavation, is properly read to foreclose the literal application of the ordinance's provision prohibiting

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expansion to adjoining parcels. While Hawkins did hold that a non-conforming mining operation could continue to mine on the same parcel of land, the decision did not address the question of whether this right of expansion extends to adjacent parcels of land.

A review of the facts of Hawkins is necessary to frame the discussion. Hawkins wrestled with the "diminishing assets doctrine" and the question of whether non-conforming enterprises which by their nature expand non-conformities should be read to immediately terminate such ongoing businesses. At issue in Hawkins was a gravel pit that was slowly expanding as a result of extractions occurring in a single pit:

> In July 1953 the size of the gravel pit was 175 feet by 150 feet by 6 feet deep. In October 1954 the dimensions were 175 by 150 by 7 feet. As of the date of trial, in September 1955, the pit was 240 by 210 by 8 1/2 feet.

Hawkins, 80 N.W.2d at 865. The Hawkins court recognized that a literal interpretation of the ordinance would preclude all mining activity from the moment that the ordinance was passed:

> However, in the instant case we are confronted with a diminishing asset. If the defendant is to be limited to the area of land actually excavated at the time of the adoption of the ordinance, the restriction, in effect, prohibits [a]ny further use of the land as a gravel pit.

Id. Conspicuously absent from the discussion in Hawkins is any suggestion that there was more than one parcel of land involved. From the face of the opinion, Hawkins involved one parcel and the enlargement of a single excavation on that parcel by degrees. But while the Minnesota Supreme Court has permitted an active pit on a single parcel of land to continue in operation, the court has also elsewhere acknowledged the government's legitimate and proper concern for the termination of uses that are inconsistent with orderly development:

> It is not required, however, that preexisting nonconforming uses be allowed to expand or enlarge. The public policy behind that doctrine is to increase the likelihood that such uses will in time be eliminated due to obsolescence, exhaustion, or destruction. This in turn will lead to a uniform use of the land consistent with the overall comprehensive zoning plan.

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Freeborn Cty. v. Claussen, 203 N.W.2d 323, 325 (Minn. 1972).

There is no doubt that the Hawkins decision permits expansion of an active pit on a single parcel of land. But because only one parcel was involved, it was unnecessary to address the issue here: what happens when the expansion is to a different parcel? Because Hawkins offers no guidance on this point there is no controlling authority that contradicts the literal provision of the ordinance that prohibits expansion to "adjoining property."

A. Because Hawkins Is a Judicially-Created Exception, It Should Be Interpreted Narrowly And Should Not Be Extended to Allow Expansion to Adjacent Parcels of Land.

The fundamental aim of judicial interpretation of a statute is to ascertain and give effect to the legislative intent. County of Hennepin v. City of Hopkins, 239 Minn. 357, 362, 58 N.W.2d 851, 854 (1953); In re Copeland, 455 N.W.2d 503, 506 (Minn. Ct. App. 1990). "No room for judicial construction exists when the statute speaks for itself." Commissioner of Revenue v. Richardson, 302 N.W.2d 23, 26 (Minn. 1981). Here the statute and ordinance are clear: legal non-conforming uses are not to be expanded to other land. "Zoning ordinances were established to control land use, and development in order to promote public health, safety, welfare, morals, and aesthetics." In re: Stadsvold, 754 N.W.2d 323, 329 (Minn. 2008). The limits on nonconforming uses foster the general purposes of zoning ordinances: providing for orderly development and the health and safety of the public.

Moreover, Hawkins is a judicially created exception to the literal language of the non-conforming use statute. It is fundamental that judicially created exceptions should be narrowly construed. In re ESA Envtl. Specialists, Inc., 70 F.3d 388, 394, n.5 (4th Cir. 2013) (stating that a "judicially created exception" to a rule should be "narrowly construed"). Peter v. Jax, 187 F.3d 829, 837 (8th Cir. 1999) (judicially created exception should be narrowly construed); Love v.

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Deal, 5 F.3d 1406, 1410 (11th Cir. 1993) (same); Hatfield v. Hayes, 877 F.2d 717, 720 (8th Cir. 1989) (same); Taucher v. Rainer, 237 F. Supp. 2d 7, 15 (D.D.C. 2002) (same). Because Hawkins is a judicially-created exception that did not address a situation where multiple parcels were involved, the Court should enforce the literal language of the ordinance to the extent that Hawkins does not specifically preclude it. Because Hawkins did not involve the question of an expansion on to adjoining parcels of land, principles of judicial restraint require the Court to give full effect to the ordinance provision that expressly prohibits the requested expansion.

It should be noted that Hawkins ultimately rested on constitutional considerations. The court applied the diminishing asset doctrine to avoid what would be a harsh and likely unconstitutional application to existing mining businesses: because mining involves extraction and therefore by definition enlargement of the non-conformity, all mining activities would become illegal non-conforming uses upon adoption of a zoning ordinance containing zoning restrictions on mining activities. But we know from the Minnesota Supreme Court's recent approval of discontinuance provisions that if someone is not using land for a given purpose then its status can be lost. See White v. City of Elk River, 840 N.W.2d 43, 53 (Minn. 2013) (municipality may terminate a nonconforming use of land upon showing of one year of nonuse). The right to expand a nonconformity—even if it be a mining operation—is not absolute. Judicial exceptions to the literal language of an ordinance should be read narrowly. Here there is no sound reason for extending the diminishing asset rule of Hawkins to a separate parcel of land on which the activity was not being conducted.

B. Law From Other Jurisdictions Supports the Conclusion that the Diminishing Assets Doctrine Should Not Allow A Legal Non-Conforming Use to Be Extended to an Adjoining Parcel of Land.

Apart from the literal language of the zoning code, law from other jurisdictions, even jurisdictions that may recognize the doctrine of diminishing assets, supports the conclusion that

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non-conforming mining activities cannot be extended to parcels where the activity was not taking place. While most courts have accepted the diminishing assets doctrine, they also reject the notion that activity on one parcel extends to another parcel:

> This is not to say that a landowner, merely by preparing to engage in a gravel operation and undertaking a few self-serving acts of a very limited nature, will have thrown a protective mantle of nonconforming use over his entire parcel of land as against a later prohibitory zoning ordinance. Nor is it possible to extend the protection of a permitted nonconforming use established on one parcel of land to physically separate though adjoining parcels.

Syracuse Aggregate Corp. v. Weise, 51 N.Y.2d 278, 286, 414 N.E.2d 651, 655 (1980). Put another way, "The diminishing asset doctrine normally will not countenance the extension of a use beyond the boundaries of the tract on which the use was initiated when the applicable zoning law went into effect." Stephan & Sons, Inc. v. Municipality of Anchorage Zoning Bd. of Examiners & Appeals, 685 P.2d 98, 102 (Alaska 1984).

That expansions to adjoining parcels should not be allowed is demonstrated by a New York case, Dolomite Products Co. v. Kipers, 23 A.D.2d 339, 342-43, 260 N.Y.S.2d 918, 921 (1965). There a mining operation with three contiguous lots intended to expand its activities on to parcels of land. The situation is reminiscent of that here:

> Respondent contends that the reason for purchasing parcels B and C was to work said parcels sometime in the future as it is presently operating parcel A. It would be patently unfair to the homeowners who have built residences in the area to hold that the intention to quarry, not carried out over a 40-year period, is sufficient reason to enable respondent to tack on the non-conforming use of parcel A to parcels B and C. The test of the character of parcels B and C should be the use made of these parcels prior to the adoption of the zoning ordinance which now makes quarrying illegal without a permit. It is not consonant with progressive or contemporary planning to permit one to purchase a large parcel of real property, work thirty-five acres of it and do nothing for 40 years with the balance of forty-seven acres but, nevertheless, have the right sometime in the distant future to make a non-conforming use of it in violation of an ordinance prohibiting it and to the great detriment of adjacent homeowners. Such a philosophy of planning could stunt or kill the growth of substantial areas of property surrounding the parcels in

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> question, for abutting owners would be required to wait, as in the instant case, for decades to determine the use which could be made of the property.

Dolomite Products Co. v. Kipers, 23 A.D.2d 339, 342-43, 260 N.Y.S.2d 918, 921 (1965), aff'd, 19 N.Y.2d 739, 225 N.E.2d 894 (1967). Similarly, in Twp. of Fairfield v. Likanchuck's, Inc., a case involving four contiguous tracts held in common ownership by a mining enterprise, the court refused to extend the right to conduct non-conforming activities on all parcels:

> The record here does not disclose such an "objectively manifested" intention on defendant's part to expand the mining operation to its entire tract. Defendant's soil removal activity has been confined to Lot 40 since prior to the adoption of the zoning ordinance. Also, unlike the property owner in Moore, 69 N.J.Super. at 6, 173 A.2d 430, defendant did not systematically increase and expand operations over the years. Since prior to adoption of the 1969 ordinance, defendant has engaged in sand and gravel mining sporadically, on a small and variable but not increasing scale. Moreover, when the mining was initiated and for many years thereafter, the primary use of the property was for the automobile salvage yard; mining was at best an incidental use. Significantly, after 1969, a substantial residential development was constructed contiguous to the property. The developer and subsequent buyers no doubt relied on the perceived limitation of the mining activity. Simply stated, defendant's pattern of mining has not explicitly and manifestly demonstrated an intent to expand the mining to all four lots.

Twp. of Fairfield v. Likanchuk's, Inc., 644 A.2d 120, 125 (N.J. App. Div. 1994).

The literal language of the ordinance prohibits the expansion of legal non-conforming uses to adjoining parcels of land. This provision, combined with cases that refuse to extend legal non-conforming uses to adjoining parcels, strongly supports the Township's position that the expansion of mining activities should not be extended into parcels where the non-conforming activity was not taking place.

II. THE CESSATION OF ALL MINING ACTIVITY ON THE SECTION 11 PARCELS CONSTITUTED AN ABANDONMENT OF THE RIGHT TO CONDUCT LEGAL NON-CONFORMING MINING-RELATED ACTIVITIES ON THE SECTION 11 PARCELS.

As Wilmar concedes, the right to continue a non-conforming use may be lost if the use is discontinued for a period of more than one year. Complaint, ¶¶ 44-45. A discontinuance of a

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non-conforming use for a period of more than one year requires that the non-conforming use then cease. The controlling statute provides:

> Except as otherwise provide by law, any nonconformity, including the lawful use of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion, unless:
>
> (1) the nonconformity or occupancy is discontinued for a period of more than one year. . . .

Minn. Stat. § 462.357, subd. 1e(c). Similarly, the Cascade Township Zoning Ordinance provides that legal non-conforming use status can be lost if the use is discontinued for a period of one year:

> NON-CONFORMING USES: The lawful use of land or structures existing at the time of the adoption of this zoning ordinance may be continued although such use does not conform with the district provisions herein, subject to the following provisions.
>
> A. Land: The non-conforming use of land shall not in any way be expanded or extended either on the same or adjoining property.
>
> . . .
>
> G. Use, Discontinuance: In the event that a non-conforming use of any structure or structure and land is discontinued for a period of one (1) year, the use of the same shall conform thereafter to the uses permitted in the district in which it is located.

Cascade Township Zoning Ordinance, Section 1.28. It is a fundamental principle of land use law that the right to a non-conforming use can be lost through discontinuance. White v. City of Elk River, 840 N.W.2d 43, 53 (Minn. 2013) (municipality may terminate a nonconforming use of land upon showing of one year of nonuse); County of Isanti v. Peterson, 469 N.W.2d 467, 469 (Minn. 1991) (same), overruled on other grounds by Tyroll v. Private Label Chemicals, Inc., 505 N.W.2d 54 (Minn. 1993).

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There are three respects in which the non-conforming activities have been discontinued in this case. First, the mining of bedrock on the section 11 properties has not occurred for decades. Second, Mathy's records reflect that not just bedrock mining, but all mineral extraction ceased on the section 11 properties for a period of more than one year on several occasions in the last fifteen years. Finally, with the end of Mathy's rock quarrying activities on the section 14 property in 2012, there has been a cessation of rock quarrying throughout the property for a period of more than one year.

A. Hard Rock Mining In Section 11 Has Long Been Discontinued and Cannot Be Allowed as a Legal Non-Conforming Use.

Mathy has limited its activities on section 11 to scraping surface materials and making pit runs for decades. Hard rock quarrying in section 11 has been discontinued for decades. Since the 1998 lease between Wilmar and Mathy was entered into, the only place where rock was mined and processed was the south portion of the property south of 55th Street. Fitzgerald Depo., p. 7, l. 25. 55th Street is the road that separates the section 11 and section 14 properties, so property that is south of 55th Street is in section 14 and not section 11. Although there is a quarry depicted on a diagram that Wilmar at one point prepared, that quarry has not been used since the 1970's. Fitzgerald Depo., p. 8, l. 12-p. 9, l. 2. Wilmar principal Fitzgerald is not aware of any blasting or rock crushing taking place on the section 11 parcels since 1998 when the lease was entered into. Fitzgerald Depo., p. 19, l. 5-11.

Pat Peterson, a Mathy Construction manager, testified that the bedrock extraction operation that took place took place was in the south part of the property, south of 55th Street. Peterson Depo., p. 35, l. 7-10. He also testified that the operations north of 55th Street involved mostly pit runs and strippings. Peterson Depo., p. 35, l. 11-14. Mathy Vice President Perry

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Atterholt agreed that the extraction of bedrock has taken place in the quarry south of 55th Street. Atterholt Depo., p. 7, 8-13.

The excavations from section 11 are noted in the records to be "pit runs." Pit runs are the excavation of materials directly from the land without processing. Atterholt Depo., p. 16, l. 16-20.

The absence of hard rock mining in section 11 is also apparent when one reviews Atterholt's letter of November 18, 2003. Cascade Township 182-83. Mathy memorialized the activity that had taken place on the section 11 properties and in describing its activities came up with no evidence of hard rock mining on the section 11 properties—merely "pit runs."

All the evidence shows that the activities conducted by Mathy on section 11 have been either surface scrapings or "pit runs"—the removal of surface materials, usually from a bank, without any on-site processing. Such "pit runs" are commonly used for obtaining topsoil, sand, or gravel for use in projects. Here, such pit runs—when they sporadically occurred—have been the nature of the use during the period of the Mathy lease. But while there has been some use of the section 11 property for pit runs, there has been no hard rock mining on section 11 during the period of the lease, which has runs since 1998. While there may have been some historic hard rock mining on the section 11 property at some time, such activity has been long discontinued—certainly well beyond a period of one year. Hard rock mining has been discontinued on all of the section 11 properties and this has resulted in the loss of any legal non-conforming status.

B. Mineral Extraction on All Section 11 Parcels Ceased for Periods of More than One Year on Several Occasions and the Section 11 Parcels Thus Lost Any Legal Non-Conforming Status They May Have Had.

Although there has been no hard rock mining on the section 11 parcels for many years, borrow materials in the form of topsoil, sand, and surface rock have been removed on an

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infrequent basis. The specifics of the extractions from the section 11 properties have been discussed at length above. See supra, 5-8; 13. While there are some periods where the removal activities appear to have been quite active, there have also been long periods of inactivity, including from the years 2004 to 2012. Mathy's North Pit Mining History, Bayliss Aff. Ex. 6; Mathy Ticket Report Summary, Bayliss Aff. Ex. 7. In some calendar years, the extractions amounted to a single New Year's token truckload. Id. The extractions for these years show four periods of discontinuance lasting more than one year in: 2008-09; 2010-11; 2011-12; and 2012-13. Id. During each of these years there was a period of discontinuance that lasted more than one year. Id. Once a year of discontinuance has occurred, any legal non-conforming status is lost and the use must "conform thereafter to the uses permitted in the district in which it is located." Cascade Township Zoning Ordinance, Section 1.28, Bayliss Aff., Ex. 11. Given the absence of mining activities on the section 11 parcels, they have lost any legal non-conforming use status that they may have had. It would therefore be improper for the Court to issue a declaration that they are a legal nonconforming use.

C. Because All Hard Rock Mining Discontinued Three Years Ago, Hard Rock Mining is No Longer a Legal Non-Conforming Use.

Finally, the one-year discontinuance provision comes into play because it has been three years since Wilmar's tenant Mathy abandoned its bedrock mining activities throughout the section 11 and section 14 properties. By Wilmar's admission, it has been three years since they have mined bedrock on the section 14 properties. See Fitzgerald Depo., p. 19, l. 19-23; see also Laures Affidavit, ¶ 4. Mathy has not yet started mining bedrock on the section 11 properties. So for the last three years they have not been doing it anywhere. Because they have discontinued their bedrock mining, the legal non-conforming status of this use has been lost.

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III. IF THE COURT CONCLUDES THAT WILMAR DID NOT DISCONTINUE ITS OPERATIONS OR THAT ITS OPERATIONS SHOULD BE ALLOWED TO EXPAND DESPITE THE APPARENT PROHIBITION OF EXPANSION TO ADJOINING PROPERTY, THEN THE COURT SHOULD APPLY THE GENERALLY RECOGNIZED "THREE-PRONG TEST" IN EVALUATING WILMAR'S DIMINISHING ASSET CLAIMS.

As noted above, the Hawkins decision created a judicial exception to clear language contained in nonconformity statutes and ordinances that prohibits the expansion of non-conforming uses. The result in Hawkins was necessary to avoid every active gravel pit or mine from being illegal upon a governmental entity adopting a zoning code that rendered such uses nonconforming. If Hawkins had been determined otherwise, then no gravel pit could ever be grandfathered in, because to dig out more gravel would be to expand the non-conformity—something prohibited by the non-conforming use statute, or something that would at least eliminate the use's grandfathered status. In short, were Hawkins decided otherwise, because mining is an extractive enterprise, no gravel pit operation could ever operate as a legal grandfathered use.

But while Hawkins opened the doors to gravel pits and similar businesses claiming that they should be entitled to expand their operations, Hawkins never addressed the question presented here: When a mining business expands its operations in a way that is inconsistent with the prior use of an adjacent parcel, does it have unfettered grandfather rights merely because it conducted some extraction in the past? Hawkins presented a gravel business that simply wished to continue to mine from the same pit by continuing expansion that had been ongoing. Here Wilmar contemplates something different: moving its operations to different parcels and commencing a frenzy of blasting, rock extraction, rock crushing, and hauling activities on parcels where these activities either never took place or took place in only a token manner. Courts have noted that because it contravenes the principle of retiring non-conforming uses, the

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diminishing assets doctrine must be applied with caution. See Township of Fairfield v. Likanchuk's, Inc., 644 A.2d 120, 124 (N.J. App. Div. 1994) ("Because of the expressed aversion toward expansion of nonconforming uses, the "diminishing asset" theory must be applied with caution"); see also Fred McDowell, Inc. v. Bd. of Adjustment of Twp. of Wall, 757 A.2d 822, 830 (N.J. App. Div. 2000).

While it has been almost sixty years since the Minnesota Supreme Court decided Hawkins, the court has not revisited the doctrine of diminishing assets since that time. It has not answered any of the nuanced questions that can arise in such cases, such as: whether the doctrine automatically extends to the full dimensions of the parcel involved—even if there was no intention to so expand at the time of adoption of the ordinance; whether it extends to adjacent parcels of land; whether its application can be affected by the competing interests of landowners that develop around the property; whether there are any time limits on the exercise of the rights. Jurisdictions across the nation have wrestled with these thorny questions and have placed limits on the scope of the doctrine:

> In setting limits to the expansion of a prior nonconforming use to extract a diminishing asset, thereby balancing the inherent tension between the rule and the exception and between the legitimate interests of the municipality and those of the property owner . . . we deem it reasonable for a zoning board to consider, without limitation, such factors as the size of the lot or tract for which the prior nonconforming use is claimed; the rate of extraction as well as the rate of expansion as of the date the ordinance was enacted; the projected exhaustion of the asset at the present rate of extraction; evidence that the owner manifested its intention to expand before the zoning change; and the nature of development of surrounding properties and the community since the enactment of the zoning ordinance that rendered the prior use nonconforming.

Twp. of Wall, 757 A.2d at 833. This search for the limits of the diminishing assets doctrine has led to a consensus arising out of a New Hampshire case, Town of Wolfeboro (Planning Bd.) v. Smith, 556 A.2d 755, 756 (N.H. 1989). The Town of Wolfeboro case dealt with the expansion of

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an excavation pit. The pit had been in operation continuously, but the owners sought a substantial expansion of the pit and contended that because the use of the pit pre-dated the zoning ordinance, the property was grandfathered. Id. at 756. The neighbors and the Township contested the right of expansion, noting the substantial changes in patterns of mineral removal. Id.

In analyzing the landowner's right to use to expand the excavation the court first accepted the basic principle at the heart of the diminishing asset doctrine:

> If the phrase "continue such existing excavation," as found in the grandfather clause, were understood to allow only vertical and not lateral expansion, such an interpretation would lead many owners, including the present defendants, to find that they could not "continue" their existing excavations for very long, if at all. Such an interpretation is also contrary to the decisions of the many courts which have examined a similar issue; namely, whether lateral expansion of an excavation onto land previously unexcavated constitutes a permitted continuation of a nonconforming use or an unpermitted expansion. We are not aware of any jurisdiction which has stated that "continuing" an excavation necessarily allows only for an increase in depth and not in width.

Id. at 757-58. The Court then noted that although the legislature had intended to allow excavations to continue, without a permit, onto previously unexcavated lands that reasonable limitations on the expansion were also intended. Id. at 759. After analyzing applicable case law, the court created a three-prong test, which it stated as follows:

> In conclusion, we hold that a party who desires to continue excavation operations without a permit under RSA chapter 155–E must meet a three-pronged test: First, he must prove that excavation activities were actively being pursued when the law became effective; second, he must prove that the area that he desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent; and, third, he must prove that the continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood. A municipality requesting that a permit be obtained need only prove that excavations are ongoing and that no permit has been granted. Upon this showing, the burden of proof shifts to the excavator to prove all three prongs of the test which we have outlined above.

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Id. After creating this three-prong test, the court then analyzed the facts of the case before it and determined that the requested expansion had not been shown to have been contemplated at the time the zoning ordinance had been adopted. Id. at 760.

The test created in Town of Wolfeboro has now been adopted by the majority of courts wrestling with the scope of the diminishing assets doctrine. There is a "growing consensus among jurisdictions that apply the doctrine of diminishing assets to use the following three-prong test . . . ." Seherr-Thoss v. Teton Cty. Bd. of Cty. Comm'rs, 329 P.3d 936, 949 (Wyo. 2014). It has been has been adopted in the following states: New Hampshire (Town of Wolfeboro, 556 A.2d at 759); New Jersey (Town of Fairfield v. Lianchuk's, Inc., 644 A.2d 120 (N.J. App. Div. 1994); New Mexico (Romero v. Rio Arriba County Comm'rs, 149 P.3d 945, 951 (N.M. App. 2006); Rhode Island (Town of W. Greenwich v. A. Cardi Realty Associates, 786 A.2d 354, 363-64 (R.I. 2001)); and Wyoming (Seherr-Thoss, 329 P.3d at 949 (Wyo. 2014). Just as the diminishing assets doctrine grew out of a consensus of common law decisions from foreign jurisdictions, so does the three-prong test, the tool that courts use to analyze the diminishing assets exception.

Apart from the fact that it has been adopted by most courts, this Court should apply it in this case for the following reasons:

- In the almost sixty years since Hawkins was decided the courts have provided no real guidance as to how the diminishing assets doctrine should be applied in cases involving delayed use, competing development, or expansion on to additional parcels of land
- The test places substance over form by preventing parties from preserving an exceptional status by engaging in token activity
- It balances the conflicting legal rights of all parties
- It avoids basing important land use decisions solely on distant historically distant acts

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- It provides results that can be tailored to meet the innumerable variables that arise in these cases

Courts throughout the nation have used the three-prong test to analyze the scope of the diminishing asset exception in cases involving planned expansions of non-conforming uses. The test makes sense and serves the salutary purpose of balancing the rights of competing landowners. The Court should use the following test to analyze Wilmar's claim of entitlement to application of the diminishing asset doctrine in this case:

> First, [the landowner] must prove that excavation activities were actively being pursued when the [ordinance] became effective; second, [the landowner] must prove that the area that he desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent, and, third, [the landowner] must prove that the continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood.

Town of W. Greenwich, 786 A.2d at 363-64.

IV. WILMAR CANNOT ESTABLISH THE NECESSARY ELEMENTS OF THE THREE-PRONG TEST SO THAT THE DIMINISHING ASSETS EXCEPTION SHOULD NOT BE EXTENDED TO THE SECTION 11 PARCELS.

Wilmar is unable to satisfy the elements of the three-prong test. To meet the test, Wilmar must: 1) prove that excavation activities were actively being pursued when the law became effective; 2) prove that the area that he desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent; and 3) prove that the continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood. Town of Wolfeboro, 556 A.2d at 759.

Wilmar cannot prove any of these requirements. First, Wilmar cannot establish that the activities were taking place on all of the parcels for which it seeks declaratory relief. Second, Wilmar cannot establish that the envisioned expansion was foreseen at the time land use controls

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came to apply to the property. Third, Wilmar cannot establish that the project will not have a substantially different and adverse impact on the neighborhood.

A. Wilmar Is Unable to Establish the First Two Prongs of the Three Prong Test.

Wilmar's plan to conduct extensive bedrock mining is a plan of recent vintage. The plan was first reduced to writing in connection with the environmental review process before the DNR. With respect to the first prong, With respect to three of the six Section 11 parcels, the cul-de-sac, the square or rectangular parcel, and the abandoned road, Wilmar can show no history of excavation. Wilmar cannot establish that excavation was actively being pursued on any of these parcels at the time that the law came into effect. And the reality of the section 11 parcels is that they have been subject to minimal activity for decades. Wilmar has disclosed no information from which it could be inferred that they envisioned anything like the currently proposed bedrock mining activity until recently. Wilmar cannot show that excavation was being pursued on these parcels at the time of the enactment of the ordinance and thus fails to establish the first prong of the test.

With respect to the second factor—that the area Wilmar desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent—Wilmar has done nothing to show that there was anything other than a vague intent to develop the property. It has been noted that

> The mere unexpressed intention or hope of the owner to use the entire tract at the time the restrictive zoning ordinance is adopted, is not enough. Intent must be objectively manifested by the initial and ongoing operation of the owner before the activity was rendered nonconforming by the newly-adopted regulation.

Twp. of Fairfield, 644 A.2d at 125. Here Wilmar relies on little more than its unexpressed intention or hope to develop the section 11 parcels into a quarry. This vague intention is insufficient to meet the requirements of the second prong of the test.

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B. The Impact Of Wilmar's Announced Intention To Proceed With A Mammoth Rock Quarrying Project On The Section 11 Properties Would Have A Substantially Different And Adverse Impact On The Neighborhood.

The third prong of the test requires the Court to look at the impact on adjacent properties. Town of Wolfeboro, 556 A.2d at 759. In applying the three-prong test, courts are particularly alert to the effects on adjacent residential properties. See Town of Fairfield 644 A.2d at 125; see also Fred McDowell, Inc. v. Bd. of Adjustment of Twp. of Wall, 757 A.2d 822, 834 (N.J. App. Div. 2000) (holding that development of residential properties near proposed use was properly considered). Here, the truly mammoth project that Wilmar's tenant Mathy proposes will turn the section 11 parcels into a hundred-foot-plus hole in the ground after at least a half century of blasting, rock crushing, and millions of dump truck trips. And all this activity is going to take place on parcels surrounded by residential properties.

The properties at issue are immediately adjacent to the area of the proposed project. The Hallmark Terrace residences are within twenty feet of the section 11 parcels at issue in this proceeding. The more high-end residences on Oak Meadow Lane have lots that touch the lots that are the subject of this proceeding. The residences on those lots sit on a hill that is high above the proposed hard rock mining operation. The geographic configuration is such that adverse impacts would seem likely.

The nature of the activities also suggests the likelihood of adverse impacts on the adjacent properties. Mathy's mining will include blasting with explosives, drilling, rock crushing, heavy equipment operation, and more than a million truck trips in and out of the quarry. It will also involve the consumption of four billion gallons of water a year.

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This is also not a situation where the inconvenience will be just temporary. If it lasts as long as Wilmar suggests, 50-100 years, most residents will be dead before the activity transitions to its reclaimed form as a huge hole that fills with groundwater.

The proposed mining activity is incompatible with the surrounding residential properties. Conzemius Report, p. 6. It would also have substantially different adverse impacts on the neighborhood. Id. For this reason, Wilmar is unable to establish the third prong of the three-prong test.

CONCLUSION

Wilmar seeks a declaration that all the section 11 parcels are entitled to legal nonconforming use status. Because Wilmar's request would expand a non-conforming use to adjacent parcels, and because any mineral extraction in section 11 that once existed has been discontinued for a period of more than one year, the Court should deny Wilmar's request and determine that the use of the section 11 parcels for mining purposes is an illegal nonconforming use.

QUINLIVAN & HUGHES, P.A.

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s/ Kenneth H. Bayliss

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