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STATE OF MINNESOTA | DISTRICT COURT - CIVIL DIVISION

COUNTY OF OLMSTED | THIRD JUDICIAL DISTRICT

Wilmar Investments, LLC,

Plaintiff,

vs.

Cascade Township,

Defendant.

Court File No: 55-CV-15-6531
Case Type: Declaratory Judgment

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Wilmar Investments, LLC ("Wilmar") submits this memorandum of law in support of its Motion for Summary Judgment on its claim for a declaratory judgment. Wilmar's Motion should be granted because Minnesota law clearly indicates the mining and quarry activity on the subject property is a pre-existing nonconforming use entitling the mining operations to continue.

The parties do not disagree on the basic facts underlying this dispute. Mining operations have occurred continuously on Wilmar's property in Section 14 of Cascade Township ("Cascade") since 1946. Wilmar also owns contiguous land in Section 11 and is the record owner of the real property that forms the basis of this action. The real property in Section 11 and Section 14 is all part of one stock of geological reserves.

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Although a prohibitive ordinance was passed in the 1970s, the mining operations on Section 11 and 14 qualify as a legal nonconforming use. Cascade Township denies the operation of the quarry in Section 11 and 14 is a pre-existing nonconforming use. In particular, Cascade Township generally contends the Section 11 property has not been part of the annual operation of the Pit since the adoption of any applicable zoning ordinances; that any use of the Section 11 parcels was discontinued for more than one year; that the parcels were not lawfully mined at any time; that the use of the land in Section 11 is an impermissible expansion of the Pit to adjacent property; and no grandfather rights attach to the land because the activities were not lawful at the time the land use controls were adopted.

The issue, therefore, is whether the use undertaken on the Section 14 and Section 11 land and the intended future use of the land is a pre-existing nonconforming use which is not subject to any land-use controls. More specifically, the question is whether the mining activities on Section 11 and 14, and the anticipated additional mining activities on Section 11, constitute an improper expansion of the nonconforming use rights which clearly apply to the Section 14 parcels. This is a purely legal question; there is no dispute of fact present in this case.

Minnesota case law clearly indicates that in the case of a diminishing asset, an owner's nonconforming use extends to all of the land that comprises the asset. In other words, conducting additional mining operations on a portion of land not previously mined is not an "expansion" of a nonconforming use. Although Defendant Cascade

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Township has referenced authority from other jurisdictions, these cases are clearly contrary to Minnesota law. Because the Court's duty is to apply Minnesota law as it stands, the Court should grant Wilmar's Motion for Summary Judgment and issue a declaration that Wilmar is entitled to continue its legal nonconforming operations on the entirety of the subject property located within Sections 11 and 14.

STATEMENT OF THE DOCUMENTS RELIED UPON

Defendants' memorandum relies upon the following:

1. The Affidavit of Mark Hindermann, with a true and correct copy of the following attached thereto:
    a. Exhibit 1: Image showing the outline of the subject property.
    b. Exhibits 2-15: Images showing the locations of the referenced parcels.
    c. Exhibit 16: Image showing Parcel ID Number 74.11.13.075927, which was included in the Complaint but is not and should not be included in this dispute.
    d. Exhibit 17: Aerial photograph of the subject property.
    e. Exhibit 18: Lease from Wilmar to Mathy.
2. The Affidavit of Derek S. Rajavuori, Attorney for Plaintiff, with a true and correct copy of the following attached thereto:
    a. Exhibit A: Portions of the Deposition Transcript of Patrick Peterson.
    b. Exhibit B: Portions of the Deposition Transcript of Andrew Peters.
    c. Exhibit C: Portions of the Deposition Transcript of William Atterholt.
3. The Affidavit of William J. Ryan, Attorney for the Plaintiff, with a true and correct copy of the following attached thereto:
    a. Exhibit A: Summary of the Chain of Title for the Real Property located in Sections 11 and 14, Township 107, Range 14.

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b. Exhibit B: Compilation of Deeds establishing the Chain of Title for the Real Property located in Sections 11 and 14, Township 107, Range 14.

STATEMENT OF UNDISPUTED FACTS AND PROCEDURAL POSTURE

The underlying facts are not in dispute. Wilmar Investments, LLC ("Wilmar"), William Fitzgerald, Patricia Fitzgerald, and Mark Hindermann are the owners of certain property in Cascade Township, Olmsted County, Minnesota. (Hindermann Aff. ¶ 2; Ryan Aff. Exs. A-B.) Collectively, the Section 11 Property and the Section 14 Property combine to form a quarry referred to herein as the "Pit." (Hindermann Aff. ¶s 2,4.) The Pit contains several aggregate minerals and other geological resources. (Peters Depo. p. 13.) The makeup of these resources in the Section 11 Property is a continuation of the same geological material in the Section 14 Property. (*Id.* at p. 16.) The Pit is therefore one single geological reserve. (*Id.*) Wilmar, the Fitzgeralds, and Hindermann collectively own the Pit and lease it to Mathy Construction Company ("Mathy"), who has conducted mining operations on the property since 1998. (Hindermann Aff. ¶ 2-3, 18-19; Peterson Depo. pp. 59-60; Atterholt Depo. P. 56.)

Wilmar is comprised of two members, William Fitzgerald and Mark Hindermann, both of whom entered the mining business at the current location of the Pit in the early 1960s. (Hindermann Aff. ¶s 1, 6.) Hindermann moved to Rochester in 1960 to work for Rochester Sand & Gravel partnership ("RS&GP"), a business that conducted mining operations on the Pit at that time. (*Id.*) Hindermann purchased stock in the RS&G corporation ("RS&G, Inc.") in 1962. (*Id.*) It was at this time that the mining operations

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of RS&GP were overtaken by RS&G, Inc. (*Id.*) RS&GP or its partners continued to own the land on which the mining activity occurred, and RS&G, Inc. leased the land from RS&GP or its partners. (*Id.* at ¶ 6-7.) Fitzgerald purchased shares of RS&G, Inc. in 1964, and in 1966, Fitzgerald and Hindermann became the sole owners of RS&G, Inc.. (*Id.* at ¶s 6-7.) RS&G, Inc. conducted mining operations on the Pit until 1998, when Fitzgerald and Hindermann sold the business to Mathy. (*Id.* at ¶s 7, 17-18.)

Mining operations began on the Pit in 1946 by a partnership that eventually transferred mining rights to RS&G, Inc.. (Hindermann Aff. ¶s 15-16.) Over a twenty-year period from the 1940s through the 1960s, RS&GP or its predecessor or owners – either individually or as partners – acquired the various parcels that comprise the Pit. (Hindermann Aff. ¶s 5-8; Ryan Aff. Exs. A-B.) All of the parcels at issue were acquired prior to 1970. (Hindermann Aff. ¶ 8; Ryan Aff. Exs. A-B.) The entire Pit contains the assets sought to be mined, and the parcels of the Pit were all acquired with the intent of expanding the Pit's mining operations. (Hindermann Aff. ¶ 8; Peters Depo. p. 16.) Until at least 1969, no ordinance or law restricted the use of the Pit for mining. (Compl.; Ans.)

Although the parties dispute the effective date, Olmsted County enacted an ordinance effectively prohibiting the use of the Pit for mining operations in either 1976 or at the earliest, in 1970. (Compl.; Ans.) At that time, the parties agree active mining operations were being conducted on the Section 14 Property. (Hindermann Aff. ¶ 17.) Hindermann's Affidavit also indicates that a berm was formed on the Section 11 Property prior to the ordinance, that sand has been removed from the northern portion of the

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Section 11 Property since the late 1940s, and that two artificial mining ponds were formed in the Section 11 Property beginning in the late 1940s. (*Id.* at ¶s 12, 14.) Since he acquired an ownership interest in RS&G, Inc. in 1962, Hindermann has always understood the Pit to be one single holding owned for the purpose of conducting mining operations. (*Id.* at ¶ 20.)

In 1998, Hindermann and Fitzgerald sold the assets and business of RS&G, Inc. to Mathy. (Hindermann Aff. ¶ 18.) Around that same time, Mathy leased the Pit from Wilmar with the intent of continuing RS&G Inc.'s mining operations, which it has done since it took possession of the Pit in 1998. (Peterson Depo. p. 59-60; Atterholt Depo. p. 56; Hindermann Aff. ¶ 19.) Beginning in 2009 and continuing through the present date, Mathy began planning to conduct additional activity on the Section 11 Property. (*See generally* Compl.; Ans.) Cascade has opposed these additional operations. (*Id.*)

Wilmar has filed the current action, seeking a declaration that it is entitled to continue mining operations on the Pit, including on the Section 11 Property. (*See* Compl.) The parties do not dispute the ownership of the Pit, that mining has occurred continuously on the Section 14 Property as a legal non-conforming use, and that the parcels that comprise the Pit are all contiguous. (Compl.; Ans.) Further, Cascade has not produced any evidence inconsistent with the uses of the Section 11 Property as described in the Affidavit of Mark Hindermann – which is contiguous to the Section 14 Property – namely, that a berm was formed on the Section 11 Property in the 1960s, that sand was removed from the northern portion of the Section 11 Property in the late 1940s, and that

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two artificial ponds were formed in the 1940s by mining operations on the Section 11 Property. This is therefore a purely legal question for the Court.

Wilmar contends that the entire Pit constitutes one single holding, that the entire Pit contains the diminishing asset at issue, that the entire Pit has been designated for mining operations as the land was acquired in the 1940s through 1960s, and that its nonconforming use rights apply to the Pit in its entirety. Wilmar's position is consistent with Minnesota law.

Cascade's argument appears to be two-fold. First, Cascade appears to argue that each Parcel ID Number must have mining activity upon it annually since 1969 to the present in order to be considered a nonconforming use. Second, Cascade appears to argue that for any Parcel ID Number that does not have proof of annual mining activity, undertaking future mining activities in the parcel would be an illegal expansion of mining activity onto additional property not subject to grandfather protection. These positions are contrary to the clear mandate of the Minnesota Supreme Court.

ARGUMENT

Summary judgment is properly granted when the record shows there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Stelling v. Hanson Silo Co.*, 563 N.W.2d 286, 289 (Minn. App. 1997). In determining whether motions for summary judgment should be granted, the court looks at the pleadings, depositions, answers to interrogatories, admissions and affidavits to determine that there are no genuine issues of material fact and that either

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party is entitled to judgment as a matter of law. *Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn. 1982); *Valletta v. Recksiedler*, 355 N.W.2d 314, 316-17 (Minn. App. 1984). To defeat a motion for summary judgment, the non-moving party must present affirmative, probative evidence tending to support every essential element of their cause of action. *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989). Therefore, summary judgment is appropriate when the non-moving party fails to provide the court with specific evidence showing there is a genuine issue of material fact. *Erickson v. General United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977).

I. WILMAR IS ENTITLED TO CONTINUE ITS MINING OPERATIONS ON THE ENTIRE PIT AS A LEGAL NONCONFORMING USE.

It is well established that zoning ordinances are subject to restrictions designed to protect vested interests in real property. Specific to this case, the Minnesota and U.S. Constitutions provide that zoning restrictions are subject to the vested interests of lawful uses already established within the zoned district. *Hawkins v. Talbot*, 80 N.W.2d 863, 865 (Minn. 1959), *see also White v. City of Elk River*, 840 N.W.2d 43, 49 (Minn. 2013). A similar restriction is also found in Minnesota Statutes Section 462.357, subd. 1e(a), which provides that "any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control…may be continued."[1]

[1] Further, one of the zoning ordinances potentially at issue provides "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…" Cascade Township Zoning Ordinance Section 1.28 (emphasis added).

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In a typical case, these "nonconforming" uses remain lawful so long as they are continuous and are not expanded or enlarged. *Hawkins*, 80 N.W.2d at 865, Minn. Stat. § 462.357, subd. 1(e)(a), 1(e)(a)(1), Cascade Township Zoning Ordinance Section 1.28. A mere change in ownership of the land does not constitute an expansion of a nonconforming use, and owners down the chain of title stand in the place of their predecessors. *Id.* The fact that ownership of the Pit has changed since the 1960s therefore has no bearing on this case. The central is whether, in light of the nature of mining operations, conducting ongoing and additional mining on portions of the Section 11 Property not previously mined constitutes an "expansion" of Wilmar's legal nonconforming use of the Pit. For the reasons discussed below, the clear mandate of the Minnesota Supreme Court compels the conclusion that Wilmar's proposed operations do not constitute an "expansion" and therefore qualify as legal nonconforming uses, inclusive of all land within Sections 11 and 14 comprising the Pit.

a. The existing and planned activities on the Pit do not constitute an expansion of the Pit's pre-existing, nonconforming use of the property.

In the case of a diminishing asset, extraction from portions of the land not previously mined does not constitute an "expansion" of a legal nonconforming use. In *Hawkins v. Talbot*, the Supreme Court of Minnesota affirmed the trial court's judgment in favor of a mine operator who sought to continue extracting gravel from a pit situated on land subject to a prohibitive zoning ordinance. 80 N.W.2d at 864-65. The operator had extracted gravel from the pit for over a decade prior to the adoption of the ordinance

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and continued its operations thereafter. *Id.* After the ordinance was enacted, a group of landowners filed suit to enjoin the mining operations, arguing the operator's horizontal expansion across the pit was an impermissible extension of the nonconforming use. *Id.* The trial court disagreed. *Id.*

In affirming the trial court's judgment for the operator, the Supreme Court of Minnesota was confronted with a "diminishing asset," which was distinguishable from typical nonconforming uses involving buildings or improvements. *Hawkins,* 80 N.W.2d at 865. In those typical cases, if the restrictions were upheld, the owner could continue his business with the existing facilities. *Id.* In *Hawkins*, however, if the operator was "limited to the area of land actually excavated at the time of adoption of the ordinance," the restriction would prohibit any further use of the land as a gravel pit. *Id.* at 865. The court therefore held that in the case of a diminishing asset, the nonconforming use covers "all of that part of the owner's land which contains the particular asset, and not merely that area in which operations were actually being conducted at the time" the ordinance was adopted. *Id.* at 866. In other words, horizontal expansion of an existing quarry does not constitute an expansion of a legal nonconforming use. *Id.* Courts in other jurisdictions have approached diminishing assets in a similar manner. *See Du Page Cty. v. Elmhurst-Chicago Stone Co.*, 165 N.E.2d 310, 313 (Ill. 1960) ("we think that in cases of a diminishing asset the enterprise is 'using' all that land which contains the particular asset and which constitutes an integral part of the operation, notwithstanding the fact that a particular portion may not yet be under actual excavation.") *Syracuse Aggregate Corp.*

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v. Weise, 72 A.D.2d 254, 258 (N.Y. 1980) (holding in favor of an excavator where "the nature of his use manifestly implies an appropriation of the entirety to such use.")

In this case, it is clear that ongoing and planned mining activity on the Section 11 Property does not constitute an expansion of the Pit's nonconforming use. Like the mine in *Hawkins*, which was in use at the time the restrictive ordinance was enacted, the Pit as a whole, inclusive of the land in Sections 11 and 14, was used and intended for use for mining operations prior to the adoption of the 1970 and 1976 zoning ordinances. Like the *Hawkins* use, which required horizontal expansion into areas of the mine not previously used for mining, the Pit here contains areas in Section 11 from which no minerals have been extracted. However, like both the *Hawkins* and *Du Page* mines, the entire Pit contains the mineral assets in question, and the minerals constitute a diminishing asset.

To prevent Wilmar from "expanding" its operations throughout the Pit would limit it to the land previously excavated at the time the applicable ordinance was adopted and would prevent the use of the Pit for its historical and intended purpose. Not only would such a result directly violate *Hawkins*' mandate, it would also deprive the property owners of the vested right to conduct mining operations on the subject property. The Court should therefore follow the clear directive of the Minnesota Supreme Court, grant Wilmar's Motion for Summary Judgment, and issue a declaration that the mining operations on the Section 11 and 14 properties at issue constitute a legal nonconforming

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use and that the entire Pit, which contains the diminishing asset at issue, is subject to that nonconforming use.

CONCLUSION

Based upon the foregoing discussion, Wilmar respectfully requests the Court grant its motion to dismiss Cascade's allegations of nuisance.

Dated: July 19, 2016.

DUNLAP & SEEGER, P.A.

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