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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 TO DISMISS PURSUANT TO MINN. R. CIV. P. 12.02(e)

INTRODUCTION

Plaintiff Wilmar Investments, LLC ("Wilmar") submits this memorandum of law in support of its Motion to Dismiss Defendant Cascade Township's "affirmative defense" and general defense of nuisance. The Court should dismiss Cascade's nuisance related defenses pursuant to Minn. R. Civ. P. 12.02(e) (1) for lack of subject matter jurisdiction and (2) for failure to state a claim upon which relief can be granted.

This is an action seeking a declaratory judgment that certain mining operations on the property described in the Complaint constitute a legal non-conforming use. Specifically, Wilmar seeks a declaration that the mining operations on land owned by the Plaintiff and located in Sections 11 and 14 of Township 107, Range 14 existed prior to the enactment of restrictive zoning ordinances, that those mining operations have been

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continuous for several decades, and that this continuous use has "grandfathered" the mining operations as a legal use of the property.

In response, Defendant Cascade Township ("Cascade") has improperly alleged, as an affirmative defense, that Wilmar's "proposed use" constitutes a nuisance. Cascade's "defense" does not allege a current or reasonably imminent nuisance, it does not allege a disturbance to an interest in real property, and it fails to abide by the mandatory procedure for abating a public nuisance, which is well-established by statute.

Cascade's allegations of nuisance are nothing more than an attempt to distract the Court from the central issue in this case: whether the mining operations constitute a pre-existing, and therefore legal, non-conforming use of the property. Because Cascade's allegations of nuisance fail on several grounds, the "affirmative defense" of nuisance should be dismissed.

STATEMENT OF THE DOCUMENTS RELIED UPON

Plaintiff's memorandum relies upon the pleadings and documents attached thereto.

STATEMENT OF THE FACTS

I. Background

Wilmar is the owner of certain land located in Sections 11 and 14 of Cascade Township, Olmsted County, Minnesota. (Compl. ¶ 1). The property at issue consists of several contiguous parcels in Section 14 (the "Section 14" Property) and Section 11 (the "Section 11 Property"). (*Id.* at ¶ 3). Together, the Section 11 Property and the Section 14 Property consist of a single, contiguous land holding referred to herein as the "Pit."

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(*Id.*) Wilmar owns the Pit and leases it to Mathy Construction Company ("Mathy"), who conducts mining operations thereupon. (*Id.* at ¶ 1.) Various entities, including Rochester Sand and Gravel ("RS&G"), have conducted mining operations on the Pit continuously since 1946. (Compl. ¶s 18-20.)

In 1976, Olmsted County enacted a zoning ordinance under which the mining activities did not conform. (Compl. ¶ 21.) Prior to this 1976 ordinance, there were no restrictions on the use of the Pit for mining activities. (Compl. ¶ 21.) Following the ordinance's enactment, RS&G continued to use the Pit for mining operations as a pre-existing, and therefore legal, non-conforming use of the property. (*Id.* at ¶ 23.) The use has been continuous to date, either through Mathy, or RS&G and its predecessors in interest. (*Id.* at ¶s 4, 18-23.)

In 1998, after extensive negotiations, Mathy purchased RS&G, leased the Pit's mining rights, and continued to conduct mining operations on the Pit. (Compl. ¶s 4, 24-28.) As part of the negotiation process, an Olmsted County official assured Mathy that the mining operations constituted a pre-existing non-conforming use. (*Id.* at ¶ 27.) Currently, Mathy leases the pit from Wilmar and conducts its mining operations thereupon. (*Id.* at 29.)

In 2009, Mathy began planning to expand existing mining operations on the Section 11 Property. (*Id.* at ¶ 30.) As part of that process, Mathy was required to complete an environmental assessment report with the Minnesota Department of Natural Resources ("DNR"). (*Id.*) The DNR issued its decision in April 2014, concluding that

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the project did "not have the potential for significant environmental effects." (*Id.*) After receiving the decision, Mathy began meeting with Olmsted County staff, who eventually concluded that jurisdiction over the Pit rested with Cascade. (*Id*. at ¶ 11.)

To avoid litigation, Mathy offered to enter into an agreement with Cascade that would permit continued and additional mining on the Section 11 Property. (*Id.* at ¶ 33.) Cascade refused and took the position that "prior to commencing any mining activity in the [Section 11 Property], Mathy Construction must submit to the Cascade Township Zoning Ordinance procedures and requirements" because "the continuity of use and inclusion of the [Section 11 Property] in the non-conforming use are in doubt." (*Id.* at ¶ 34.) Without admitting any obligation to do so, Wilmar and Mathy applied for a conditional use permit. (*Id.* at ¶ 36.) Cascade denied the application, despite recommendations from the Cascade Township Planning Commission, the Olmsted County Highway Department, and the Township Cooperative Planning Authority. (*Id.* at ¶s 36-40.)

II. Procedural Posture

Wilmar commenced the current action in September 2015, seeking a declaration that the mining activities in the Pit constitute a pre-existing non-conforming use of the property. (Compl. ¶ 1.) In Cascade's Answer, it raised the potential for future nuisance as an "affirmative defense," alleging that "the use of the land that Plaintiff proposes – which includes blasting and gravel crushing in proximity to nearby residences – constitutes a nuisance, so that the activity is not permitted." (Ans. ¶ 6.) Wilmar now

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moves to dismiss Cascade's "affirmative defense" because (1) it is not ripe, (2) it was improperly pled as a defense rather than a counterclaim, (3) Cascade lacks standing to bring an action for private nuisance, and (4) Cascade failed to follow the mandatory statutory procedures for abating a public nuisance.

STATEMENT OF THE ISSUES

I. WHETHER CASCADE'S NUISANCE CLAIM SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

II. WHETHER CASCADE'S NUISANCE CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

ARGUMENT

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER CASCADE'S CLAIM FOR NUISANCE.

1. Cascade's premature nuisance claim is not ripe for judicial review.

The existence of a justiciable controversy is a required for the proper adjudication of a party's claim. *Izaak Walton League of Am. Endowment, Inc. v. State Dep't of Nat. Res.*, 252 N.W.2d 852, 854 (Minn. 1977), *Lee v. Delmont*, 36 N.W.2d 530, 537 (Minn. 1949), *Leiendecker v. Asian Women United of Minnesota*, 731 N.W.2d 836, 841 (Minn. Ct. App. 2007). Regardless of the type of proceeding, a justiciable controversy must exist in order for a litigant's claim to be properly before the court. *State v. Colsch*, 284 N.W.2d 839, 841 (Minn. 1979), *Lee*, 36 N.W.2d at 537. No controversy is presented without a genuine conflict in the tangible interests of opposing litigants. *Izaak Walton*, 252 N.W.2d at 854. In other words, to establish the existence of a justiciable

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controversy, a litigant must show that a "direct and imminent injury" will result from the opposing party's acts or omissions. *Leindecker*, 731 N.W.2d at 841 (citing *Nat'l Park Hospitality Ass'n v. Dep't of the Interior,* 538 U.S. 803, 807 (2003)). If the litigant cannot assert "any present, immediate, or reasonably imminent" injury, its claim must be dismissed. *See Lee*, 36 N.W.2d at 537, *Colsch,* 284 N.W.2d at 842 (finding a lack of subject matter jurisdiction where "the speculative nature of this injury [was] apparent"). Issues which have "no existence other than in the realm of future possibility are purely hypothetical and are not justiciable." *Lee*, 36 N.W.2d at 537, *Colsch*, 284 N.W.2d at 842. Importantly, because the existence of a justiciable controversy is essential to the exercise of judicial power, the issue can be raised at any stage of a proceeding. *Izaak Walton*, 252 N.W.2d at 854, *Irwin v. Goodno*, 686 N.W.2d 878, 880 (Minn. Ct. App. 2004*), Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 433 (Minn. Ct. App. 1995) ("both subject matter jurisdiction and standing may be challenged at any time").

On the face of the pleadings, Cascade's alleged nuisance is speculative and fails to assert any "present, immediate, or reasonably imminent" injury. To be clear, neither Wilmar nor Mathy are currently conducting the planned expanded mining operations that gave rise to this action. Mathy has been in the process of planning expanded mining operations on the Section 11 Property for several years, but it is not currently engaged in the planned expansion conducting these operations. Cascade simply alleges that the *proposed* expanded use would constitute a nuisance, if it were to materialize. Cascade's alleged nuisance is speculative and does not exist "other than in the realm of future

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possibility." *See Lee*, 36 N.W.2d at 537. Accordingly, the Court lacks subject matter jurisdiction over Cascade's "affirmative defense," and the allegations of nuisance should be dismissed.

II. CASCADE HAS FAILED TO RAISE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

The lack of ripeness on Cascade's "affirmative defense" of nuisance also warrants dismissal on the merits. Both private and public nuisances require allegations of a present nuisance – that is, allegations that the nuisance is being currently maintained. Because Cascade has prematurely raised nuisance as an "affirmative defense" to Wilmar's "proposed expanded use," Cascade cannot establish an essential element of a nuisance claim.

Moreover, Cascade cannot maintain an action for private nuisance because it cannot allege injury to an interest in real property.

Finally, Cascade has failed to follow the procedures required to abate a public nuisance, which are outlined in detail in Minn. Stat. § 617.80 *et seq*.

For these reasons, Cascade has failed to state a claim upon which relief may be granted.

1. Cascade has improperly designated nuisance as an "affirmative defense."

Cascade's Answer alleges that "the use of the land that Plaintiff proposes…constitutes a nuisance, so that that the activity is not permitted." (Ans. P. 5, ¶ 6.) Cascade has provided no authority suggesting nuisance can be raised as an affirmative defense, nor has it explained how a *potential* nuisance gives rise to any cause

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of action. Although Minnesota Rule of Civil Procedure 8.03 allows the Court to treat a pleading as properly designated, Cascade's nuisance allegations fail regardless of their label. As outlined in detail below, an analysis of Cascade's claim of nuisance, regardless of whether it is considered an affirmative defense or a counterclaim, mandates the conclusion that Cascade has failed to state a claim upon which relief may be granted.

2. Rule 12 standard of review.

Pleadings generally must consist of a "short and plain statement of the claim showing that the pleader is entitled to relief." Minn. R. Civ. P. 8.01. Pleadings that fail to state a claim upon which relief can be granted will be dismissed. *In Re Milk Indirect Purchaser Antitrust Litig.*, 588 N.W. 2d 772, 774 (Minn. App. 1999) (citing Minn. R. Civ. Pro. 12.02(e)). "[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quoting *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)). A bare legal conclusion alleged in the complaint is not binding on the court. *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008). In recent years the Minnesota Supreme Court has followed the lead of the federal court and adopted a much higher standard against which to measure the sufficiency of the allegations in a complaint, stating, "[a] plaintiff must provide more than labels and conclusions" in its pleadings. *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

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On a motion to dismiss for failure to state a claim, the trial court may consider only the pleading and the documents referred to therein. *Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000); *see also* Minn. R. Civ. P. 12.02(e); *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 670 (Minn. 1955). All facts as alleged in the pleadings are accepted as true. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). Failure to establish any essential element requires dismissal of the entire claim. *Noske v. Friedberg*, 670 N.W.2d 740, 743 (Minn. 2003) (citing *Godbout v. Norton*, 262 N.W.2d 374, 376 (Minn. 1977)). In other words, if it is not "possible on any evidence which might be produced…to grant the relief demanded, the claim will be dismissed." *Id.* (quoting *N. States. Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)) (internal quotation marks omitted).

2. Cascade does not have a claim for private nuisance.

Minnesota law provides that an action for private nuisance "may be brought by any person whose property *is* injuriously affected or whose personal enjoyment *is* lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." Minn. Stat. § 561.01 (emphasis added). It is clear from the language and the use of the present-tense "is" that the statute does not contemplate relief for a *proposed* activity that *may* constitute a nuisance at some indeterminate point in the future. Because private nuisance requires a showing that the defendant's conduct is currently interfering or has interfered with an interest in property, any allegation of private nuisance fails as a matter of law. It is not "possible on any evidence which might

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be produced" to show that property is being injuriously affected by conduct that has not occurred.

Cascade also lacks standing to allege a private nuisance. An action for private nuisance requires proof that the defendant's conduct has interfered with the plaintiff's use and enjoyment of an interest in property. *Anderson v. State, Dep't of Nat. Res.*, 693 N.W.2d 181, 192 (Minn. 2005) ("Private nuisance is limited to real property interests"). A cause of action for private nuisance fails if a party cannot show an injury stemming from an interest in land. *Anderson v. State, Dep't of Nat. Res.*, 674 N.W.2d 748, 760 (Minn. Ct. App. 2004), *aff'd in part, rev'd in part*, 693 N.W.2d 181.

Cascade cannot allege an injury to an interest in real property. It has made no allegation that the "proposed use" interferes with its private ownership interest in land. It is not an owner of private property; instead, it is a sovereign entity charged with the administration of municipal duties. It is therefore not a landowner with standing to bring a cause of action for private nuisance. Accordingly, Cascade cannot establish the essential element of injury to an interest in real property.

For these reasons, to the extent Cascade's "affirmative defense" can be read as a claim for private nuisance, it should be dismissed.

3. Cascade has not complied with the mandatory procedure for abating a public nuisance.

Minn. Stat. § 617.80 *et seq*. establishes the mandatory procedure for abating a public nuisance. Section 617.81 specifically provides that the scheme "must be followed" in order to enjoin or abate a public nuisance. Specific to this case, a public

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nuisance exists "upon proof of two or more separate behavior incidents" described in item (iii), which defines nuisance to include the maintenance of "a condition which unreasonably annoys, injures, or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public." Minn. Stat. § 609.74, Minn. Stat. § 617.81. Proof of nuisance exists if each of the elements of the conduct constituting the nuisance is established by clear and convincing evidence. Minn. Stat. § 617.81.

If a "prosecuting attorney" has reason to believe that a nuisance is maintained in the jurisdiction the prosecuting attorney serves…the prosecuting attorney shall provide" written notice "*to all owners and interested parties*." The notice must (1) specify the type of nuisance being maintained, (2) summarize the evidence that a nuisance is being maintained, including the dates or dates on which nuisance-related activities are alleged to have occurred, (3) inform the recipient that failure to abate within 30 days of service of the notice could result in injunction proceedings, and (4) inform the owner of certain remedies available at law. Minn. Stat. § 617.81.

If the recipient of the notice fails to abate the alleged nuisance, the prosecuting attorney "may initiate a complaint for relief in the district court." Minn. Stat. § 617.82. The prosecutor must "by verified petition seek a temporary injunction…provided that at least 30 days have expired since service of the" required notice. *Id.* The prosecuting attorney must then serve a notice of hearing to show cause, and the Court must hold a hearing at which the respondents have an opportunity to be heard, prior to issuing a temporary injunction. *Id.*

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Cascade has failed to comply with the procedure outlined above, which is expressly required in a public nuisance case. Cascade has not alleged that it provided Wilmar or Mathy, an additional interested party, with any notice that a nuisance "was being maintained" on the subject property. It has not summarized the evidence or provided specific dates, and it did not inform Wilmar of the remedies outlined in the statutory scheme. Moreover, Cascade did not file a petition for an injunction 30 days following service of notice, and it has not requested a hearing to show cause. Cascade has simply raised nuisance as an affirmative defense in this declaratory judgment action. Because nuisance is beyond the proper scope of these proceedings, and because Cascade has failed to follow the requisite procedures, its "affirmative defense" should be dismissed.

4. Cascade's speculative nuisance claim fails on its merits

The premature nature of Cascade's nuisance allegations also render Cascade's claims void as a matter of law. It is clear from the language that this statute also contemplates current conduct, not speculative nuisance which may or may not occur in the future. The statute expressly requires proof of two or more incidents constituting a nuisance; it is impossible to offer proof of an incident that has not yet happened. The statute also requires the prosecutor to summarize the evidence of the nuisance and provide specific dates when the activity occurred. Again, it is logically impossible for Cascade to summarize evidence and provide dates which do not exist. For these reasons, Cascade's nuisance allegations fail to state a claim upon which relief may be granted.

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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.

By: /s/ Derek S. Rajavuori
Robert G. Benner
Registration No. 227420

Derek S. Rajavuori
Registration No. 396816

Attorneys for Wilmar Investments, LLC
30 3rd Street SE, Suite 400
Rochester, Minnesota 55904
Telephone: (507) 288-9111