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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF OLMSTED | THIRD JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Judge: Joseph F. Chase
Court File #55-CV-15-6531

Wilmar Investments, LLC,

Plaintiff,

vs.

Cascade Township,

Defendant.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The parties have filed cross-motions for summary judgment, each seeking judgment as a matter of law. The arguments advanced by Wilmar in its memorandum have for the most part been thoroughly addressed in the detailed summary judgment motion papers filed by Cascade Township in support of its own motion for summary judgment. See Amended Memorandum in Support of Motion for Summary Judgment, Document 53; and supporting motion materials, Documents 17-50. Cascade Township relies on the arguments made in its earlier-filed memorandum and incorporates them by reference.

At heart, Plaintiff's motion fails because it is based on a misreading of the Minnesota Supreme Court's decision in Hawkins v. Talbot, 80 N.W.2d 863, 865 (Minn. 1957). Plaintiff contends that Hawkins should be read to allow expansion of a mining operation not only on the same parcel, but also to adjoining parcels where mining activities were not occurring at the time of the adoption of an ordinance. Hawkins, however, did not involve the issue of the expansion of mining activities to adjoining parcels because in Hawkins there was but one parcel. Neither did Hawkins involve a situation where there were significant known impacts to adjoining residential

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properties. Hawkins also did not involve a decades-long delay in the pursuit of the mining activity in question.

Because it is a court-created exception to the language in non-conforming use statutes stating that non-conforming uses cannot be expanded, Hawkins does not apply to the situation presented in this case. Expansion of mining activities to adjacent parcels where the activity had not been taking place trammels the rights of adjacent landowners, who have come to expect that property will be developed in a manner that is consistent with property's recent use. Rather than adopting Wilmar's overreaching interpretation of Hawkins, the Court should limit Hawkins to the situation that was presented to the Hawkins court: development on the same parcel of land. Moreover, here, given that decades that have passed from the time of the adoption of the ordinance to the present, and that Mathy Construction, Inc. proposes to develop a giant new hard-rock quarry in section 11, the Court should limit Hawkins to development on the same parcel of land. In the event that the Court is inclined to consider some allowance on adjoining parcels, it urges the court to apply the three-prong test articulated in Town of Wolfeboro (Planning Bd.) v. Smith, 556 A.2d 755, 756 (N.H. 1989). Under any of these scenarios, Wilmar's summary judgment motion is properly denied and Cascade Township's motion for summary judgment is properly granted.

STATEMENT OF DOCUMENTS RELIED ON

Cascade Township relies on the following documents in opposing Wilmar's motion. These documents have already been filed in support of Cascade Township's motion for summary judgment.

1. Affidavit of Kenneth Bayliss with attachments (Doc. 19-42)
2. Affidavit of Roger Ihrke (Doc. 46)

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3. Affidavit of David Derby (Doc. 45)

4. Affidavit of Lenny Laures (Doc. 47-50)

5. Affidavit of Charles Wallace (Doc. 44)

6. Declaration of Alex Conzemius, with report (Doc. 43)

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.

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.

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App. 2006). Here uncontested facts demonstrate that Cascade Township is entitled to judgment as a matter of law and that Wilmar's motion for summary judgment should be denied.

STATEMENT OF UNDISPUTED FACTS

Cascade Township's summary judgment memorandum contains a detailed recitation of the facts. Amended Memorandum in Support of Motion for Summary Judgment, p. 3-17. Rather than repeat the entire argument advanced in that memorandum, Cascade Township incorporates it by reference.

LEGAL ARGUMENT

I. HAWKINS IS DISTINGUISHABLE BECAUSE IT DID NOT INVOLVE THE QUESTIONS PRESENTED HERE.

Wilmar contends that the result in this case is determined by the Minnesota Supreme Court's decision in Hawkins. Cascade Township has analyzed Hawkins and its application to this case in the memorandum it filed in support of its summary judgment motion. See Amended Memorandum, p. 17-20. Cascade Township incorporates by reference the arguments and analysis contained in that earlier-filed memorandum.

One aspect of Wilmar's use of text from Hawkins is worth mentioning. Wilmar repeatedly trots out language from Hawkins that refers to "all of that part of the owner's land" and suggests that this evidences an intention by the Hawkins court to extend the diminishing asset not just to a single parcel, but to contiguous parcels. See Wilmar Memorandum of Law in Support of Motion for Summary Judgment, p. 10-11. But when a case involves a single parcel of land, as in Hawkins, there is no real reason to even use the word "parcel," because when multiple parcels are not at issue the court can just refer to "land." There is nothing in the Hawkins decision that suggests any intention to apply the diminishing asset exception to parcels adjoining

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a grandfathered parcel. Indeed, the Hawkins court noted that the case simply involved the gradual expansion of the edge of 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.

Given that Hawkins did not involve multiple parcels, if the Hawkins court had made a ruling on that issue it would be dicta. But this is not even a situation where the court's statement is dicta, because there is no indication in the Hawkins opinion that the word "land" was being used by the court in the specific way that Wilmar suggests. Wilmar's argument that the Hawkins court addressed this issue is simply a strained overreading of the text of the opinion. Of course, the danger of such overreading is apparent if one considers that if one were blind to context—as Wilmar seems to be—one could read "all of that part of the owner's land" to include even non-contiguous land or land held miles away in some remote corner of the township or county. The Hawkins court did not address a situation involving multiple parcels and it was simply adopting the diminishing assets exception.

II. THE FOREIGN CASES CITED BY PLAINTIFF, SYRACUSE AGGREGATE AND ELMHURST-CHICAGO STONE COMPANY, DO NOT SUPPORT WILMAR'S ARGUMENT, BECAUSE THEY BOTH INVOLVE A SINGLE PARCEL OF LAND.

Wilmar asserts that two cases from foreign jurisdictions, Du Page Cty. v. Elmhurst-Chicago Stone Co., 165 N.E.2d 310, 311 (Ill. 1960) and Syracuse Aggregate Corp. v. Weise, 424 N.Y.S.2d 556 (N.Y. App. Div. 1980), support extending the right to mine to adjacent parcels of land. Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, p. 10-11. Upon careful review, however, neither case involved more than one parcel of land.

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The first case cited by Plaintiff, Du Page Cty. v. Elmhurst-Chicago Stone Co., 165 N.E.2d 310, 311 (Ill. 1960) does not involve multiple parcels of land. In describing the property at issue, the court noted: "The property in question is a 30-acre tract of land west of and adjoining the city of Elmhurst." Id. at 311. There is nothing in the court's description of the land to suggest that more than one parcel is involved. The case involved a discussion of different activities occurring at different areas of the property, but no suggestion that the case involved multiple parcels of land. Id. at 312-13. Instead of deciding whether it would extend the diminishing assets exception to adjacent parcels, the court wrestled with the more basic question of whether it would recognize the diminishing assets exception:

> This is not the usual case of a business conducted within buildings, nor is the land held merely as a site or location whereon the enterprise can be conducted indefinitely with existing facilities. In a quarrying business the land itself is a material or resource. It constitutes a diminishing asset and is consumed in the very process of use. Under such facts the ordinary concept of use, as applied in determining the existence of a nonconforming use, must yield to the realities of the business in question and the nature of its operations.

Id. at 313 (1960). Elmhurst-Chicago Stone was the Illinois court's pronouncement that it would join Minnesota and other states that recognized the diminishing assets exception. It did not suggest that rights existing on one parcel of land could be transferred to another parcel of land.

And the same is true of the other foreign decision cited by Wilmar, Syracuse Aggregate, 424 N.Y.S.2d 556 (N.Y. App. Div. 1960). The first two sentences of the Syracuse Aggregate opinion make it clear that the case involved only one parcel of land:

> The central issue on this appeal is whether a nonconforming pre-existing use of property for the excavation of sand, gravel and related materials extends to the entire parcel of land or is limited to the area under excavation at the time a municipality adopted a zoning ordinance prohibiting the expansion of nonconforming uses.
>
> The property in question is a 25 acre parcel of land in the Town of Camillus approximately 700 feet wide by 1600 feet long.

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424 N.Y.S.2d at 557 (emphasis added). The issue in Syracuse Aggregate was again the basic one of whether New York courts would recognize the diminishing asset exception:

> The central issue on this appeal is whether a nonconforming pre-existing use of property for the excavation of sand, gravel and related materials extends to the entire parcel of land or is limited to the area under excavation at the time a municipality adopted a zoning ordinance prohibiting the expansion of nonconforming uses.

Id. The court recognized that the diminishing assets exception was accepted in a majority of jurisdictions and was based on a sound understanding of the law, but never addressed the broader question of whether the doctrine would be extended to adjacent parcels of land.

And rather than supporting an expansive application of the diminishing assets doctrine, Syracuse Aggregate is best read as a adopting a restrictive approach—allowing some expansion when circumstances warrant, but prohibiting a blanket prohibition against expansion:

> Special Term erred in its application of the rule that nonconforming uses may not be expanded, implementing a blanket rule that no additional land, beyond that utilized as of the time the ordinance became effective, may ever be entitled to nonconforming usage. This all-encompassing rule is not appropriate in cases where, as here, the entire parcel of land is dedicated to the removal of deposits in the soil and the manifestation that it is so devoted is unmistakably discernible.

Id. at 560. Syracuse Aggregate does not deal with whether the diminishing assets exception applies to adjoining parcels of land; it simply holds that the exception has application in non-conforming use cases involving mining activities.

But a consideration of Syracuse Aggregate should not end with the decision cited by Wilmar. That decision was appealed. Syracuse Aggregate Corp. v. Weise, 414 N.E.2d 651 (N.Y. 1980). This second Syracuse Aggregate decision again shows that the facts were narrowly limited to a single parcel of land:

> But where, as here, the owner engages in substantial quarrying activities on a distinct parcel of land over a long period of time and these activities clearly

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> manifest an intent to appropriate the entire parcel to the particular business of quarrying, the extent of protection afforded by the nonconforming use will extend to the boundaries of the parcel even though extensive excavation may have been limited to only a portion of the property.

Syracuse Aggregate Corp., 414 N.E.2d at 655 (emphasis added). None of the authority cited by Wilmar supports extending the diminishing assets exception to adjacent parcels.

While the decision in Syracuse Aggregate did not involve multiple parcels, a later New York case, Dolomite Products Co. v. Kipers, 260 N.Y.S.2d 918, 919 (N.Y. App. Div. 1965), makes it clear that the New York courts will not extend the diminishing assets exception to adjoining parcels. In fact, Dolomite Products presents facts remarkably similar to those present here: more than one parcel of land; some mining activity, but not hard rock mining, on the adjoining parcels; and intervening residential development. Id. at 919-21.

Dolomite Products involved three parcels, parcels A, B, and C. Id. at 919. The only quarrying of stone took place on parcel A, though parcel B had areas where top soil had been stripped from the land and some test drilling had been performed. Id. at 920. Parcel C also had a berm constructed on it. Id. Stone quarrying had not occurred on them for more than 40 years and in the intervening years numerous residential properties had been developed in the area. Id. at 920-21. Some residences were as close as 110 feet to the parcels that were intended to be developed for mining purposes. Id. at 921. Following the purchase of the property by the landowner, most of parcels B and C had been used for farming and nursery purposes. Id. at 919.

The court held that the expansion of the quarrying activity into parcels B and C was an impermissible expansion of the non-conforming use:

> 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

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> 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 some time 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 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, 260 N.Y.S.2d at 921. Our case is remarkably similar to Dolomite Products. Both cases involve: multiple parcels of land; a voiced intention to expand bedrock mining activities, including blasting; nearby homeowners; some stripping and berming on the adjoining parcels, but no ongoing hard rock mining; and long years of dormancy. See id. at 919-21. Given that it involved multiple parcels of land, the Dolomite Products decision is far more applicable to our case than the New York court's earlier decision in Syracuse Aggregate.

Beyond Dolomite Products, numerous cases from foreign jurisdictions have held that the diminishing assets exception should be extended to adjacent parcels of land. In Stephan & Sons, Inc. v. Municipality of Anchorage Zoning Bd. of Examiners & Appeals, 685 P.2d 98, 102, n. 6 (Alaska 1984), the court stated: "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."

In a case involving a landowner that owned two parcels split by a highway, with one parcel an active quarry and the other not, the Ohio Supreme Court noted that the lower court had addressed a situation similar to the one presented in our case:

> However, the trial court found, which finding was approved by the Court of Appeals, that as a matter of fact, evidenced by appellant's own conduct over the years, his 46.5 acres comprise two distinct parcels of land, separated by U.S. Highway 33; that appellant had failed to establish a preexisting use for quarrying purposes of the land lying east of U.S. Highway 33 before the enactment of the

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> zoning resolution; and that appellant's use of his land west of U.S. Highway 33 prior to the enactment of the zoning resolution did not entitle him to extend or expand such use for quarrying activities to his land east of that highway.

Davis v. Miller, 126 N.E.2d 49, 51 (Ohio 1955). The Davis court affirmed the decision, holding that the activity could not be expanded to the adjacent parcel.

A New Jersey case, Township of Fairfield v. Likanchuk's, similarly declined to extend the diminishing asset doctrine to adjoining parcels:

> However, simply because the nature of the use involves a diminishing asset does not necessarily justify its expansion. Because of the expressed aversion toward expansion of nonconforming uses, the "diminishing asset" theory must be applied with caution. Public concern toward wholesale excavation and its attendant dangers are well founded. . . . Also, neighboring property may be developed for residential or other uses which are incompatible with the mining use in reliance on the perceived dormancy or limitation of the excavation activity at the time it became a nonconforming use.

Twp. of Fairfield v. Likanchuk's, Inc., 644 A.2d 120, 124–25 (N.J. App. Div. 1994).

A later New Jersey case, Fred McDowell, Inc. v. Board of Adjustment of Township of Wall, adopted the approach in Likanchuk's and refused to allow activities on one lot to expand to another. McDowell, 757 A.2d 822, 826 (N.J. App. Div. 2000). McDowell is a case quite similar to our case. These similarities include the following with respect to the circumstances of the section 11 properties in our case:

- The mining operation had sold for residential purposes some of the land near the property into which it intended to extend mining. Id. at 827. (Here, Wilmar sold adjacent section 11 properties for residential purposes).
- While it held the property it saw that the property was put to other uses, including agricultural uses. Id. (Here, the aerial photos show that the majority of the section 11 parcels have been farmed for decades).

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- There was evidence of historic mining, some small amount of removal of materials, some observable surface mining on the parcel, and borings on the property, but otherwise no evidence of significant mining activity. Id. (Here, these activities were also present).

Ultimately, the McDowell court held that the diminishing assets exception is a limited doctrine, not mechanically extended to adjoining parcels:

> On the other hand, the municipality's recognized right to limit prior nonconforming uses and to bring such uses into conformity with subsequently enacted zoning ordinances remains the rule and cannot be swallowed by the diminishing asset exception. We are satisfied that the diminishing asset exception has reasonable limits and does not stand for the proposition that unlimited expansion of a mining site is permissible, irrespective of other potentially relevant factors.

McDowell, 757 A.2d at 833.

The decisions in Dolomite Products, Stephan & Sons, Davis, Likanchuk's, and McDowell, represent thoughtful analyses of cases involving multiple parcels of land. The approach taken in these cases strongly supports the Township's position that Wilmar's motion for summary judgment should be denied and that the Township is entitled to summary judgment on Wilmar's claims.

III. THE CESSATION OF ALL MINING ACTIVITY CONSTITUTED AN ABANDONMENT OF THE RIGHT TO CONDUCT LEGAL NON-CONFORMING MINING-RELATED ACTIVITIES.

This argument was addressed at length in Cascade Township's earlier-filed memorandum. Cascade Township incorporates by reference the arguments it made in that memorandum with respect to this issue. See Amended Memorandum, p. 22-26.

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IV. THE COURT SHOULD APPLY THE THREE-PRONG TEST IN DETERMINING WHETHER THE ACTIVITY SHOULD BE PERMITTED.

This argument was addressed at length in Cascade Township's earlier-filed memorandum. Cascade Township incorporates by reference the arguments it made in that memorandum with respect to this issue. See Amended Memorandum, p. 27-34.

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 requested declarations and determine that the use of the section 11 parcels for mining purposes is not grandfathered and would be an illegal nonconforming use.

QUINLIVAN & HUGHES, P.A.

Dated: August 5, 2016

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