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8/5/2016 5:04:20 PM
Olmsted County, MN

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 IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Wilmar commends Cascade for its effort to distract the Court from long-established Minnesota law and the very simple, straightforward facts of this case. Contrary to Cascade's assertions, Wilmar need not establish that it mined hard rock on every inch of its land annually for the past five decades. That is not what Minnesota law requires. Instead, the issue before the Court is whether the Supreme Court's ruling in *Hawkins v. Talbot* applies when one land holding, acquired solely for the purpose of operating a quarry, is identified by several parcel identification numbers for tax-assessment purposes. Specifically, where there is undisputed evidence: (1) that the Wilmar land has been occupied and used for mining operations since the 1940's; and (2) that annual mining activities have occurred on portions of the land occupied and used by Rochester Sand & Gravel, Wilmar, and now Mathy Construction, does Minnesota's

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

"diminishing assets" doctrine allow for additional operations on adjoining tax ID parcels that have always been considered part of the same geological asset? Cascade may dispute the specific activities that have occurred on each separate tax ID parcel, but it has not produced a shred of evidence to rebut the showing that Wilmar, Mathy, or their predecessors in interest have continuously engaged in mining activities on portions of the Pit since the 1940s.

Moreover, Cascade's submissions advocate for a standard that has not been incorporated into Minnesota law. The *Hawkins v. Talbot* case established the law governing nonconforming mining operations in Minnesota. *Hawkins* has been repeatedly interpreted as favorable to the land owner seeking to continue mining operations and has not been overturned or criticized. The fact that Wilmar's land is separated into several "parcels" for convenience in tax assessment is of no consequence. The Pit, in accordance with the *Hawkins* holding, constitutes "all of that part of the owner's land that contains the particular asset." Wilmar was entitled to rely on *Hawkins* and Minnesota statutes in planning the sequential mining activity on its land. Wilmar certainly was not obligated to reach into the law of foreign jurisdictions to determine how to protect its rights. Because the law in Minnesota specifically allows Wilmar to continue mining on the entire Pit, this Court should apply Minnesota law as it stands, and Cascade's Motion should be denied.

Finally, even if the Court chooses to apply Cascade's proposed three-prong test, it must deny Cascade's Motion for Summary Judgment. The test itself incorporates terms, such as "objective manifestations" and "substantially different," that are quintessential

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

questions of fact. A fact-finder would need to determine whether Wilmar objectively manifested an intent to excavate the Pit and whether the proposed operations would have a "substantially different" impact on the neighborhood. In light of the fact that Wilmar, Mathy, or their predecessors in interest initiated an Environmental Assessment for additional operations in the Pit, continued extractions on portions of the Pit, and entered into mining leases all serve as objective measures of Wilmar's intent to excavate the area. Further, the absence of evidence of complaints from nearby residents, the fact that Cascade approved the platting of residential property right next to a different, larger quarry, and Roger Ihrke's own statements against interest establish the existence of fact questions on the issue of what, if any, impact continued mining activity will have on the surrounding neighborhood.

STATEMENT OF THE RECORD

Plaintiff's memorandum relies upon the documents and exhibits provided with its Motion for Summary Judgment, the submissions provided in support of Cascade's Motion for Summary Judgment, and the following:

I. The Affidavit of Derek S. Rajavuori, with a true and correct copy of the following attached thereto:

   a. Portions of the deposition transcript of William Fitzgerald, with exhibits.

   b. Township Cooperative Planning Association's recommendations to the Cascade Township Planning Commission on Mathy Construction's proposal.

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

c. Plat map for residential property near the Goldberg Quarry in Cascade Township, Olmsted County, Minnesota.

d. Relevant portions of an Environmental Assessment Worksheet submitted by Mathy Construction to the Minnesota Department of Natural Resources ("DNR") and the corresponding report and findings issued by the DNR.

e. Portions of the deposition transcript of Andrew Peters, with exhibits.

f. Portions of the deposition transcript of Patrick Peterson.

g. Portions of the deposition transcript of William Perry Atterholt.

h. Portions of the deposition transcript of Mark Hindermann.

II. The Affidavit of William Perry Atterholt.

STATEMENT OF THE FACTS

I. Undisputed facts

The parties agree on several facts underlying this dispute. The property at issue, referred to herein as the "Pit," is comprised of one single geological reserve asset. (Peters Depo. pp. 13, 16, Ex. 7.) The Pit was acquired by Wilmar or its predecessors in interest prior to the adoption of any prohibitive zoning ordinance. (Hindermann Aff. ¶ 2; Ryan Aff. Exs. A, B.) Mining activities have occurred in the Pit continuously from the late 1940s through the present, though the extent and locations of such use are in dispute. (Hindermann Aff. ¶s 14-17; Peterson Depo. pp. 59-60, Atterholt Depo. p. 56) However, the undisputed record shows the operators have extracted sand and gravel from the Section 14 ground on an annual basis since the late 1940s. (*Id.*)

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

Currently, Mathy leases the Pit from Wilmar. (Hindermann Aff. ¶s 18-19; Ex. 18.) In 1998, Mathy purchased the business and assets of Rochester Sand and Gravel, Inc. ("RS&G, Inc."), the company that operated the Pit since the mid-1960s. (*Id.* at ¶s 18-19.) In close connection with that transaction, Mathy also entered into a lease with Wilmar for the land in Sections 11 and 14 comprising the Pit. (*Id.*) The lease specifically contemplates extraction of the minerals and geological resources from the Pit property as a whole. (Hindermann Aff. Ex. 18.) Finally, as part of its ongoing operations, Mathy submitted an Enviornmental Assessment Worksheet – in accordance with Minnesota Administrative Rules, Chapter 4410 – for the Pit land within Section 11 in December of 2009. (Rajavuori Aff. Ex. D.)

II. Additional evidence of mining operations on the pit

During the course of negotiations for the lease of the Pit, the parties took steps to confirm Wilmar had the right to continue mining operations on the Pit as a non-conforming use. (Fitzgerald Depo. pp. 27-29.) As part of that process, the parties worked with Olmsted County and in 1998 received a letter from Geri L. Maki, the Olmsted County planner/sanitarian at that time, indicating:

> It is staff[']s understanding that the exi[s]ting sand and gravel pit located in Section 11 and 14 of Cascade Township has never gone through a Condition[al] Use Permit due to the age of the pit being older than the establishment of a County Zoning Ordinance in 1976. This non-conforming use may continue as long as it does not expand onto adjoining property. If the use were to discontinue for a period of one year, then in order for the pit to start up again a Conditional Use Permit would be required.

(Fitzgerald Depo. Ex. 4.)

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

In the late 2000s, Mathy undertook steps to extract additional minerals from portions of the Section 11 Property that now form the basis of this action. (Rajavuori Aff. Ex. D; Atterholt Depo. pp. 51-3, 56.) As part of the process of initiating these operations, Mathy submitted an Environmental Assessment Worksheet in 2009. (Rajavuori Aff. Ex. D.) Following extensive review by residents, area governing bodies, and state and local agencies, the Environmental Assessment Review was completed and a Record of Decision was published by the MDNR on April 2, 2014, concluding that the proposed project did "not have the potential for significant environmental effects." (*Id.*)

III. Evidence exists that the mining operations will not have a substantial impact on the surrounding area as Cascade contends

A review of the chains of title and deeds attached to the Affidavit of William J. Ryan show that the only residential buildings immediately adjacent to the Pit all lie within the Oak Terrace Mobile Home Park, which has been in the area of the Pit for decades. (Ryan Aff. Exs. A, B; Hindermann Depo. p. 38.) Other than complaints from a single individual made to Patrick Peterson of Mathy, there is no evidence of any complaints from nearby residents. (Peterson Depo. p. 48.)

Further, Cascade's dramatic rhetoric regarding the impact on the surrounding area is directly rebutted by Cascade's own actions. A review of public records show that Cascade agreed to the platting of residential property on land immediately across the road from the Goldberg Quarry Olmsted County. (Rajavuori Aff. Ex. C.) Goldberg Quarry, which is also operated by Mathy, is larger than the Pit at issue and consists of similar

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

operations. (Atterholt Aff. ¶s 2-3.) Clearly the close proximity of the visible Goldberg Quarry was of no concern.

Finally, Roger Ihrke, an administrator of the Township Cooperative Planning Association ("TCPA") and Cascade's own representative and proposed expert witness, specifically concluded in the TCPA's comments on Mathy's proposal that "mining the resources [in the Pit] makes sense," that "mining in this area prior to development would best serve the public," and that it was in the public's interest to "assure the resources remain available by keeping development away from the resources until used." (Rajavuori Aff. Ex. B.) Based on its analysis, Mr. Ihrke and the TCPA staff recommended approval of Mathy's proposal. (*Id.*)

STATEMENT OF THE ISSUES

I. WHETHER THE RULING IN *HAWKINS V. TALBOT* APPLIES TO THIS CASE.

II. WHETHER QUESTIONS OF FACT PREVENT SUMMARY JUDGMENT IN THE EVENT THE COURT ACCEPTS CASCADE'S PROPOSED THREE-PRONGED TEST.

STANDARD OF REVIEW

A court shall render summary judgment forthwith "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. Upon review, the evidence is viewed in the light most favorable to the nonmoving party and any doubts about the

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

existence of a material fact are resolved in that party's favor. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

Summary judgment is a "blunt instrument" and "should not be employed to determine issues which suggest that questions be answered before the rights of the parties can be fairly passed upon." *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966). Rather, it should be employed "only where it is perfectly clear that no issue of fact is involved, and that it is not desirable nor necessary to inquire into facts which might clarify the application of the law." *Id.* (citing 3 Barron & Holtzoff, Federal Practice and Procedure (Rules ed.) § 1234). Thus, if reasonable persons might reach different conclusions, summary judgment should be denied. *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 605 (Minn. 1957).

ARGUMENT

I. *HAWKINS V. TALBOT'S* EXTENT OF THE ASSET TEST APPLIES TO WILMAR'S OPERATIONS.[1]

It is a "fundamental principle" that uses of land "lawfully existing at the time of an adverse zoning change may continue to exist until they are removed or otherwise discontinued." *Hooper v. City of St. Paul,* 353 N.W.2d 138, 140 (Minn. 1984). Consistent with this "fundamental principle" and in the interest of protecting the constitutional rights of mining operators, the Minnesota Supreme Court has expressly declared that, in the mining context, nonconforming use rights apply to "all of that part of the owner's land" that contains the asset being extracted. *Hawkins v. Talbot*, 80 N.W.2d

[1] Wilmar incorporates by reference the arguments set forth in its Memorandum of Law in Support of its Motion for Summary Judgment.

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

863, 866 (Minn. 1957). The *Hawkins* decision was expressly grounded on the protection of a land owner's ability to use the property in the manner it intended. In *Hawkins*, 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 owner's land for its geological assets. *Id.* at 865. With that in mind, the court specifically held that:

> the phrase 'occupy a greater area of land than that occupied by such use at the time of the adoption of this ordinance' should be interpreted, in the case of a diminishing asset, to mean **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 of the adoption of the ordinance. In other words, since the gravel here 'occupied' a larger area than the part actually being mined at the time of the adoption of the ordinance, the entire area of the gravel bed could be used without constituting an unlawful extension of a nonconforming use.

Hawkins, 80 N.W.2d at 866 (emphasis added). Indeed, Cascade's own memorandum acknowledges the "harsh and likely unconstitutional application to existing mining businesses"[2] that would result from a failure to apply the diminishing assets doctrine.

Within a year of the *Hawkins* decision, the Supreme Court of Illinois applied a nearly identical "diminishing assets" test to mining operations in *County of Du Page v. Elmhurst-Chicago Stone Company*, a case in which the mining operation, like Wilmar's, was bisected by a road. 165 N.E.2d 310, 313 (Ill. 1960). The court held:

> In a quarrying business the land itself is a material or resource…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. **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

[2] *See* Cascade's Memo. p. 19.

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

> actual excavation. It is in the very nature of such business that reserve areas be maintained which are left vacant or devoted to incidental uses until they are needed. Obviously it cannot operate over an entire tract at once.

Du Page, 165 N.E.2d at 313 (emphasis added). Again, these decisions focus on the "nature of the business" and the fact that, in contrast to most ordinary nonconforming uses, the land itself is the property owner's asset. Both *DuPage* and *Hawkins* have been cited as broad, land-owner friendly proclamations of the doctrine of "diminishing assets."[3] *See Moore v. Bridgewater Tp.*, 173 A.2d 430, 438 (N.J. 1961), *Syracuse Aggregate Corp. v. Weise,* 72 A.D.2d 254, 259 (N.Y. Sup. Ct. 1980), *Bainter v. Vill. of Algonquin*, 675 N.E.2d 120, 125 (Ill. Ct. App. 1996).

That mining is a unique business has been the focus of several iterations of the "diminishing assets" rule throughout the nation. Courts wrestling with the issue have acknowledged the fact that a mining operator's asset is the land itself. *See also Syracuse Aggregate*, 414 N.E.2d at 654–55 ("By its very nature, quarrying involves a unique use of land. As opposed to other nonconforming uses in which the land is merely incidental to the activities conducted upon it, quarrying contemplates the excavation and sale of the corpus of the land itself as a resource....Thus, as a matter of practicality as well as economic necessity, a quarry operator will not excavate his entire parcel of land at once, but will leave areas in reserve, virtually untouched until they are actually needed."), *Seherr-Thoss v. Teton Cty. Bd. of Cty. Comm'rs*, 329 P.3d 936, 951 (Wyo. 2014) (recognizing "the practice of gravel operations to leave undisturbed areas they intend to

[3] It is also worth noting that in the nearly sixty years since its publication, *Hawkins* has generated no "negative citing references" on Westlaw.

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

excavate later") *Town of W. Greenwich v. A. Cardi Realty Associates*, 786 A.2d 354, 363 (R.I. 2001) ("courts have acknowledged that the amount and frequency of the recovery of the material is driven by market forces, varies with the seasons and fluctuates with the needs of the industries that depend on the resource....Unlike other nonconforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change caused the use to be nonconforming.") As such, in the context of mining operations, the landowner's asset is its *land*, and the economic nature of the operations results in portions of that land sitting without extensive excavation for significant periods.

In a similar vein, the law seeks to avoid discouraging the use of this "untouched" property while the quarry operator waits for it to be "actually needed." In rejecting an argument that alternative uses of dormant mining land destroy the nonconforming status of the property, the Supreme Court of Wyoming persuasively noted that requiring the operator to prepare or "cordon off" future areas "discourages the productive use of land," which is contrary to public policy. *Seherr-Thoss v. Teton Cty. Bd. of Cty. Comm'rs*, 329 P.3d 936, 950–51 (Wyo. 2014). In other words, the fact that an operator devotes mining property to other uses during dormant periods does not impact the nonconforming status of the property.

In this case, *Hawkins*' clear mandate allows Wilmar to continue to conduct operations on the Section 11 Property. Given the unique nature and economic realities of the mining business, Wilmar has not conducted extraction on every single square foot of

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

its property. Like the property in *Hawkins*, however, Wilmar's asset is the property itself. Wilmar's land is composed of all of the land within the "Pit" and includes the land in both Section 14 and 11. Because the entire Pit is the "part of the owner's land that contains" the asset in question, Wilmar – and its tenant Mathy – is entitled to continue its mining operations under Minnesota law. In keeping with the policy of encouraging productive use of property, the Court should not penalize Wilmar from devoting unmined portions of its land to temporary alternative uses.

a) The identification of Wilmar's land into separate tax-ID parcels has no bearing on this case.

Cascade argues that *Hawkins* is distinguishable because it only involved a single "parcel" of land. Cascade's argument is not only inconsistent with the *Hawkins* decision, it ignores the considerations behind the "diminishing assets" doctrine and fails to consider the actual language used in the applicable ordinances and Minnesota law.

First, *Hawkins v. Talbot* involved "land" owned by the defendant which was across a highway from land owned by the Plaintiff. *Hawkins*, 80 N.W.2d at 864. Cascade theorizes, on its own, that only one "parcel" of land was involved. In doing so, Cascade ignores the point that it did not matter in the *Hawkins* case how many parcels were involved. Instead, what mattered was what land Talbot owned, whether the removal of sand and gravel occurred from the land as a whole prior to the adoption of adverse ordinances, and the extent of the mineral assets within the *land* owned by the defendant.

Cascade's position impermissibly restricts the decision in *Hawkins* by changing *Haukins*' use of the word "land" to "parcel." Cascade is clearly attempting to evade the

plain language of the holding in the *Hawkins* case, which allows for ongoing mining operations on the owner's "land" to the extent it contains the asset, and instead convince this Court that Wilmar is expanding its operations onto "adjacent" parcels. Cascade's argument in this regard is completely contrary to *Hawkins* and should be rejected.

Black's Law Dictionary defines "parcel" as "a continuous tract or plot of land *in one possession, no part of which is separated from the rest by intervening land in another's possession.*" *Parcel*, Black's Law Dictionary (10th ed. 2014) (emphasis added). The *Hawkins* case itself mentions the term "parcel" only once, instead expressly declaring that nonconforming use rights apply to "all of that part of the owner's *land*" that contains the asset. *Hawkins*, 80 N.W.2d at 866-66. Again, the focus is on the presence of the asset, not the division of the holding into separate parcels for tax assessment purposes. Certainly neither Wilmar nor Mathy ever considered the Pit to be made up of several parcels. (*See* Hindermann Aff. ¶s 8, 20; Peterson Depo. p. 61; Atterholt Depo. p. 56.)

Second, for the sake of argument, Wilmar will accept the operative zoning ordinance is the one Cascade claims was adopted in 1971 by the Olmsted County Board of Commissioners referred to in Cascade's memorandum of law. That ordinance provides, in pertinent part, "the non-conforming use of *land*...existing at the time this ordinance becomes effective, may be continued provided...the non-conforming use of *land* shall not in any way be expanded or extended either on the same or *adjoining property*." 1971 Olmsted County Land Use Ordinance, Section 3.24. Here again, the

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

ordinance references "land" rather than "parcels." In this case, the "land" involved has been used and is and has been a part of a planned quarry operation since before the claimed adoption of the 1971 zoning ordinance. (*See* Hindermann Aff. ¶s 14, 17: Ryan Aff. Exs. A, B.) The quarry operation is not expanding to adjoining land. It is simply moving through the land which holds the mineral assets owned by Wilmar.

Third, Minnesota's non-conforming use statute, which trumps any local zoning regulation, does not use or focus on the term "parcel." Instead, the statute provides ". . . any nonconformity, including the *lawful use or occupation of land or premises* existing at the time of the adoption of an additional control under this chapter, may be continued, . . .unless: (1) the nonconformity or occupancy is discontinued for a period of more than one year . . . ." Minn. Stat. §462.357. The statute does not concern itself with "parcels" or tax identification numbers. Instead, it expressly allows the owner or user of "land" who is using or occupying the "land" in a nonconforming manner to continue to use or occupy the "land" in the manner in which it was previously used or occupied. Here, Wilmar, its predecessors in title, and now its lessee Mathy, have used and occupied the land in Sections 11 and 14 for the sole purpose of extracting the mineral assets within the land well before the adoption of any applicable zoning restrictions, and they have continued to do so on an annual basis to the present time.

Further, it is worth noting that a very similar argument was specifically rejected by the Ohio Court of Appeals in an unpublished decision. In *Torok v. Rubber City Sand & Gravel Co.*, the operator owned a single holding of land – the eastern section, the central

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

section, and the western section – which was divided into three "parcels" by a road and a railroad track. 1979 Ohio App. 1979 WL 207680 at *1-2 (Ohio Ct. App. 9th Dist. June 13, 1979). It was "clear that [the operator] established its nonconforming use on the eastern and central sections several years prior" to the ordinance at issue. *Id.* at *4. In rejecting the plaintiff's argument that the western section was a "separate tract" and therefore operations thereupon constituted an unlawful expansion of the nonconforming use, the court noted the "record clearly shows that the entire tract has always been treated by [the operator] as comprising a single unit." *Id.* The court also noted that nothing in the ordinance at issue affected "a division of [the operator's] land into separate parcels." *Id.* The court applied the ruling from *Du Page* and held that the nonconforming use applied to the western section of the operator's property. *Id.* at *4-5.

Like the ordinance at issue in the *Torok* case, neither the Olmsted County ordinance nor Minnesota Statutes discuss how many tax parcels compose the land upon which a pre-existing nonconforming use exists. Instead, like the *Torok* case, in which the operator had treated its several "parcels" as a single unit, the owners and operators of the Pit have always treated it as a single land holding owned for mining and quarrying purposes.

Minnesota law also evinces policies in contrast to the cases cited in support of Cascade's adjoining property argument. Section 462.357, Minnesota's zoning enabling statute, specifically prohibits amortization of a nonconforming use, providing that "a municipality must not enact, amend or enforce an ordinance providing for the elimination

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

or termination of a use by amortization which use was lawful at the time of its inception." Minn. Stat. § 462.357, subd. 1(c). The prohibition against amortization is in contrast to the case law from foreign jurisdictions cited in support of Cascade's adjoining property argument. Minnesota law reflects a policy of continuing protection for pre-existing nonconforming uses, rather than the phasing out of nonconforming use rights. For example, in *Syracuse Aggregate Corp. v. Weise*, cited in support of Cascade's adjoining parcel argument, the court noted that a municipality "may even eliminate [nonconforming uses] provided that termination is accomplished in a reasonable fashion" 414 N.E.2d 651, 655 (N.Y. 1980). Minnesota law, specifically section 462.357, subd. 1(c)'s prohibition on amortization, specifically forecloses this option.

Minnesota's zoning enabling statute was last revisited in 2011 and specifically provides that a municipality is not prohibited from "enforcing an ordinance providing for the prevention or abatement of nuisances, as defined in section 561.01 or eliminating a use determined to be a public nuisance as defined in section 617.81." Minn. Stat. § 462.357, subd. 1(d). Both of the referenced statutes, which govern private and public nuisances, respectively, are discussed in detail in Wilmar's memorandum in support of its Motion to Dismiss Cascade's allegations of nuisance. Both statutes require proof of a current nuisance in order for an action to be maintained. When the legislature revisited the statute in 2011, it was perfectly capable of incorporating a test similar to the three-prong analysis proposed in Cascade's submissions. Instead, the legislature specifically

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

chose to refer to Minnesota's nuisance laws, under which speculative analyses of potential future nuisances are prohibited.

Finally, the court in *Hawkins* was also confronted with allegations of nuisance and escalation arguments. Specifically, the *Hawkins* plaintiff alleged that the mining constituted a nuisance and that the recent use of a rock crusher was an "escalation" of the nonconfoming use. *Hawkins,* 80 N.W.2d at 866-67. Despite the presence of claimed negative impact to nearby neighbors and the use of the rock crusher, the *Hawkins* court declined to incorporate a balancing test into its decision. *See Id.*

The issue here is simple. *Hawkins*, which is controlling Minnesota law, promulgated the extent of the diminishing asset test, and that test applies to this case. *Hawkins* was devoid of any discussion regarding "parcels," and the very definition of the term "parcel" is incompatible with Cascade's argument. Further, both Minnesota's zoning enabling statute and the Olmsted County ordinance arguably at issue refer to "land" rather than "parcels." Minnesota's legislature has had the opportunity to modify the *Hawkins* test or incorporate additional considerations for decades, and it has declined to do so. Finally, Minnesota policy directly supports the continuation of nonconforming uses, which contradicts the policy behind Cascade's proposed three-prong test. Because we have a controlling decision of the Minnesota Supreme Court, and because Minnesota law and policy aligns with that decision, the Court should apply *Hawkins* and deny Cascade's Motion for Summary Judgment.

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

II. IF THE COURT ACCEPTS CASCADE'S PROPOSED THREE-PRONG TEST, ISSUES OF MATERIAL FACT PREVENT SUMMARY JUDGMENT

Cascade argues that the Court should adopt the three-prong test, articulated by a foreign jurisdiction, that directly opposes the test set forth in *Hawkins*. *See Town of Wolfeboro (Planning Bd.) v. Smith*, 556 A.2d 755, 756 (1989).[4] Specifically, *Wolfeboro* requires the land owner to prove (1) that excavation activities were actively being pursued when the adverse zoning law became effective; (2) 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) that the continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood. *Id.* at 759.

In *Wolfeboro*, the only objective manifestation of intent was the fact that the land had "been timbered twice prior to the effective date of the statute." *Id.* at 760. Importantly, the court also noted "It is clear from the record that the defendants were aware that the trial court would have to find a manifestation of intent to continue the excavation over the entire parcel if there was to be a finding that the defendants' operation fell under the grandfather clause of the statute." *Id.*

Here, objective evidence creates issues of material facts regarding the application of Cascade's proposed test.[5] Unlike the operation in *Wolfeboro*, where the only step taken was the removal of timber, Wilmar and its predecessors or successors have engaged

[4] Notably, Cascade contends that this test has been adopted by a "majority" of jurisdictions, and then proceeds to cite cases from only five states. In reality, the states are all over the map in their approach to nonconforming uses of diminishing assets. *See* Eunice A. Eichelberger, *Change in area or location of nonconforming use as violation of zoning* ordinance, 56 A.L.R.4th 769 (originally published in 1987).

[5] Cascade does not appear to dispute Wilmar's ability to satisfy the first prong of the Wolfeboro test.

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

in significant mining operations on the Pit since the 1940s. They have established a large quarry in Section 14, they established berms in Section 11, they removed sand and gravel from Section 11, they created artificial ponds as a result of its mining operations on Section 11, they leased the land to mining companies since the 1960s, and they submitted an Environmental Assessment Worksheet in 2009 to comply with Minnesota law governing the extraction of minerals. *See Ernst v. Johnson County*, 522 N.W.2d 599, 604 (Iowa 1994) ("Due to the nature of the quarrying business, *maintenance of the required permits and licenses* in combination with minimal activity *demonstrates an uninterrupted operation* following an initial establishment of the nonconforming use.") The presence of "objective manifestations" of Wilmar and lessees' intent is therefore a question for the jury.

Further, although Cascade dramatically postulates that Wilmar's proposed use would have a substantially different impact on the neighborhood, it fails to address the fact that in seven decades, there is no evidence of complaints from nearby residences other than those brought in the mid-2000s by a single individual residing in the adjacent mobile home park. Cascade also fails to note that it consented to the platting of residential property directly across the road from the Goldberg Quarry in Olmsted County, on which similar mining operations are conducted. Finally, Cascade fails to mention that Roger Ihrke, its purported expert witness, specifically recommended approval of Mathy's proposal in the 2014 TCPA recommendation letter. For these reasons, the impact on the neighborhood is a question of fact for the jury.

Filed in Third Judicial District Court
8/5/2016 5:04:20 PM
Olmsted County, MN

CONCLUSION

Based upon the foregoing discussion, Wilmar respectfully requests the Court deny Cascade's Motion for Summary Judgment.

Dated: August 5, 2016.

DUNLAP & SEEGER, P.A.

By: _____

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