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State of Minnesota
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District Court
Third Judicial District
Court File Number: **55-CV-15-6531**
Case Type: Civil Other/Misc.

Notice of Filing of Order

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Wilmar Investments, LLC vs Cascade Township

You are notified that an order was filed on this date.

Dated: November 14, 2016

Charles L. Kjos
Court Administrator
Olmsted County District Court
151 S.E. 4th Street 5th Floor
Rochester MN 55904
507-206-2400

cc: KENNETH H BAYLISS, III

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STATE OF MINNESOTA | DISTRICT COURT
CIVIL DIVISION
COUNTY OF OLMSTED | THIRD JUDICIAL DISTRICT

Wilmar Investments, LLC,

Plaintiff,

v.

Cascade Township,

Defendant.

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

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

This matter came on for hearing at the Olmsted County Courthouse, Rochester, Minnesota, on August 16, 2016, on the parties' cross-motions for summary judgment, and on Plaintiff Wilmar's motion to dismiss Defendant Cascade's "allegations of nuisance." Plaintiff was represented by Attorneys Robert G. Benner, and Derek S. Rajavuori, Rochester, Minnesota. Defendant Cascade was represented by Attorney Kenneth H. Bayliss, St. Cloud, Minnesota. The Court, having reviewed the motion papers and memoranda, and having heard the arguments of counsel, **HEREBY ORDERS AS FOLLOWS**:

1. Plaintiff's motion for summary judgment and for dismissal of Defendant's "allegations of nuisance" are **DENIED**.

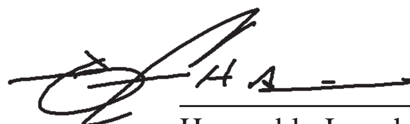
2. Defendant's motion for summary judgment is **DENIED.**

The Court's Memorandum, filed herewith, is incorporated herein.

Dated: November 10, 2016.

BY THE COURT:

Chase, Joseph
2016.11.10
15:41:58
-06'00'



Honorable Joseph F. Chase
Judge of District Court

MEMORANDUM

Wilmar Investments, LLC (Wilmar) has sued Cascade Township (Cascade) seeking a declaratory judgment that it "has the right to continue to conduct mining activities on certain land located in Sections 11 and 14 of Cascade Township, Olmsted County" (the "Property").[1] See Plaintiff's Complaint, paragraph 1. Gravel and rock mining has been conducted at locations on the Property for decades, and before land use controls were first adopted by Olmsted County in 1971. The zoning ordinance, now administered by Cascade, designated the property at issue here as "AG District." Mining is not a lawful land use in the AG zone without a conditional use permit. The parties agree, however, that at least some part of the Property was being actively mined long before the zoning code was enacted, with the result that on at least some part of the Property, mining is allowed to continue as a pre-existing, nonconforming use.

The issue to be determined in this case is whether all (and if not all, what portion) of the Property is entitled to the pre-existing, nonconforming use designation. The factual development that brings this legal question to a head is the plan of Wilmar's lessee, Mathy Construction, to substantially expand and extend its mining operations into areas of the Property that have either never been previously mined, or have not been mined in many years.

The key Minnesota case on this issue is *Hawkins v. Talbot*, 80 N.W.2d 863 (Minn. 1957). *Hawkins* was an action brought to enjoin operation of Talbot's gravel pit. The pit had existed prior to enactment of an ordinance that zoned the property "residential." Thus, it qualified as a pre-existing, nonconforming use. Therefore, the operation could "be continued," but was prohibited, by ordinance, from "be[ing] enlarged or increased…[or] extended to occupy a greater area of land than that occupied by such use at the time of the adoption of this ordinance…[or] be[ing] moved to any other part or parcel of land upon which the same is conducted at the time of the adoption of this ordinance." *Hawkins* at 864-65. The problem was that the pit was growing laterally, not just in depth. The neighbors sued, contending that this enlargement of the pit went beyond "continu[ation]" of the pre-existing, nonconforming use, and therefore violated the zoning ordinance.

In ruling in favor of the pit owner, the Supreme Court brought to Minnesota the "Doctrine of Diminishing Assets." The *Hawkins* Court noted, first, that a limitation on a municipality's zoning authority is that its restrictions "must be subject to the vested property interests of lawful businesses and uses already established." Id. at 865. Such uses are "exempt[ed]" from the restrictions of the new zoning ordinances, but the exemption is commonly coupled with the requirement "that there shall be no enlargement of the nonconforming use. These restrictions have generally been upheld." *Id.*

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[1] The Property is comprised of the larger part of three quarter sections of land stacked on top of each other, north and south. The most northerly quarter section is in Section 11, and the southern two are in Section 14. The Property appears to be about 400 to 420 acres in size. Fifty-fifth Street Northwest runs east and west between the Section 11 and Section 14 portions. (It appears that at this location, 55th Street Northwest has historically been a relatively minor thoroughfare, dead-ending on the east side of the south fork of the Zumbro River. However, a major upgrade of 55th at this location is now under construction.) It appears that the present controversy focuses primarily (if not entirely) on the Section 11 portion of the Property.

The *Hawkins* Court recognized, however, that quarries, gravel pits, and the like, present a unique situation:

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

Id.

The Court noted the difficulty of "reconciling" the legislature's "inten[t] that existing [nonconforming] uses should be preserved…[but] are not to be extended" in a case "where the use consists in stripping loam for sale, and where no more loam can be stripped without extending the denuded area beyond its existing boundaries." Citing cases from other jurisdictions that had addressed this situation, the *Hawkins* Court held as follows:

> We are of the opinion 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.

Id. at 866.

The *Hawkins* Court also noted that "a mere change in the ownership of land does not, in itself, constitute an extension of a nonconforming use. It is clear that, for the purpose of applying the ordinance in question, the defendant, Paul Talbot, stands in the place of his predecessors." *Id.*[2]

Wilmar argues that it is entitled to summary judgment, permitting it to mine the entire Property, under a straightforward application of *Hawkins* to the undisputed facts. Wilmar's gravel mining on the Property pre-dated the zoning ordinance; the gravel on the Property occupies a larger area than was being mined when the ordinance was adopted; therefore, under *Hawkins*, Wilmar is entitled to mine "the entire area of the gravel bed" on its land in both Sections 11 and 14 "without constituting an unlawful extension of a nonconforming use." *Id.*

Not so fast, says Cascade. As far as one can tell from the Supreme Court's opinion, *Hawkins* involved a single, unsubdivided piece of real estate. Wilmar's land, on the other hand, is comprised of seven large subparcels in addition to several smaller odds and ends. Some of these subparcels have been mined, and some have not. Some were mined in the distant past, but not recently. Some have been "hard rock" mined, while others have merely had soil or near-surface gravel stripped off. Cascade contends that Wilmar's property should not be viewed as a single

[2] The *Hawkins* Court also upheld the trial judge's finding that, despite some dust and noise emanating from the gravel pit, the use did not constitute a nuisance.

unit (as was apparently the case in *Hawkins*). Rather, Cascade argues that the pre-existing, nonconforming use analysis must be separately conducted for each individual subparcel.

If one accepts Cascade's argument, pre-ordinance mining on one subparcel would not establish a pre-existing, nonconforming use—and the right to "continue" mining—on an as-yet undisturbed subparcel next door. Extension of mining across a subparcel line would violate Cascade's ordinance which prohibits extension of nonconforming uses to an "adjoining property." And past cessation of mining on any subparcel for more than a year would constitute an abandonment of (and loss of the right to continue) the nonconforming use on that subparcel, even if active mining was still occurring on an adjacent subparcel.[3] So goes Cascade's reasoning. This is the first and primary argument Cascade takes in opposition to Wilmar's contention that Wilmar must prevail under *Hawkins*.

I cannot agree with Cascade's position. The subparcels in question together comprise one contiguous tract which, for all practical purposes, has been one unit since the 1960s. The entire Property has been under common ownership for fifty years, and before the zoning ordinance was adopted. Its owners (or their lessees) have been continuously engaged in commercially mining various parts of the Property for gravel, sand, rock, and soil. The Property has been owned and operated as a larger version of the business addressed in *Hawkins*: An active gravel-mining operation positioned to expand its excavation into further, as-yet undisturbed portions of the valuable geologic deposit on the operator's land. There is no evidence (so far) to contradict Wilmar's contention that this is all land acquired long ago by gravel-mining people for the specific purpose of producing gravel as the marketplace demanded it.

Cascade points out that the old lines between the component subparcels could still have legal implications, such as requiring set-backs. This means that if Wilmar wanted to put up a new building straddling, for example, the line between Subparcels 31013 and 31017, building permitting authorities might decline to issue the permit, citing the ordinance's set-back provisions. But we are not dealing with a building set-back issue.

The Property at issue here is an assembled tract, put together by Messrs. Foster, Arend, and Dalsbo in the 1950s and '60s (primarily in 1955 and 1958). The internal subparcel lines within the Property are remnants of the series of transactions by which Wilmar's predecessors operating Rochester Sand & Gravel acquired the land, piece by piece, and added it to the gravel business. I believe these lines could have been erased by the procedure known as consolidation (which the Court understands to be, basically, the reverse of subdivision). But I see no practical reason that would have motivated Rochester Sand & Gravel to formally consolidate. Before governmental land-use controls arrived, only two boundary lines would have had any real significance for the entrepreneurs mining and selling materials from this land: one would have been the geologic limit of the valuable deposit(s) they sought to develop, and the other would have marked the property line between their land (which they could eventually mine) and the neighbors' (which they could not). The old lines between the parcels they had added to the business over time would have been of historic interest only.

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[3] Cascade's ordinance provides that the right to continue the nonconforming use is lost if it is discontinued "for a period of one year." See also Minn. Stat. § 462.357, subd. 1e(c).

I am not persuaded that lines between subparcels that have been commonly owned since the Eisenhower Administration should now define Wilmar's right to continue mining on its land. *Hawkins* held that the right to continue a pre-existing use is founded on "the vested property interests of lawful businesses and uses already established." A party that assembles, through a series of land acquisitions, a contiguous property containing valuable mineral deposits that span its various subparcels; and that has undertaken the commercial extraction of those deposits; has, by any reasonable analysis, a vested property interest in continuing the enterprise on the property it assembled for that purpose.

Thus, I reject the construction Cascade advocates of the zoning ordinance's prohibition of expansion or extension of a nonconforming use to an "adjoining property." The subparcels of the Property at issue here are not reasonably understood to be "adjoining propert[ies]." The Property at issue here is reasonably seen as *one* unit. I conclude that the subparcel lines do not distinguish Wilmar's case from *Hawkins*. Active mining operations taking place anywhere on the Property at the time the ordinance was enacted establish a pre-existing, nonconforming use as to all of the property containing the geologic asset. Further, the nonconforming use is not abandoned anywhere, as long as mining continues somewhere on the Property. I consider this to be a common-sense analysis of this situation, and no Minnesota case law dictating a different result has been brought to the Court's attention.

I am also not persuaded by Cascade's argument that differences in the *type* of mineral extraction activities undertaken in different places on the Property should, per se, limit or control future use. I am talking about "quarrying of bedrock" ("hard rock mining"), for example, versus "extraction of sand and gravel" and "scrap[ing] of topsoil." It is reasonable to gather that quarrying operations typically extract and sell all material of commercial value, starting with any topsoil or other "overburden" that overlies other deposits; and working down to sand, gravel, and bedrock beneath. One reasonably infers that these are usual and necessary phases of a single commercial excavation operation. The Court notes that Section 3.15 of the 1971 zoning ordinance itself groups all "excavating of mineral material" together for regulation, describing it as "use of land for the excavation for commercial purposes of mineral material or removal of topsoil."

Thus I deny Cascade's motion for summary judgment. The proposed expansion of mining here is not an extension onto an "adjacent parcel;" and there has been no discontinuance of mining operations for a year or more, resulting in loss of the right to continue the nonconforming use on any part of Wilmar's property.

However, I also deny Wilmar's *Hawkins*-based motion for summary judgment. I agree with Cascade's contention that the "three-prong test" explained and applied in a number of cases in other jurisdictions, most recently *Seherr-Thoss v. Teton County Board*, 329 P3d 936 (Wyo. 2014), should and will be adopted in Minnesota for application to this and similar cases. The "three-prong test" has developed in the decades since *Hawkins* was decided. The analysis begins with application of the "doctrine of diminishing assets" to quarrying operations. But it conditions application of that doctrine—and allowing such nonconforming land uses to laterally expand—on the owner proving three things:

1) That the excavation activities were actively being pursued when the zoning ordinance became effective;
2) That the area that the land owner desires to excavate was clearly intended to be excavated at the time the ordinance became effective, 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 negative adverse impact on the neighborhood than the operation conducted before the zoning ordinance became effective.

Seherr-Thoss at 949, and *Town of West Greenwich v. A. Cardi Realty*, 786 A2d 354, 364-65 (R.I. 2001).

Wilmar objects to this importation of case law from other jurisdictions to modify the *Hawkins* rule. I disagree with Wilmar's argument that the three-prong test is inconsistent with Minnesota statutes. The *Hawkins* "diminishing assets" rule is not a matter of statute. It is a judicially-created exception to zoning ordinances that would otherwise prohibit lateral expansion of pre-existing, nonconforming quarrying operations. The three-prong test is a judicially-created refinement of that judicially-created exception. I am not persuaded that any Minnesota statute prohibits Minnesota courts from making that refinement.[4]

The three-prong test strikes me as useful in arriving at a just outcome in a case like this one, which has features quite different than *Hawkins* presented. The *Hawkins* opinion does not describe the size "of that part of [Talbot's] land which contains the particular asset," and so when *Hawkins* authorizes expansion to "the entire area of the gravel bed," we cannot know how large that expansion could be. However, one reasonably infers that the quarrying operation in *Hawkins* was considerably smaller than that proposed here.[5] In the present case the Property is a mile and a half long, and half a mile wide. The planned expansion could involve hundreds of acres and parts of Wilmar's property that have been a long distance from any considerable mining for decades. The *Hawkins* rule, fashioned in the context of a relatively small nonconforming use expansion, may need to be modified when a very large expansion is at issue.

The rationale for the third prong of the test—which ones anticipates may be particularly important in this case—was described by the Supreme Court of New Hampshire as follows:

> Although we hold that the legislature intended to allow excavation to continue, without a permit, onto previously unexcavated land which had been appropriated for that use, we understand the phrase "continue such excavation" to contain some limitation on an increase in the area or the intensity of the excavation.

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[4] Wilmar also asserts that the three-prong test is inconsistent with *Hawkins* itself, in which the trial court considered and rejected a nuisance claim on disputed facts. It is true that the Minnesota Supreme Court did not take the opportunity in *Hawkins* to *invent* the three-prong test. I do not think, however, that the Court can be said to have "*declined*" to apply such a test, which developed in other jurisdictions after *Hawkins* was decided.

[5] Between 1953 and 1955, the gravel pit in *Hawkins* grew from 175 feet by 150 feet (0.6 acre) to 240 feet by 210 feet (1.2 acres). *Hawkins* at 865.

> In general, courts have held that although an increase in the intensity of a nonconforming use does not usually amount to a "change" or "expansion" of that use [authority cited], an increase of intensity which serves to change the character or purpose of the nonconforming use will be considered to have changed the use. [Authority cited.] A great increase in the size or scope of a use has also been considered to be a factor in determining whether the character of the use has been changed, so that the use is no longer a continuing one. [Authority cited.] In order to determine whether a use should be considered a "continuation" of a prior use or a "change" in use, courts have considered whether the use has a substantially different effect on the neighborhood. [Authority Cited.]

Town of Wolfeboro v. Smith, 556 A2d 755, 759 (N.H. 1989).

I agree with Cascade that the three-prong test should be applied here to determine whether the proposed expansion of mining is a permitted nonconforming use. I disagree, however, with Cascade's assertion that it is entitled to summary judgment when that test is applied. Cascade argues, for example, that "Wilmar cannot establish that [mining] activities were taking place on *all of the parcels* for which it seeks declaratory relief." Cascade's July 19, 2016 Memorandum of Law in Support of Motion for Summary Judgment, p. 31 (italics added). But as is stated above, this Property is properly seen as a single unit. Mining activities were taking place on the Property when the zoning ordinance was enacted.

Regarding the second prong—proof by objective manifestations that at the time the ordinance came into effect, the owner clearly intended to excavate the entirety of the Property—there is the fact that the principals of Rochester Sand & Gravel had acquired the entire Property before 1971. They were in the gravel, rock, and sand mining business; and this Property contains those materials. A fact finder may reasonably infer from these objective facts that the gravel merchants who purchased this gravel-bearing Property clearly intended to excavate the entirety of it at some time. This is a disputed question of fact precluding summary judgment.

If Wilmar is successful in proving the first two prongs, the third clearly presents disputed fact questions. Cascade contends that the proposed "mammoth rock quarrying project" is "incompatible with the surrounding residential properties." See Cascade's July 19, 2016, Memorandum of Law, pp. 32-33. Cascade may turn out to be correct about this. But Wilmar points out that many years of quarrying on the Property have produced few complaints from neighbors. A mobile home park abuts the Property on the southeast side of the Section 11 portion, and quarrying up to the property line would be very close indeed to those residences. However, judging from an aerial photograph of the Property, most of the rest of the perimeter of Wilmar's land is not close to residences—though it may abut the boundaries of some large residential lots. These are genuine issues of material fact for trial.

Let us turn to Wilmar's motion to dismiss Cascade's "premature" nuisance-based "Affirmative Defense" number 6.[6] I am persuaded that a nuisance claim would not now present a justiciable controversy, as any injury from Wilmar's proposed expanded mining activities is at this time

[6] 6. Defendant alleges 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.

only prospective. However, Cascade says that its nuisance pleading is intended to do nothing more than "put Wilmar on notice that Cascade Township would rely on these effects [of expanded mining on adjoining residences] in opposing the declarations Wilmar seeks." Cascade's August 5, 2016 Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss Affirmative Defense, p. 1. Cascade asserts that this is relevant because nuisance-related concerns regarding impact on "adjoining parcels" from expanded quarrying "are routinely and necessarily raised…in nearly all cases addressing application of the three-prong test." *Id.*

Cascade is correct that the third prong of the test addresses neighborhood impact:

> Furthermore, a landowner seeking to expand his operation…must meet the third prong of the *Wolfeboro* analysis and demonstrate that the activity will not have "a substantially different and adverse impact on the neighborhood." *Id.* Compliance with this element will have the desired effect of preventing nuisance-type activity and ensure the preservation of the public health and safety.

Town of West Greenwich v. A. Cardi Realty at 364.

As the above discussion indicates, I anticipate that Minnesota will adopt the three-prong test as a means of analyzing expansion of pre-existing, nonconforming uses in the diminishing assets context. The Court understands Cascade's nuisance pleading as "simply pointing out [its contention] that [expanded mining activities] would have negative consequences for adjoining properties," and "put[ting] Wilmar on notice that [Cascade] would be arguing that [Wilmar's] proposed activities bear on its entitlement to relief." *Id.* at p. 5. In other words, Cascade will contest the third prong of the three-prong test. Understood in this way, I see no need to dismiss or strike the pleading.

J.F.C.

Assistance with research and preparation provided by Ingrid Bergstrom, J.D.