BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

Oak Park Quarry, LLC, Appellant

Appeal No. 3668

BRIEF OF APPELLANT

Oak Park Quarry, LLC, by its attorneys, Axley Brynelson, LLP, submits this Brief in support of its administrative appeal to the Dane County Board of Adjustment of the Zoning Administrator's written decision dated March 3, 2015. A copy of the decision subject to appeal is attached hereto as Exhibit A.

This appeal is made pursuant to Dane County Ordinance §15.14(6), which authorizes the Board of Adjustment "[t]o hear and decide appeals where it is alleged that there has been an error in any order, requirement, decision or determination made by the zoning administrator in the enforcement of the zoning ordinance or section 59.97 of the Wisconsin Statutes."

A. FACTUAL BACKGROUND

1. Oak Park Quarry, LLC owns the former Vernon Mandt farm in Section 29, Town of Deerfield, Dane County, Wisconsin (the "Quarry"). The Quarry parcel, as acquired from Mandt by Oak Park Quarry, LLC, consists of Dane County Parcel Numbers 071229395005, 071229380002, 071229295319, 071229280110, and 071229190011.

2. Individuals with first hand observations of the Quarry from the 1940s to 1980s have supplied Affidavits documenting that they observed a quarry on the Mandt Farm just to the east of Oak Park Road. *See* Affidavits of Sharon Halverson, Donald Strand, Phyllis Syvrud, John Prescott, Richard Erickson, and Robert Riege. (Exhibits B, C, D, E, F, and G) These witnesses recollect a quarry with a high wall of 15-20 feet in height dating back to the 1940s and 1950s.

3. Aerial photography records also show that mineral extraction operations have existed at the Quarry since before 1969. Provided herewith is the Affidavit of Jeff Kraemer of Stantec. The Kraemer Affidavit incorporates and interprets a series of historical aerial photographs. Mr. Kraemer renders an expert opinion that the area claimed to be a quarry was clearly subjected to man-made operations consistent with quarry operations, and inconsistent with agriculture. This man-made disturbance dates back at least to 1937 per the aerial photos. (Exhibit H)

4. In 1969, N. Carpenter & Sons attempted to register the Vernon Mandt Quarry with Dane County pursuant to Dane County Code of Ordinance ("DCCO") § 10.191(6). (Exhibit I) Under § 10.21(1)(c) DCCO: "Mineral extraction operations which existed prior to 1969 and were registered with and approved by the Dane County Zoning Administrator shall be considered nonconforming uses." The significance of having a registered mineral

extraction site is that once registered, the mineral extraction site is not to be considered abandoned or discontinued if the site is inactive for more than one year. DCCO § 10.21(1)(d).

a. The document indicates that the Quarry was "started in 1859."
b. The original handwriting on the document lists the location as "Town of Deerfield, Section # 29."
c. The document describes the quarry as "rock quarry comprising 10 to 15 acres of rock."
d. In what appears to be *different handwriting*, someone entered in "N.W. of N.W. ¼."

5. As indicated in the Administrator's Decision, Dane County completed a document entitled "Mineral Extraction Registration," purportedly in 1969, for Vernon Mandt in Section 29, Town of Deerfield. (Exhibit J)
    a. The Form indicates review only on aerial photo inspection, not photo evidence or field evidence.
    b. The Form indicates the review was only of the NW ¼ NW ¼.
    c. Dane County asserts the Form declines to accept the registration.

6. There never was a quarry in the NW ¼ NW ¼ of Section 29. All aerial photography documents that fact. Moreover, Vernon Mandt never owned the NW ¼ NW ¼ of Section 29. The only reasonable conclusion is that the person who wrote "NW of NW ¼" on the application in 1969 made a mistake of fact / scrivener's error.

7. Vernon Mandt also never owned the parcels in Section 29 which held what was commonly known as the "Kelly Quarry." The Kelly Quarry was in the NW ¼ NE ¼ and/or NE ¼ NE ¼ of Section 29. The Administrator's Decision suggests the intent of Vernon Mandt was to register the Kelly Quarry. Neither the owner nor the legal description match the Kelly Quarry, however.

8. Wisconsin DOT records show the Mandt Pit in Section 29 was subject to testing in years 1987, 1989, and 1995. (Exhibit K)

9. Wisconsin DOT records show the Mandt Pit in Section 29 was subject to testing, based on notations as to test numbers 2151-2-50 and 2013-3-53, in years 1950 and 1953. The document supports a conclusion that the Mandt Pit was an approved source for DOT projects. (Exhibit L)

B. PROCEDURAL BACKGROUND

1. Jon Halverson and legal counsel met with Administrator Lane on January 5, 2015. All of the affidavits, except for Kraemer and Riege, were then presented. An oral request was made for an opinion on whether the Oak Park Quarry qualified as a non-conforming use.
2. By letter dated 2/4/2015, Counsel for Oak Park wrote to Administrator Lane, submitting the Kraemer Affidavit. Said letter specifically requested a formal opinion on whether the Oak Park Quarry has nonconforming use status. (Exhibit M)
3. By letter dated 2/27/2015, Counsel for Oak Park wrote to Administrator Lane, submitting the Riege Affidavit. Said letter again requested a formal opinion on whether the Oak Park Quarry has nonconforming use status. (Exhibit N)
4. By letter dated March 3, 2015, Roger Lane responded to the 2/4/2015 Letter and concluded that the "property does not contain a non-conforming use." (Exhibit A)

C. DISCUSSION

1. The Appeal Is Properly Brought before the Board of Adjustment.

a. Applicable Dane County Ordinances

DCO 10.25(1) Zoning Administrator. (a) The provisions of this ordinance shall be administered by or under the zoning administrator.... (b) It shall be the duty of the zoning administrator to ... take such action as may be necessary for the enforcement of the regulations provided herein....

DCO 15.14(6) The board of adjustment shall exercise the following powers and responsibilities: (a) To hear and decide appeals where it is alleged that there has been an error in any order, requirement, decision or determination made by the zoning administrator in the enforcement of the zoning ordinance or section 59.97 of the Wisconsin Statutes.

DCO10.26(3) *Appeals to the board.* Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the zoning administrator or other administrative officer.... Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof.

DCO 10.26(6) *Powers of the board of adjustment.* The board of adjustment shall have the following powers: (a) To hear and decide appeals where it alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of sections 59.69, 59.692 or 87.30. Wis. Stats., or of any ordinance adopted pursuant thereto.

b. The Administrator's March 3, 2015 Letter is an appealable decision.

The County Ordinances clearly indicate that an appeal to the Board of Adjustment must relate to a zoning administrator's determination. Roger Lane's 3/3/2015 Letter made a direct and substantive response to the request for a determination on non-conforming use status.

2. The Oak Park Quarry Has Non-Conforming Use Rights.

Oak Park Quarry, LLC contends that the Quarry on said property, within the complete confines of its ownership extent, possess legal non-conforming use rights. The Quarry was first opened in 1859. The Quarry, based on eye witness testimony and aerial photography analysis, clearly existed in the 1940s and 1950s. In 1969, N. Carpenter & Sons attempted to register the Quarry with Dane County pursuant to Dane County Code of Ordinance ("DCCO") § 10.191(6). Under § 10.21(1)(c) DCCO: "Mineral extraction operations which existed prior to 1969 and were registered with and approved by the Dane County Zoning Administrator shall be considered nonconforming uses." The significance of have a registered mineral extraction site, *inter alia*, is that once registered, the mineral extraction site is not to be considered abandoned or discontinued if the site is inactive for more than one year. DCCO § 10.21(1)(d).

The Quarry qualifies as a nonconforming mineral extraction site. There are two criteria to meet the standard. First, the mineral extraction operation must have existed prior to 1969. DCCO § 10.21(1)(c). Second, the site must be registered with and approved by the Dane County Zoning Administrator. *Id.* These two standards should be deemed satisfied under the facts presented.

First, mineral extraction operations existed at the Quarry since well before 1969. The Affidavits of Sharon Halverson, Donald Strand, Phyllis Syvrud, John Prescott, Richard Erickson, and Robert Riege, as well as the Affidavit and aerial photos from Jeff Kramer, cannot be disputed.

The second criterion is whether the site was registered with Dane County zoning. Enclosed is a copy of the N. Carpenter & Son registration of the Property. The location of the property is identified as Section 29 in the town of Deerfield. We note that there is a notation at the end of the registration of "N.W. of N.W. ¼." Dane County Zoning interprets this to mean that only the N.W. of the N.W. ¼ was sought to be registered.

However, the N.W. of N.W. ¼ must be disregarded for several reasons. Further, as discussed below, the indication of the quarter quarter section on a registration is immaterial to whether a mineral extraction site was registered.

First, the handwriting of the N.W. of N.W. ¼ is plainly different that the rest of the handwriting on the registration of the site. Since this was submitted to Dane County in 1969, we have no way of knowing who included this extra notation. However, it is plain that the extra notation was not written by whoever prepared the registration. It suggests that a mistake may have been made.

Second, Mr. Mandt did not own any property in the NW ¼ of the NW ¼, Section 29, Town of Deerfield. Nevertheless, Mr. Mandt and N. Carpenter & Sons obviously intended to register Mr. Mandt's property, because they completed and submitted a mineral extraction registration to Dane County (*see also*, Exhibit G, Mr. Mandt's *Affidavit of Intent to Mine*). This further suggests a mistake was made.

Third, Mr. Mandt has submitted an *Affidavit of Intent to Mine* (Exhibit G). That Affidavit explicitly provides that the inclusion of the N.W. of N.W. ¼ in the registration was in error. Rather, the registration was intended for all of the Mandt property located in Section 29 in the town of Deerfield.

Under these circumstances, the County's aerial review of a registration in the NW ¼ NW ¼ was in review of an erroneous description. If actual aerial photography or a field inspection were made of the correct Quarry location, the registration certainly would have been verified. The County today should be readily able to appreciate this erroneous legal description and correct same.

Thus, the Quarry has met both requirements of § 10.21(1)(c) DCCO, mineral extraction, and is as a legal nonconforming use, which Dane County cannot prohibit. Further, under § 10.21(1)(d), as a registered nonconforming site, it does not matter if the Quarry has been mined continuously, or if mineral extraction operations were otherwise discontinued.

3. The Law Allows the BOA to Correct the Mistake in the Legal Description.

There are several grounds on which the BOA can rectify the mistaken legal description on the registration document for this Quarry. First, Wisconsin law interpreting Dane County's 1968 ordinance provides that the County's narrow approach to the Oak Park Quarry is in error.

As recognized in the Supreme Court's decision of *Smart v. Dane County*, the 1968 County Ordinance provided: "All existing mineral extraction operations shall be deemed non-conforming uses and may be continued provided that they have been worked prior to the date of adoption of this ordnance and they have been registered with the County Zoning Supervisor within one year of the date of adoption of this ordinance." 177 Wis.2d 445, 449-50 (1993). In *Smart*, the parcel consisted of two forty acre adjacent tracts. The zoning administrator, upon receipt of registration for both, accepted one and rejected the other. The zoning administrator acknowledged, however, that limiting a non-conforming use to specific quarter-quarters "was apparently only a policy decision ...[and] not included in the original ordinance [nor] ... any amendment." 177 Wis.2d at 450-51.

Thus, there was no legal requirement to register a quarter-quarter. This helps explain why the Carpenter/Mandt filing only referenced Section 29. It also explains the different handwriting where, per a County policy, the quarter-quarter was listed on the form.

The conclusions here are: (1) the registration's designation of Section 29 was sufficient; (2) the inclusion of a quarter-quarter was not required; and (3) the mistaken identity of the quarter-quarter was the result of a County policy not part of the ordinance.

Additionally, as further noted in *Smart*, where the Zoning Department made an error in 1969 in denying non-conforming use status to the applicant, Wingra, "it was reasonable for the Board [of Adjustment] to correct this error." 177 Wis.2d at 455. Likewise, it is permissible and reasonable to correct the error demonstrated in this appeal.

Second, the error in the legal description of the subject registration is the product of mutual mistake. "Mutual mistake" exists where both parties to a contract are unaware of the existence of a past or present fact material to their agreement." *Gielow v. Napiorkowski*, 2003 WI App 249, ¶ 22. "This unawareness or belief, however, must arise from a lack of knowledge of the possibility that the fact may or may not exist." *Id.* Here, both the registrant and the County were mistaken that the listed quarter quarter section was (a) required; and (b) correctly stated. In reality, it was not required and incorrectly stated. This mutual mistake resulted in the zoning department inspecting the wrong parcel and improperly concluding there was no pre-existing quarry that could be registered.

While mutual mistake is typically applied in contract law, the Dane County 1968 Ordinance essentially created a contract between a quarry owner and the County. A bargain was made that the quarry owner's rights would be preserved so long as the quarry owner timely registered his quarry. Carpenter and Mandt attempted to perform. The County attempted to perform. Both parties, based on an unknown source of mistaken legal description, were unable to perform based on accurate information. This is a clear mutual mistake.

The remedy for this mutual mistake is reformation. The Court may remedy the matter "to make a writing express the bargain which the parties intended to put in writing." *Frantl Industries, Inc. v. Maier Constr., Inc.*, 68 Wis.2d 590, 594-95 (Wis. 1975). Here, the registration form should be reformed to state the correct quarter quarter section. If that is done, the evidence from 1968 is overwhelming that a quarry did exist and would have been verified and accepted on the registration form.

Third, given that the quarter quarter listed on the registration was not owned by the registrant and did not contain a quarry, it was clearly a scrivener's error by whoever wrote that notation. When both parties to a transaction rely on a scrivener to perform a service relating to the transaction, a mistake by the scrivener is a mutual mistake. *Schluz v. Rudie*, 275 Wis. 99, 103 (Wis. 1957). A mutual mistake arises, and principles of equity allow the court to reform the contract to put the parties' intentions into effect. *Krause v. Hartwig*, 14 Wis.2d 281, 284-85 (Wis. 1961).

Thus, as a matter of law and/or equity, this is a clear case where a mistaken legal description should be corrected by the Board of Adjustment. If the registration listed only Section 29, or listed the correct quarter-quarter (SE ¼ of NW ¼, Section 29, Town of Deerfield), the undisputed evidence would require a finding of a valid registration. As such, the reformation of the registration must result in a valid registered non-conforming use.

4. The Scope of Non-Conforming Use Rights for the Oak Park Quarry.

As a nonconforming use, Dane County cannot prohibit, or require permits for, the establishment or expansion of the Quarry. Wisconsin has long-standing law regarding nonconforming uses for mineral extraction. In *Sturgis v. Winnebago Co. Bd. of Adjustment*, 141 Wis. 2d 149, 413 N.W.2d 642 (Ct. App. 1987), Wisconsin first recognized the diminished asset rule. In *Sturgis*, the Wisconsin Court of Appeals quoted from the Illinois Supreme Court explaining the rule:

> 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 mineral 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. We think that in cases of a diminishing asset the enterprise is "using" all that land which contains the particular asset and which constitutes an integral part of the operation, notwithstanding the fact that a particular portion may not yet be under actual excavation. It is in the very nature of such business that reserve areas be maintained which are left vacant or *332 devoted to incidental uses until they are needed. Obviously, it cannot operate over an entire tract at once.

Sturgis, 141 Wis.2d at 153, 413 N.W.2d at 643-44 (quoting *County of DuPage v. Elmhurst-Chicago Stone Co.*, 18 Ill.2d 479, 165 N.E.2d 310, 313 (1960))

In *Smart v. Dane Co. Bd. of Adjustment*, 177 Wis. 2d 445, 501 N.W.2d 582 (1993), the Wisconsin Supreme Court applied the diminishing asset rule to the expansion of a nonconforming mining operation. Under the diminished asset rule, the property owner is "using" all of the land that contains the particular asset and which constitutes an integral part of the operations, notwithstanding the fact that the particular portion may not be under actual excavation. *Smart*, 177 Wis. 2d at 454. The Court reasoned that in the quarrying business the land itself is a mineral or resource and constitutes a diminished asset as it is consumed in the very process of use. *Id.*

As related to the matter at hand, *Schroeder v. Dane Co. Bd. of Adjustments*, 228 Wis. 2d 324, 596 N.W.2d 472 (Ct. App. 1999), is directly on point. In that case, the Wisconsin Court of Appeals considered how §§ 10.191 and 10.21 DCCO are to be interpreted in light of the

diminishing assets rule. The specific issue was whether a registration that only indicated one quarter quarter section could be expanded beyond that quarter quarter section without a conditional use permit issued by Dane County. The court reviewed §§ 10.191 and 10.21 DCCO and determined that under the diminishing asset rule, regardless of the quarter quarter section listed on the registration, the property owner could expand the mineral extraction site without the need for a conditional use permit.. The court stated:

> Neither § 10.191(6) nor § 10.21(1)(c) make any reference to the intended area of expansion of the operation, whether it must be registered, or how it is to be determined and approved by the county. The ordinance sections do not refer to registration of "area" at all, but only to registration of "operations."

Schroeder, 228 Wis. 2d at 335.

The Wisconsin Court of Appeals explained that "[t]he diminishing asset rule is a gloss on the definition of 'existing use' for mineral extraction operations whereby all land which constitutes an integral part of the operation, notwithstanding the fact that it was not under actual excavation, is considered 'in use.'" *Schroeder v. Dane Co. Bd. of Adjustments*, 228 Wis. 2d 324, 341, 596 N.W.2d 472 (Ct. App. 1999). Therefore, when a property owner has a legal nonconforming mineral extraction site, it can be expanded under the law of diminishing assets, regardless of any size included with the registration. The only limitation is the owner's intent and ownership of the property. *Id.*

The above legal authorities make absolutely clear that the Quarry is a legal nonconforming mineral extraction site, and that Oak Park Quarry, LLC can conduct a mineral extraction operation at the Quarry without the need for a conditional use permit. Under what is commonly referred to as the "diminishing assets rule," the county cannot require a conditional use permit for the expansion of the legal, nonconforming mineral extraction site, nor can it prohibit extraction regardless of whether a conditional use permit has been issued.

5. The County's Past Issuance of Permits to the Quarry Did Not Cause a Waiver of Non-Conforming Use Rights.

Finally, the fact that Oak Park, and its predecessors, have applied for and received a conditional use permit for this quarry does not eliminate the non-conforming use rights. No Wisconsin cases provide that a CUP eliminates non-conforming use status. Further, the Minnesota Supreme Court recently addressed this issue and concluded that a CUP does not terminate non-conforming use rights.

In *White v. City of Elk River*, it was undisputed that the land use (campground) was nonconforming when the zoning ordinance became effective. The litigants disputed what effect, if any, the CUP obtained by the campground had on the non-conforming use rights. The issue was one of first impression in Minnesota. 840 N.W.2d 43 (MN Sup. Ct. 2013). Following the

decision of Connecticut in *Taylor v. Zoning Board of Appeals*, 783 A.2d 526 (Conn. App. Ct. 2001) (holding a nonconforming sand and gravel mine that existed before the zoning ordinance was enacted, and which applied for and received a CUP for the use, did not extinguish the right to continue the use independent of the permit), the Minnesota Supreme Court concluded that "a landowner does not surrender the right to continue a nonconforming use by obtaining a conditional use permit unless the landowner validly waives that right."

A waiver is an intentional relinquishment of a known right. A valid waiver requires (1) knowledge of the right; and (2) an intent to waive the right. An application for a CUP and acceptance of a CUP are not sufficient, alone, to constitute a waiver. *White v. City of Elk River*. Unless there is other evidence of intent to waive, the right remains.

Here, there is absolutely no evidence that Oak Park, or its predecessors, ever knowingly waived its nonconforming use rights. Their mere exercise of applying for and receiving a CUP is meaningless. Yet Dane County places great emphasis on that CUP process. Dane County is in error in that regard.

D. CONCLUSION

For the aforementioned reasons, Oak Park Quarry, LLC disagrees with the Zoning Administrator's Determination dated March 3, 2015, and consequently requests that the Board of Adjustment reverse the decision of the Zoning Administrator.

Dated this 2nd day of April, 2015.

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