Daily Development for Tuesday, September 7, 2010
by: Patrick A. Randolph, Jr.
Elmer F. Pierson Professor of Law
UMKC School of Law
Of Counsel: Husch Blackwell Sanders
Kansas City, Missouri
dirt@umkc.edu

Another great contribution from Ira Meislik. There will be more coming over the next week or so.

ZONING AND LAND USE; NONCONFORMING PREEXISTING USE: The operation of a landfill is similar in nature to the operation of a quarry; therefore special New York case law involving expansion of quarries that qualify as preexisting uses will apply to landfills as well. A landndfill operator is entitled to prior non-conforming use protection from zoning ordinances that may later bar new landfill operations, even as to portions of the site as to which no permit has been obtained.

Jones v. Town of Carroll, 15 N.Y.3d 139, 2010 WL 2399642 (N.Y. June 17, 2010.)

A property owner had 50 acres of land in an agricultural/residential zoning district. In 1989, the municipality granted a special use variance permitting the operation of a construction and a demolition landfill on the entire parcel. The land use variance was contingent on obtaining a state landfill permit. The owner obtained the proper permit from the state to allow landfill operations to commence on roughly two acres. Subsequently, the permit was expanded to cover three acres.

Everything went well until 2005 when the municipality "adopted a new zoning law that prohibited the expansion of any landfill beyond the area and scope allowed under the operators [sic] permit from [the state] as of the date of this Local Law." Then, the municipality sought to prevent the landowner from using the remaining 47 acres of its property for landfill purposes.

The landowner sued, and the lower court ruled in its favor. The municipality appealed, and the Appellate Division "held that the local law was applicable since the [state] permit covered only three acres and [the landowner] merely contemplated the future expansion of [its] operation." The landowner appealed to the New York's Court of Appeals (its highest court). That Court ruled in the landowner's favor, applying the following principles. "As a general rule, a nonconforming use of real property that exists at the time a restrictive zoning ordinance is enacted is 'constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of [an] ordinance." Ordinarily, "[a] party seeking to overcome a restrictive zoning ordinance 'must demonstrate that the property was indeed used for the nonconforming purpose, as distinguished from a mere contemplated use, at the time the zoning ordinance became effective.' ... Where only part of a parcel is being used , a landowner may seek protection for the remaining portion by demonstrating that the use is unique and adaptable to the entire parcel ... and showing that the landowner took 'specific actions constituting an overt manifestation of its intent to utilize the property for the ascribed purpose.'"

The law in New York grants dispensation to mining operations. In 1980, the Court of Appeals "observed that mining, unlike other types of nonconforming uses, is unique in that it '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."

In a 2009 case, the Court of Appeals recognized "that a quarry owner 'would not necessarily seek a permit for lands that it did not intend to excavate immediately, or at least not until some time in the future." This means that the Court's reasoning was "that it would be unreasonable to limit the boundaries of the vested right [e.g., for a quarry] to just the area approved for mining under a [] permit where the quarry owner demonstrated an intention to eventually use a larger area for such mining activities." In that 2009 case, the Court "explained that a contrary rule would 'fail[] to consider the realities of the [mining] industry' and require 'a very narrow reading of'" the 1980 case.

In this case, dealing with a landfill, the Court felt that the operation conducted by the landowner was "sufficiently similar in nature to the quarries" that were involved in the earlier cases. "As opposed to other nonconforming uses in which the land is merely incidental to the activities conducted upon it, ... the use of property as a landfill, like a mine, is unique because it necessarily envisions that the land itself is a resource that will be consumed over time. Additionally, the owner of landfill property can reasonably be expected to hold a portion of the land in reserve for future expansion of that activity, just as a quarry operator may find necessary. The fact that the [state] permit covered only a limited area [in this case was] not determinative of [the landowner's] rights over the remaining 47 acres of the parcel." Once the landowner "dedicated substantial areas around the actual landfill for site related purposes," purchased extensive equipment, employed many peop le, "developed plans for multi-stage enlargement of the landfill and engaged in discussions with investors regarding future operations," the landowner adequately demonstrated a vested right to operate the landfill throughout the entire property notwithstanding and the zoning change would not be applied to restrict that right.

Comment: 1 Here is a post from Ira ten years ago, involving a New Jersey case, on another aspect of the problem. Fred McDowell, Inc. v. Board of Adjustment of the Township of Wall, 334 N.J. Super. 201, 757 A.2d 822 (App. Div. 2000) (Though a non-conforming use can be expanded beyond the boundaries of a property in the case of extractive industries, such as mining, it is first necessary for an owner to objectively manifest its intent to use a contiguous lot or even one across a highway for such extractive purposes before the zoning law changed.)

Comment 2: On the notion of quarry expansion after it becomes a nonconforming use, there are differing approaches in different states. Extensive research is recommended. Compare: Buffalo Crushed Stone, Inc. v. Town of Cheektowaga, 864 N.Y.S.2d 598 (A.D. 4 Dept. 2008). (A landowner is not entitled to conduct quarrying activities on parcels of land not zoned for such activities merely because the parcels are contiguous to other parcels of land also owned by the landowner and on which quarrying had occurred over a long period of time.) With

Hansen Bros. v. Bd. of Supervisors of Nevada County, 35 Cal. Rptr. 358 (Cal. App. 1994) (The DIRT DD for 4/11/95) (Mining use in one area of a parcel land is entitled to be extended to balance of parcel as a pre-existing use, but owner cannot significantly intensify rate of extraction.) Hansen held that the mining activity "imprinted" the entire parcel, and acknowledged that the doctrine applies primarily to mining and not to other activities.
But also compare: Township of Fairfield v. Likanchuk's, Inc., 644 A.2d 120 (N.J.Super.App.Div. 1994). (part of the same DD) (The expansion of a mining operation from a small area of a tract to the entire tract, where mining is a prior nonconforming use, constitutes an illegal expansion of the use.) The Fairfield case differentiates its facts from those applying the "diminishing asset" notion. It characterized the "so called diminishing asset" cases as slightly different, since the nature of the nonconforming use, such as excavation or soil removal, involves the utilization of a wasting asset and requires continual expansion over an area. Nonetheless, in such cases, the owner must show that the entire tract was dedicated by the owner to the mining activity despite the fact that the activity was limited when it was rendered a nonconforming use. The mere unexpressed intention or hope of the owner to use the entire tract at the time the restrictive zoning ordinance is adopted is not enough. Intent must be objectively manifested by the initial and ongoing operation of the owner before the activity was rendered nonconforming. Hansen, cited above, also embodies this principle.

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