[Cite as *Suffield Twp. Bd. of Trustees. v. Rufener,* 2011-Ohio-3294.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

BOARD OF SUFFIELD TOWNSHIP TRUSTEES,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0061**
- vs -	:	
ALVIN O. RUFENER, et al.,	:	
Defendants-Appellants.		

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2010 CV 0187.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Christopher J. Meduri*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Chad E. Murdock, 228 West Main Street, P.O. Box 248, Ravenna, OH 44266 (For Defendants-Appellants).

DIANE V. GRENDELL, J.

{¶1} Defendants-appellants, Alvin and Lana Rufener, appeal from the July 23 Order and Journal Entry of the Portage County Court of Common Pleas, adopting the Magistrate Decision and granting the plaintiff-appellee, Board of Suffield Township Trustees' (Suffield), request for a permanent injunction against the Rufeners, preventing them from extracting natural resources from a portion of their property. For the following reasons, we affirm the decision of the court below.

{¶2} In 1993, the Rufeners purchased a 73.9 acre tract of land, located at 725 State Route 224, in Suffield Township, Ohio. This tract of land is situated at lot number 38. At the time of the purchase and continuing through 2007, the tract of land was divided into roughly two halves for the purposes of zoning. The eastern half of the property, which occupied approximately fifty-four percent of the total lot, was located in a residential (R-1) district, while the western half, which occupied approximately forty-six percent of the lot, was located in an industrial (I-1) district.

{¶3} In 2000, the Rufeners applied for both a conditional use permit for the industrial portion of their land and a variance for the residential portion of the land. In their application, they stated that they wanted to conduct "sand [and] gravel extraction and processing" on their land. The Suffield Township Board of Zoning Appeals (BZA) found that "[m]ineral extraction is not a conditionally permissible use in an R1 district" and that the Rufeners testified that they could not proceed with the project on only the industrial portion of the land. Therefore, the Rufeners' requests were denied by the BZA.

{¶4} In November of 2002, a proposed zoning amendment was submitted to the voters of Suffield Township on the general election ballot. This amendment proposed rezoning the residential portion of the Rufeners' lot to industrial, and would have made the entire property industrial. This proposed amendment was rejected.

{¶5} On May 27, 2004, the BZA granted the Rufeners' request for a permit to allow gravel and sand extraction on the I-1 portion of their property. The Rufeners were granted a conditional use permit. The conditions on this permit required that mining be limited to only a specific portion of the I-1 half of the property. This area was

approximately 12.5 acres and was located 80 feet west of the State Route 224 right of way, 100 feet from the rear of the property, 100 feet from the R-1 district to the east, and 50 feet from the creek. Other conditions required that the Rufeners erect a visual barrier to this area and create lines to show the area where they could conduct mining operations.

{¶6} In 2007, the Suffield Township Zoning Commission rezoned the Rufeners' property, zoning the entire property as R-1, residential. This changed the half of the property previously zoned industrial to residential. No part of the Rufeners' property remained zoned industrial.

{¶7} On February 2, 2010, Suffield filed a Complaint seeking preliminary and permanent injunctions against the Rufeners, pursuant to R.C. 519.24 and 519.99. Suffield alleged that the Rufeners were extracting natural resources from portions of their property beyond the land that had been approved for such extractions, the 12.5 acres allocated by the Rufeners' 2004 conditional use permit. Suffield requested that the permanent and preliminary injunctions be issued to prevent the Rufeners from extracting natural resources from any portion of their property, including within the 12.5 acre area described by the BZA.

{¶8} Suffield also filed a Motion for Temporary Restraining Order on February 2, 2010, seeking that the court enjoin the removal of natural resources outside of the 12.5 acre area. In an attached affidavit, James Albertoni, Zoning Inspector for Suffield Township, asserted that he had personal knowledge the Rufeners were extracting natural resources outside of the permitted 12.5 acre area and that the amount removed exceeded 10,000 tons.

{¶9} On February 5, 2010, the magistrate issued a Judgment Entry granting Suffield's Motion for Temporary Restraining Order and ordered that the Rufeners cease extraction of natural resources from their land outside of the designated 12.5 acres. The trial court adopted the magistrate's decision on February 5, 2010.

{¶10} On February 12, 2010, the court held a hearing on the preliminary injunction. The following testimony was presented at the hearing.

{¶11} Larry Schrader, Chairman of the Suffield Township Zoning Commission, testified that prior to the 2007 change in zoning, the Rufeners' property was zoned I-1, industrial on one portion and R-1, residential on the other portion. He testified that in September of 2007, the Rufeners' property was rezoned, as part of a township-wide rezoning. This rezoning was done in an attempt to create zoning boundaries consistent with property lines. After this rezoning, the Rufeners' entire property was zoned R-1, residential.

{¶12} Marc Frisone, Chairman of the BZA, testified that the Rufeners applied for both a conditional use permit and a variance in 2000, but did not receive either of the two. Frisone also testified that the Rufeners again applied for a conditional use permit for the industrial zone in 2004, and were given such a permit, with conditions. Frisone testified that one condition required the Rufeners to construct a visual barrier that would protect the adjoining neighbors. Another condition required the Rufeners to create a "line of demarcation" by erecting wooden posts and placing piping on the ground, to clearly show the 12.5 acre area where the Rufeners could conduct extractions. Frisone testified that it was the intent of the BZA that no mining would occur outside of that 12.5 acre area. Frisone testified that in 2009, the Rufeners requested an extension of time

on their conditional use permit but that the BZA ultimately did not make a finding as to whether to grant the extension, due to the BZA's belief that it did not have jurisdiction.

{¶13} Jim Albertoni, a Zoning Inspector, testified that he observed the Rufeners extracting sand and gravel at a rate of about 80 truckloads per day in January of 2010. He also testified that the Rufeners were currently mining outside of the 12.5 acre marked area. Albertoni testified that he believed the Rufeners were removing approximately 1,600 tons of soil from their property daily.

{¶14} On March 2, 2010, the magistrate issued a Magistrate Decision and Journal Entry, ruling on the preliminary injunctions. The court held that the Rufeners were enjoined from mining on the eastern portion of the property, the portion that had always been zoned R-1, residential. The court found that because "mining was never a lawful use on the originally zoned R-1 Residential property, mining could never become a nonconforming use."

{¶15} However, the court denied the injunction regarding the Rufeners' use of the remaining portion of the property, the portion that had previously been zoned industrial, which included the 12.5 acres permitted for use. The court found that the Rufeners could not be enjoined from mining on the 12.5 acres because that use was lawful and that the Rufeners would be permitted to continue mining as a nonconforming use.

{¶16} The court also found that the Rufeners could continue to make extractions from the additional property located in the area previously zoned industrial but outside of the designated 12.5 acres. The court found that the current Suffield Zoning Resolution did not include a provision regarding the extension or expansion of

nonconforming uses, as is required by R.C. 519.19. Since no such provision existed in the zoning resolution, the court held the Rufeners could not be enjoined from expanding their extraction business beyond the 12.5 acre area covered by the conditional use permit "and onto the adjacent, originally zoned I-1 Industrial property."

{¶17} The Rufeners filed Objections to the Magistrate Decision on March 18, 2010. They asserted that the magistrate erred in allowing mining on only a portion of the property but not on the rest of the property. They argued that their nonconforming use should be extended throughout the entire parcel.

{¶18} On March 19, 2010, the trial court adopted the Magistrate Decision.

{¶19} On June 4, 2010, the magistrate issued a Magistrate Decision and Journal Entry, ruling on the permanent injunctions. The Entry stated that "[t]he parties agree that no further testimony or other evidence is necessary, and that the Magistrate decision filed March 5, 2010, contains sufficient findings of fact and conclusions of law in making the final decision in this case." As it did with the preliminary injunctions, the court granted the permanent injunction against the Rufeners regarding extracting sand and gravel from the portions of the property zoned R-1 at the time of the purchase, but denied the permanent junction as to the area located in the former industrial zone.

{¶20} The Rufeners filed Objections to the Magistrate Decision on June 21, 2010. On July 23, 2010, the trial court issued an Order, finding the Rufeners' objections not well-taken and adopting the Magistrate Decision.

{¶21} The Rufeners filed a Motion to Stay Judgment with the trial court on August 10, 2010, requesting that the court stay execution of judgment for the pendency of their appeal. The trial court denied this motion on August 12, 2010.

{¶22} On August 30, 2010, the Rufeners filed a Motion to Stay Judgment with this court seeking to stay the permanent injunction as to the residential segment of their property, pending the outcome of this appeal. On September 23, 2010, this court entered a Judgment Entry, overruling the Rufeners' Motion to Stay Judgment.

{¶23} The Rufeners timely appeal and assert the following assignment of error:

{¶24} "The trial court committed prejudicial error in enjoining the Rufeners from extending their valid, nonconforming use onto the area of their parcel zoned residential when purchased."

{¶25} Suffield brought the action for injunctive relief against the Rufeners pursuant to R.C. 519.24, which provides, in relevant part, as follows:

{¶26} "In case any building *** or any land is or is proposed to be used in violation of sections 519.01 to 519.99 *** of the Revised Code, or of any regulation of provision adopted by any board of township trustees under such sections, such board, the prosecuting attorney of the county, the township zoning inspector, or any adjacent or neighboring property owner who would be especially damaged by such violation, *** may institute injunction *** or any other appropriate action or proceeding to prevent *** such unlawful *** use."

{¶27} Thus, R.C. 519.24 "creates a cause of action against a landowner who uses or proposes to use his land in violation of any of the provisions [of] R.C. Chapter 519 or any township zoning resolution." *Ghindia v. Buckeye Land Dev., LLC*, 11th Dist. No. 2006-T-0084, 2007-Ohio-779, at ¶19 (citation omitted). Under this code section, "a board of township trustees, a county prosecuting attorney, or a township zoning inspector may file an action for injunction to prevent any unlawful use of buildings or

land." Id., citing *Baker v. Blevins*, 162 Ohio App.3d 258, 2005-Ohio-3664, at ¶12. Since the remedy is statutory, the petitioner need only show that a violation of the ordinance is occurring and is "not required to plead or prove an irreparable injury or that there is no adequate remedy at law, as is required by Civ.R. 65." *Union Twp. Bd. of Trustees v. Old 74 Corp.* (2000), 137 Ohio App.3d 289, 294. "Rather, the petitioner must prove, by clear and convincing evidence, that the property is being used in violation of the zoning ordinance." *Ghindia*, 2007-Ohio-779, at ¶19 (citation omitted).

{¶28} "The trial court's decision to grant an injunction is reviewed under an abuse of discretion standard." Id. at ¶20, citing *Baker*, 2005-Ohio-3664, at ¶17. "Absent a clear showing that the trial court abused its discretion in granting the injunction, an appellate court cannot reverse the judgment of the trial court." Id. (citation omitted).

{¶29} The Rufeners argue that the trial court erred in failing to find that the Rufeners' use of their property for extracting dirt and other materials was a nonconforming use and should be allowed on all portions of the property, including the eastern portion that was zoned R-1, residential prior to the 2007 rezoning.

{¶30} "A nonconforming use is a lawful use of property in existence at the time of enactment of a zoning resolution which does not conform to the regulations under the new resolution." *Aluminum Smelting & Refining Co., Inc. v. Denmark Twp. Zoning Bd. of Zoning Appeals*, 11th Dist. No. 2001-A-0050, 2002-Ohio-6690, at ¶14 (citation omitted). Nonconforming uses are not "favorites of the law," and are allowed to exist and continue due to "constitutional prohibitions against immediate termination of the use." Id.

{¶31} "A prior non-conforming use must meet two requirements. First, the use must have been in existence prior to the enactment of the prohibitory land use. Second, the land use in question must have been lawful at the time it commenced." *Studar v. Aurora City Bd. of Zoning Appeals*, 11th Dist. No. 2001-P-0015, 2001-Ohio-8780, 2001 Ohio App. LEXIS 5448, at *5 (citation omitted). There is a "right to continue the use of one's property in a lawful business and in a manner which does not constitute a nuisance and *which was lawful at the time*" the use was established. *Pschesang v. Terrace Park* (1983), 5 Ohio St.3d 47, 48 (emphasis sic) (citation omitted). "Stated another way, the use in question must have been in full conformance with all applicable land use regulations in effect when the activity was begun." *Dublin v. Finkes* (1992), 83 Ohio App.3d 687, 690.

{¶32} Extraction of natural resources is defined by Suffield Township Zoning Resolution (2000) as the "mining, quarrying, excavating *** of any mineral natural resource (coal, sand, gravel, clay, stone, top-soil and sub-soil)," and "the removal of topsoil and or sub-soil shall also be included when the extraction involves two hundred and fifty (250) tons or more." Extraction of a natural resource is a conditionally permissible use, which may be allowed if the BZA issues a conditional zoning certificate, and which may not be allowed without the issuance of such a permit. See Suffield Township Zoning Resolution (2000) and (2008), Section 421.2(B), and Section 801. Extraction of a natural resource is listed as a conditionally permissible use on land zoned I-1 (industrial) but not R-1 (residential) areas. Id. at Section 421.2(B)(2), and Section 403(B).

{¶33} It is undisputed by the Rufeners that under both current and past Suffield Zoning Resolutions, mining and extraction are not allowed in R-1 districts, with or without a conditional use permit. Therefore, mining on such property would not be a legal use of the eastern, always residential, portion of the property under the zoning laws. While use on the previously industrial western portion would have been legal prior to rezoning, mining on the residential portion was never allowable. The change of the I-1 section to R-1 had no effect on the land that had always been zoned residential. Therefore, even if the Rufeners had been conducting this mining prior to the change in zoning, it would not qualify as a nonconforming use because it was never a legal use of the eastern portion of the property.

{¶34} In addition, for the Rufeners' use to be nonconforming, the use must have been preexisting at the time of the change in the law. *Torok v. Jones* (1983), 5 Ohio St.3d 31, 33-34. "A person is entitled to use his property as a nonconforming use only to the extent that such use was established by preexisting use prior to adoption of the regulation involved." *Havranek v. Wolfenbarger*, 10th Dist. No. 76AP-4, 1976 Ohio App. LEXIS 6246, at *5.

{¶35} In this case, although the Rufeners had established a use on the conditionally permitted 12.5 acres prior to the 2007 change in zoning, the evidence presented at the hearing shows that their use on the eastern portion of the land did not commence until well after the zoning changes. The use of this portion of the land is different than using the industrial portion under the law. Therefore, an expansion of the nonconforming use to the eastern portion would be using the land to a different extent than it had been used previously. See Id. at *5.

{¶36} The Rufeners also argue that when use on a parcel is nonconforming, this use extends to the entire parcel and that the Suffield Zoning Resolution allows a nonconforming use to extend to their full parcel. Therefore, although extraction of resources would never have been allowed in an R-1 area, the fact that the Rufeners mined on the western portion of the same lot should allow for an extension of the use onto the eastern portion.

{¶37} We note that this case is factually distinct from other cases in which a piece of property has only one zoning district, as is typically the case. On such properties, conduct that is lawful on one portion of the property would also be lawful on the other portion of the property. This case is different, as the Suffield Zoning Resolution allows conditional permits for extraction on I-1 zoned land, but not on R-1 land. Moreover, "[e]ven when a preexisting use is properly established, expansion is still subject to reasonable zoning restrictions." *Rootstown Twp. Trustees v. Morgan*, 11th Dist. No. 90-P-2178, 1991 Ohio App. LEXIS 1856, at *11. Even if the extraction on the western portion was a nonconforming use, because it is not otherwise legal under the Zoning Resolution to have such a use on the eastern portion, the use cannot be expanded.

{¶38} In addition, a court can find a portion of a lot or a tract of land to have a nonconforming use but still find that use does not extend to another portion. See *Havranek*, 1976 Ohio App. LEXIS 6246, at *4-*6 (where the court held that a nonconforming use existed as to part of the lot behind a building setback line but not in front of such a line and held that "other provisions of the zoning resolution, such as building line requirements, must also be considered in determining the nature and

extent of the nonconforming use established"); *Randolph Twp. Trustees v. Portage Cty. Agricultural Soc.*, 11th Dist. No. 91-P-2384, 1992 Ohio App. LEXIS 3465, at *6-*7 (where the owner of a quarry owned one tract of land divided into two parcels, nonconforming use could not be expanded from one parcel to the other parcel).

{¶39} Moreover, the Rufeners' contention that mining should now be allowed on the portion of their property that has always been zoned residential is in conflict with the basic principles and purposes of nonconforming use. Nonconforming use is allowed "based on the recognition that one should not be deprived of a substantial investment which existed prior to the enactment of the zoning resolution." *Beck v. Springfield Twp. Bd. of Zoning Appeals* (1993), 88 Ohio App.3d 443, 446, citing *Curtiss v. Cleveland* (1959), 170 Ohio St. 127, 132; *Morgan*, 1991 Ohio App. LEXIS 1856, at *9 ("[n]onconforming uses are allowed to exist merely because of the harshness of and the constitutional prohibition against the immediate termination of a use which was legal when the zoning ordinance was enacted") (citation omitted).

{¶40} Such a purpose is not present in this case and the Rufeners are not placed in a worse position regarding the eastern portion of their land. The Rufeners were aware, at the time they purchased the property and throughout their ownership, that mining and extraction was prohibited on the eastern, R-1 portion of their land. Therefore, they would have never had reason to invest resources into mining on this portion of the land. Allowing the Rufeners to now extract minerals from the eastern, always residentially zoned portion of their land would go against not only the Suffield Zoning Resolution, but also against the purposes of allowing nonconforming use. The

Rufeners, under the trial court's Order, are allowed to continue with extraction on the land where they had been allowed since 2004, the western portion of the land.

{¶41} The Rufeners assert that because they intended to use their parcel for extracting sand and gravel and obtained the appropriate permits with the State to do so, their use should extend throughout the entire boundaries of their property. They further assert that such an approach is consistent with diminishing-asset use cases.

{¶42} Suffield argues that the diminishing asset doctrine further supports the trial court's decision because there was never any intent for the Rufeners to use the eastern portion of their land for extracting resources.

{¶43} The doctrine of diminishing assets has generally not been used in Ohio, but asserts that "an owner of a nonconforming use may sometimes be found to have a vested right to use an entire tract even though only a portion of the tract was used when the restrictive ordinance was enacted." *Stephan & Sons, Inc. v. Anchorage Zoning Bd. of Examiners & Appeals* (Alaska 1984), 685 P.2d 98, 101-102 (citation omitted). The determining factor is "whether the nature of the initial nonconforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies that the entire property was appropriated to such use prior to adoption of the restrictive zoning ordinance. *** The mere intention or hope on the part of the landowner to extend the use over the entire tract is insufficient; the intent must be objectively manifested by the present operations." *Id.*; *Connecticut Resources Recovery Auth. v. Planning & Zoning Comm. of Wallingford* (Conn.1993), 626 A.2d 705, 712-713; *Wolfeboro v. Smith* (N.H.1989), 556 A.2d 755, 758.

{¶44} The record indicates that there was no objective intent to use the eastern portion of the Rufeners' property for mining. In 2004, the Rufeners sought a permit only to conduct extraction on the western, industrial portion of the property. Members of the BZA testified that there was never any intent for the eastern, residential portion to be used for extraction. The Rufeners also did not begin to extract soil from the eastern portion of the property until after the zoning change occurred in 2007. There is a lack of evidence to show that the Rufeners objectively manifested their intent to mine throughout their entire property prior to the change in zoning.

{¶45} The Rufeners also argue that because the Suffield Zoning Resolution fails to include a provision allowing for an extension of nonconforming use, it fails to meet the requirements of R.C. 519.19. The Rufeners cite *Deerfield Twp. Trustees v. Buckeye Fireworks Mfg. Co., Inc.*, 11th Dist. No. 1137, 1982 Ohio App. LEXIS 13575, where the appellate court found that the failure to include a provision in a zoning resolution allowing a nonconforming use to be extended prevented the appellant from successfully seeking a permanent injunction. Id. at *3-*4.

{¶46} R.C. 519.19 reads, in pertinent part:

{¶47} "The board of township trustees shall provide in any zoning resolution for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning resolution."

{¶48} The magistrate found that the current Suffield Zoning Resolution did not contain the appropriate provision to allow for the extension of a nonconforming use, as required by R.C. 519.19. However, the magistrate also found this failure to include this provision applied only as to the extension of the use of the permitted 12.5 acres to the

remainder of the western, previously zoned I-1 portion of the land. He did not find that the failure to include an extension provision precluded Suffield's ability to obtain an injunction as to the eastern portion of the property. We agree.

{¶49} We note that *Deerfield* and related cases are distinguishable from this case. In such cases, the party with an appropriate nonconforming use was unable to obtain a nonconforming use permit because of the absence of provisions in the zoning resolution allowing for the extension of such a use. In this case, such a situation is not present, as the Rufeners would not be able to obtain a nonconforming use permit, regardless of the existence of an extension provision in the Suffield Zoning Resolution.

{¶50} As discussed in the foregoing analysis, extracting resources on the eastern part of the property is not a nonconforming use. Therefore, where there is no nonconforming use, the failure to include a provision allowing for that extension of such a use is irrelevant and did not preclude Suffield from successfully receiving an injunction as to the eastern portion of property that had always been zoned residential. The trial court did not abuse its discretion in granting an injunction to Suffield and enjoining the Rufeners from conducting extraction of natural resources on the eastern portion of their property.

{¶51} The Rufeners finally argue that the trial court abused its discretion in finding that the conditional use permit was a binding contract and that permits are not contracts.

{¶52} We note that a review of the lower court's Entries does not show that the trial court made a determination as to whether a conditional use permit is a contract. Therefore, there is no basis to determine that the trial court erred in finding that the

zoning permit is a contract. Regardless, any analysis related to this issue would be related only to the industrially zoned portion of the property, as the permit was only related to this area. The Rufeners are not disputing the part of the trial court's decision that denied Suffield's request for an injunction as to the western, formerly industrial portion of the Rufeners' property.

{¶53} The sole assignment of error is without merit.

{¶54} For the foregoing reasons, the Entry of the Portage County Court of Common Pleas, adopting the Magistrate Decision and granting Suffield's request for a permanent injunction against the Rufeners, is affirmed. Costs to be taxed against appellants.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.