

STATE OF MINNESOTA
COUNTY OF HOUSTON

DISTRICT COURT
THIRD JUDICIAL DISTRICT
CASE TYPE: Other Civil

Court File No. 28-CV-15-770

In Re: the Appeal of the Decision of the
Houston County Board of Adjustment dated
September 22, 2015, granting Zoning Permit
to Fred and Vicki Kruckow;

Sharon Beck and Jeremy Stouvenel,
Plaintiffs,

vs.

**NOTICE OF MOTION AND
MOTION FOR SUMMARY
JUDGMENT**

Houston County
Fred Kruckow and Vicki Kruckow,
Defendants.

**TO: DEFENDANT HOUSTON COUNTY, BY ITS COUNSEL, JAY T. SQUIRES,
RUPP, ANDERSON, SQUIRES & WALDSPURGER, 527 MARQUETTE AVE. S., SUITE
1200, MINNEAPOLIS, MN 55402; AND DEFENDANTS FRED AND VICKI
KRUCKOW, BY THEIR COUNSEL, TIMOTHY A. MURPHY, HAMMELL &
MURPHY, 110 E. MAIN ST., CALEDONIA, MN 55921**

NOTICE OF MOTION

PLEASE TAKE NOTICE that, on June 13, 2016, at 1:45 p.m., Plaintiff's counsel will
bring the following motion before the Hon. Carmaine Sturino, Judge of District Court, at the
Houston County Justice Center, 306 South Marshall, Caledonia, MN 55921.

MOTION

Plaintiffs move the Court for an order granting Plaintiffs summary judgment against
Defendants on the following grounds:

1. The decision of the Houston County Board of Adjustment dated September 22, 2015,
was arbitrary, capricious, unreasonable, and without lawful, rational, or factual

grounds supporting the decision.

2. The decision of the Houston County Board of Adjustment dated September 22, 2015, is not supported by substantial evidence in the record of the proceedings
3. The decision of the Houston County Board of Adjustment dated September 22, 2015, was procedurally flawed in that the Board of Adjustment failed to follow the requirements of the Houston County Zoning Code and Minnesota Law in conducting the proceedings and reaching its decision

This motion is based upon the Court's records and proceedings, upon Minn. R. Civ. P. 56, and upon Minn. Gen. R. Prac. 115.03.

NELSON LAW OFFICE

Dated: May 16, 2016

/s/ Bruce A. Nelson
Bruce A. Nelson
MN# 194827
64 West Third Street
P.O. Box 1181
Winona, MN 55987
Telephone: (507) 474-9155
Email: bruce@brucenelsonlawoffice.com

ATTORNEY FOR PLAINTIFFS

STATE OF MINNESOTA

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Plaintiffs,

MEMORANDUM OF LAW

vs.

Houston County
Fred Kruckow and Vicki Kruckow,
Defendants.

STATEMENT OF FACTS

The following facts involving the present case are not in dispute and provide the basis for Plaintiffs' Motion for Summary Judgment.

Defendant Fred Kruckow owns real property located in Crooked Creek Township in Houston County, Minnesota, legally described in Exhibit A attached hereto (hereafter referred to as the "subject property"). He purchased the subject property from his father in 2007. Mr. Kruckow's father purchased the subject property in 1964. A sand pit is located on the property. Houston County has not issued a conditional use permit allowing mining activity on the subject property.

On November 13, 2014, The Houston County Zoning Administrator sent Fred Kruckow a letter ordering him to cease and desist from engaging in mining activity that appeared to be occurring at the subject property. In a follow up letter on December 4, 2014, the Zoning Administrator reiterated to Mr. Kruckow that the Houston County Zoning Code prohibited

mineral extraction without a conditional use permit issued by Houston County, and that no conditional use permit had been granted to allow mining on the subject property. On January 28, 2015, Mr. Kruckow's attorney sent a letter to the Zoning Administrator, claiming that the Kruckows had previously sought to register the sand pit at the subject property with the County, that County records should show the subject property as a registered sand pit, that there had never been an assertion that the subject property was not properly registered, and that Kruckows were in compliance with the Houston County zoning requirements. The Zoning Administrator responded in a letter Mr. Kruckow and his attorney dated February 5, 2015, stating that it was the County's position that since the subject property was not on a list of "registered quarries" on file with the Zoning Office, Mr. Kruckow would need to obtain a conditional use permit to allow sand mining on the property. He also informed Mr. Kruckow that it would be 'beneficial to (his) position' to provide proof that the subject property had been registered as a mine when Houston County was registering mines in 1972. No additional information or documents were provided to the Zoning Administrator as proof that the subject property had been previously registered as a quarry.

On July 29, 2015, Fred and Vicki Kruckow filed a Zoning Permit Application requesting determination that the subject property is a registered quarry. This commenced an appeal to the Houston County Board of Adjustment of the administrative decision of the Zoning Administrator in denying Kruckows' request to engage in mining activity on the subject property without a conditional use permit. A public hearing on the appeal scheduled for August 27, 2016. Notice of the hearing was published August 12, 2015. The notice did not describe the action taken by the Zoning Administrator which was the subject of the appeal, nor did it reference the provisions of the Houston County Zoning Ordinance involved in the appeal.

The Houston County Board of Adjustment met on three occasions to consider the Kruckow appeal: at a public hearing on August 27, 2015; for a site visit of the subject property

which occurred on September 17, 2015; and at a continuation of the public hearing on September 22, 2015. The proceedings of the public hearing on August 27, 2015 and September 17, 2015, were electronically recorded by the County; there was no recording of the site visit. The Houston County Environmental Services Director testified on behalf of the County in response to Kruckows' appeal. He stated that the subject property was not on the 1972 list of non-conforming "registered" mines that the County had compiled at that time. Mr. Kruckow testified at the public hearing and also submitted a written statement. He claimed that his father had intended to register the subject property as a mine, and that he thought the sand pit was registered. He had worked for his father's business in several different capacities over the years, including President, since he was a teenager. His father's business included the sand mine on the subject property. He stated that the sand mine had been used for several projects over the years. He did not provide specific information regarding dates that the sand mine on the subject property had been in active use. He left his father's business in 2007, the same year he acquired ownership of the subject property from his father. He did not offer any business records showing commercial activity from the sand pit on the subject property. He also did not offer any tax records showing activity at the sand pit. Mr. Kruckow's attorney testified that the Kruckows had several quarries in operation in the County and all were on the list of 'registered' mines except the mine located on the subject property. He stated that the registration was done by verbal submission to the zoning office. The Board accepted written statements presented by Mr. Kruckow's attorney from three individuals who did not testify at the public hearing. The written statements claim knowledge of mining activity in the sand pit on the subject property over the years, but give no details as such claimed activity including dates that it occurred. A member of the Board of Adjustment asked Mr. Kruckow if he had any business records to back up the affidavits, and he responded that he did not have access to business records showing activity prior to 2007.

Plaintiffs testified in opposition to the appeal. Plaintiff Sharon Beck testified that she has lived next to the subject property for over 40 years and in that time had only seen mining activity occurring once on the property. She thought it was a pasture. Plaintiff Jeremy Stouvenel testified that he believed the subject property was still owned by his grandfather. Several other witnesses testified in opposition to the appeal, as well. One of the witnesses informed the Board of Adjustment that unless the Defendants proved that the subject property had been in continuous operation since the enactment of the zoning ordinance that they would need to go through the conditional use process. He stated that tax records would show whether the subject property had been used for sand mining continuously. Several questioned why Defendants were not going through the conditional use permit process. No tax records were provided by the Kruckows regarding the subject property.

At the conclusion of the public hearing on September 22, 2015, the Board of Adjustment granted the Kruckows appeal without making any written findings of fact.

STANDARD OF REVIEW AND AUTHORITY

1. Standard of Review.

The standard of review applied to zoning matters is whether the governmental entity's action was unreasonable. *Honn v. City of Coon Rapids*, 313 N.W.2d 409 (Minn. 1981). When a governmental entity acts in a quasi-judicial capacity by receiving and weighing evidence and making factual findings, those actions are reasonable if supported by substantial evidence. *Hibbing Taconite Co. V. Minnesota Public Service Comm.n.*, 302 N.W.2d 5 (Minn. 1980).

The Court's review focuses on the legal sufficiency and factual basis for the reasons given. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 1622 (Minn. 2006). When the municipal proceedings were fair and the record clear and complete, review is on the record. *Swanson v. City of Bloomington*, 421 N.W.2d 313 (Minn. 1988).

In this case, the governmental action the court must review is the granting of the Defendant's appeal by the Houston County Board of Adjustment. If the court concludes that the Board of Adjustment's decision is not supported by substantial evidence on the record of the proceedings established by the County, then its actions must be deemed unreasonable and their decision reversed.

2. Authority for Land Use Planning & Controls.

The Minnesota legislature has delegated to counties the power to determine and plan the use of land within their boundaries. Minn. Stat. §394.21 (2016). Included in this authority is the power to promulgate zoning ordinances. Minn. Stat. §394.24 (2016). Houston County has enacted a zoning ordinance regulating the use of land within the county. See Houston County Zoning Code §0110.0101, et seq. The Zoning Code imposes various restrictions on the use of land within the County. Nonconforming uses are protected by Minn. Stat. §394.24 (2016), which provides that:

“...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.... *If the nonconformity or occupancy is discontinued for a period of more than one year...any subsequent use or occupancy of the land or premises shall be a conforming use or occupancy*” (emphasis added).

The courts have acknowledged that although a zoning ordinance may constitutionally prohibit the creation of uses which are nonconforming, existing nonconforming uses must be

permitted to remain. *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (Minn. 2010).

Houston County has also adopted a Non-Conforming Use provision in Section Nine of its Zoning Ordinance. The policy of the County with respect to non-conforming uses is set forth in Houston County Zoning Code §0110.0901, subd. 2, which states that:

“It is the intent of this Ordinance to permit these non-conforming uses or structures to continue until they are removed, *but not to encourage their survival. Such uses are declared by this Ordinance to be incompatible with permitted uses in the districts involved...*” (emphasis added).

§0110.0901, subd. 4 of the Zoning Ordinance states that if a non-conforming use, other than a residential-use structure, is discontinued for more than 6 months, the use shall thereafter conform to the Ordinance.

In this case, the Kruckows seek to engage in sand mine activity on the subject property. Section 0110.2704 of the Houston Zoning Code prohibits any person, firm or corporation from engaging in mining on any land in the County without first obtaining a conditional use permit from the County. The Kruckows do not have a conditional use permit. The only circumstance that they could lawfully engage in extraction of sand on subject property without a conditional use permit would be to prove that the sand pit was a non-conforming use that was in existence at the time of the adoption of zoning ordinance prohibiting sand mining, and that they subsequently engaged in the extraction of sand without interruption of more than 1 year since adoption of the zoning code.

ARGUMENT

In reviewing the record, it is clear that the decision of the Board of Adjustment is unreasonable as a matter of law because it is not supported by substantial evidence.

I. The decision by the Board of Adjustment is not supported by substantial evidence in the record.

It is undisputed that no conditional use permit has been issued permitting mining activity on the subject property. As such, mining activity is prohibited unless the Kruckows can prove that it is permitted as a non-conforming use. To have status as a non-conforming use, the Kruckows must prove that (1) mining activity was occurring on the subject property on the date the zoning ordinance was enacted prohibiting mining without a conditional use permit, and (2) that mining activity continued uninterrupted by no more than 1 year from the date the zoning ordinance was approved to the present date.

1. There is not sufficient evidence in the record to support the conclusion that the prohibited use was occurring at the subject property on the date the zoning ordinance prohibiting the use was enacted.

There record contains no evidence as to whether mining activity was occurring on the subject property on the date the zoning ordinance was approved. Pursuant to §0110.0901 of the Houston County Zoning Code, lawful uses of land prohibited by the Zoning Ordinance after August 30, 1967 can continue as non-conforming uses. In support of their claim that mining was occurring on the property, Kruckows have provided written statements claiming there was mining activity 'at various times'. The authors of the statements were not present to testify as to whether mining activity was occurring at the subject property on August 30, 1967. Fred Kruckow testified on both days of the public hearing and submitted two written statements, as well. Nowhere in his testimony or written statements does he claim that the subject property was being actively mined on August 30, 1967. Aerial photographs of the subject property were provided at the public hearing. One set of photographs were taken in

1962 and another set of photographs were taken in 1976. The photographs show no mining activity on the subject property in 1962, and show what appears to be a sand pit in 1976. The photographs do not establish use of the subject property on August 30, 1967. Without this evidence, Board of Adjustment's conclusion that mining on the subject property is a lawful non-conforming use is not supported by substantial evidence in the record.

2. There is not sufficient evidence in the record to support the conclusion that prohibited use had continued uninterrupted on the subject property since the enactment of the zoning ordinance.

Even if the Board could reasonably conclude that the subject property was being actively mined when the Zoning Ordinance was adopted, there is not sufficient evidence in the record that such mining activity has continued uninterrupted to the present date. By Minnesota law, non-conforming use of land ceases to be lawful if the prohibited use terminates for more than 1 year. The Houston Zoning Ordinance is even more restrictive; it provides for the loss of non-conforming use status if the use terminates for more than 6 months. Both the statute and the Zoning Ordinance state that discontinuation of a nonconforming use for the designated time results in termination of that use. *County of Isanti v. Peterson*, 469 N.W.2d 467 (Minn. Ct. App. 1991). The court does not place upon counties the burden of having to prove that a landowner intended to abandon a discontinued nonconforming use. The case law does not require proof of abandonment of a non-conforming use; the property owner's right to continue the nonconforming use terminates by reason of its discontinuance. *Id.* at 470.

The evidence in the record is not sufficient to support the conclusion that mining activity has continued uninterrupted since zoning ordinance was adopted. Written statements submitted by Fred Kruckow, as well as his testimony, claim mining activity over the years but do

not specifically allege continuous activity. Mr. Kruckow did not actually own the subject property until 2007, so his knowledge of ongoing mining activity at the subject property is limited. Information provided by Mr. Kruckow identifies periodic use for specific projects over the years. He offered no business records showing commercial activity at the mine on the subject property. Such records could have included documents reflecting the sale of sand from the pit, records showing dealings with customers related to the sale of sand, even records related to equipment used at the sand pit would have supported his claim of continuous mining activity. His reason for failing to show records of business activity related to the mine is that he left his father's business in 2007 and had no access to the record. He certainly would have the business records related to the sand mine from the date he acquired ownership of the subject property in 2007, yet still failed to provide any documents or records to support his claim that mining activity had been in continuous operation from 2007 to the present date. Mr. Kruckow also could have provided tax records reflecting sales of sand from the subject property. Mining land has a different property tax classification and rate than other agricultural land. The subject property would have a different tax classification or rate if it were recognized as a mine. Mr. Kruckow presented no tax records showing that the subject property was classified as a mine for real estate tax purposes.

Mr. Kruckow provided written statements of other individuals in support of his appeal. These statements also do not specifically allege that sand mining activity occurred continuously since the date the Zoning Ordinance was adopted. The statements provided make vague references regarding sand mining activity occurring on the subject property, but contain no specific dates regarding such alleged activity. The individuals who provided the statements did

not testify at the public hearing and, thus, were unavailable to the Board of Adjustment for questioning regarding the allegations in their statements.

The Kruckows have failed to provide any substantive evidence in the form of documents or records to support their claim of continuous use.

II. The decision by the Board of Adjustment is arbitrary, capricious, unreasonable, and without sufficient grounds supporting the decision.

The Courts review a zoning decision that requires discretion and judgment, such as the decision to issue a conditional use permit, to determine whether the decision-maker acted arbitrarily, capriciously, or unreasonably, and whether the evidence reasonably supports the decision made. *Clear Channel Outdoor Advertising, Inc. v. City of St. Paul*, 675 N.W.2d 343 (Minn. Ct. App. 2004). Such a decision is reasonable and not arbitrary or capricious when the action bears a reasonable relationship to the purpose of the ordinance. *Id.* at 346.

Without substantial evidence in the record to support decision, the Board of Adjustment's decision is unreasonable as a matter of law and must be reversed. The record presented establishes that mining activity is prohibited on the subject property without a conditional use permit, and that no conditional use permit has been issued for that purpose. The record also establishes that on some occasion in the past, sand was extracted from the subject property but there is no evidence relative to the dates such activity occurred. The record also reflects a degree of confusion or misunderstanding by the parties and the Board of Adjustment as to the significance of the list of 'registered quarries' compiled by the Houston County Zoning Office, the absence of the subject property from the list, and the circumstances of the subject property's omission from the list; this issue is addressed in more detail below. The record is devoid of evidence of active mining operations on the subject property when the Zoning

Ordinance was adopted. The record also does not contain evidence of uninterrupted mining activity on the subject property since the Zoning Ordinance was adopted, as required to retain non-conforming use status. Without any such evidence, the decision of the Board of Adjustment granting the Kruckows' appeal was arbitrary, capricious, and unreasonable.

III. The decision of the Board of Adjustment is procedurally flawed.

A. The Board of Adjustment did not make findings of fact to support its decision.

At the conclusion of the public hearing, the Board of Adjustment recited the criteria set forth in §0110.1207 of the Houston County Zoning Ordinance for ruling on the application for appeal, but the Board made no explicit findings of fact or conclusions in support of its order. §0110.1207 prohibits the Board of Adjustment from granting the appeal unless it finds that (1) there are special circumstances affecting the use of the land that do not apply to other properties, and (2) granting the appeal would not materially adversely affect the health or safety of individuals living or working in the area, and would not be materially detrimental to the public welfare or injurious to adjacent property. The Board made no findings relative to these criteria. The record is devoid of any reference to special circumstances related to the subject property. On the other hand, there were concerns raised by witnesses regarding the potential harm to the adjacent property if unpermitted mining operations were allowed to continue at the subject property. Moreover, the criteria referenced by the Board of Adjustment do not address the law of non-conforming uses and would not have been immaterial to the issue of whether mining activity should be allowed to occur on the subject property without a conditional use permit.

Generally findings are necessary for judicial review. Kehr v. City of Roseville, 426 N.W.2d 233 (Minn. Ct. App.1988). The absence of detailed findings is not fatal to if substantial evidence in the record supports the board's application of the ordinance. With no written findings, the record of public hearing establishes the basis for action by the Board of Adjustment and whether their decision is supported by substantial evidence. The lack of written findings of fact in this case make judicial review more difficult due to the apparent confusion as to the relevant issue to be addressed by the Board in the Kruckow appeal. While not fatal to their decision, failure to provide written findings is one of a number of procedural shortcomings related to the proceedings conducted by the Board of Adjustment.

B. The notice of public hearing published by Houston County does not give adequate notice of the matter on appeal.

Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties and afford them an opportunity to be heard. Graham v. Itasca County Planning Commission, 601 N.W.2d 461 (Minn. Ct. App. 1999), citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The notice must convey the required information and must afford a reasonable time for those interested to prepare adequately and to make their appearance. Id. at 464.

The notice of public hearing published by the County and mailed to interested parties did not contain any description of the nature of the appeal. It also did not describe the action of zoning administrator that was being appealed. Such lack of information regarding the subject matter of the appeal fails to afford a reasonable time for those potentially affected by the outcome to prepare and attend the public hearing. As a result, Plaintiffs have been denied their due process rights in the appeal.

C. The Board of Adjustment did not apply the proper legal standard in making its decision.

1. Registered Mines.

The application for zoning appeal filed by the Kruckows requests a determination that the subject property is “registered” as a mine. The record clearly shows that the subject property was not ‘registered’. Kruckows’ appeal claims that the subject property was erroneously excluded from the list of registered mines that the County had compiled in 1972. They focused on showing that the subject property had been erroneously excluded from the list of ‘registered’ mines for Houston County, and so, therefore, it should be treated as a ‘registered’ mine. In support of their argument, they claimed that sand mining activity had occurred at the subject property without objection by the County or others. Mr. Kruckow told the Board that he was not aware the subject property was not on the list of registered mines, and that his father had owned other mines that were registered. He claimed that his father had attempted to enter the mine on the list of registered mines, and that exclusion of the subject property from the list of registered mines was due to error by County and not by Kruckows. The Board of Adjustment also inquired about the registration, or lack thereof, of the subject property as a mine. As a result the decision of the Board granting Kruckows’ appeal, when viewing the evidence in the record, appears to be based upon the mistaken theory that the subject property had been inadvertently left off a list of ‘registered’ mines that the County had assembled in 1972 and therefore did not require a conditional use permit. Such action is not supported by law. Minnesota law has no provision for registering mines or quarries. The Houston County Zoning Ordinance does not

have a process for registering mines or quarries; the term ‘registered quarry’ or ‘registered mine’ does not appear in the Zoning Code. By approving Kruckow’s appeal due to mistaken omission on a list of ‘registered’ mines, the Board of Adjustment has failed to apply the proper legal standard in ruling on the Kruckow appeal. It would appear that the Board was never advised of the requirements that must be met to permit a non-conforming use, or that exclusion from a list of registered mines does not create a presumption of the existence of a non-conforming use.

2. Written statements as evidence.

The Board of Adjustment accepted testimony in form of written statements, and appeared to give equal weight to the written statements as it did live testimony. The authors of the written statements did not appear at the public hearings and were not available for questioning by the Board regarding the contents of their statements. The statements contained vague information regarding the sand pit on the subject property.

Due to the procedural defects set forth herein, the decision of the Board of Adjustment is fatally flawed and the decision of the Board granting Kruckows’ appeal must be reversed.

CONCLUSION

For the reasons set forth herein, Plaintiffs ask that the Court grant them summary judgment on their Complaint.

NELSON LAW OFFICE

Dated: May 16, 2016

/s/ Bruce A. Nelson
Bruce A. Nelson
MN# 194827
64 West Third Street
P.O. Box 1181
Winona, MN 55987

Court File No. 85-CV-15-770

Telephone: (507) 474-9155

Email: bruce@brucenelsonlawoffice.com

ATTORNEY FOR PLAINTIFFS