

New York Law Journal

Real Estate Trends

WWW.NYLJ.COM

©2009 INCISIVE MEDIA US PROPERTIES, LLC An incisivemedia publication

VOLUME 242—NO. 15

WEDNESDAY, JULY 22, 2009

ZONING AND LAND USE PLANNING

Decision Case Sets Roadmap For Nonconforming Use Law

The New York Court of Appeals does not issue decisions on zoning law or land use planning topics as often as it resolves a case involving, say, questions of criminal or commercial law. Thus, when the Court does issue a zoning law opinion, it is something to which practitioners, as well as property owners, developers, and government officials, typically pay careful attention.

On June 30, the Court issued an interesting ruling involving an important zoning law subject—prior nonconforming uses—that involved a unique use of land—quarrying operations. The Court's decision, in *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*,¹ applying its nearly 30-year-old ruling in *Syracuse Aggregate Corp. v. Weise*²—which also was a prior nonconforming use case involving quarrying—sets a roadmap for nonconforming use law and highlights the importance of the underlying facts when analyzing and advocating for or against claims of nonconforming use.

Quarrying

The case involved Buffalo Crushed Stone Inc. (“BCS”), which owns approximately 280 acres of property in the upstate town of Cheektowaga, where it operates a hard-rock quarry. For the past 80 years, BCS and its predecessors, including Federal Crushed Stone Corp., have devoted the land exclusively to quarrying. The quarry consists of mineral extraction sites located primarily in the center of the property, along with processing areas, buffer zones and roads. BCS and its predecessors acquired the land in a number of transactions, either by purchase or lease, between 1929 and 1991. The zoning dispute in this case involved subparcels (in the east, south and west) that primarily were areas that BCS maintained as mineral reserves that had not been quarried.

By
**Anthony S.
Guardino**



Before 1942, there were no zoning ordinances or other limitations on the property's usage. The town then enacted ordinances, demarcating the property into certain zones or districts, and denominating such zones as residential, industry and an airport. Federal's land was classified within the Second Industrial District. The ordinance allowed gravel pits and stone quarries to be constructed in this zone, provided that the quarry company obtain a permit. The ordinance explicitly permitted nonconforming uses to continue unabated upon the condition that no buildings in the Second Industrial District be enlarged or destroyed.

In 1969, the town repealed the 1942 ordinance, enacting the 1969 zoning ordinance that divided Federal's lands into four zoning districts: a residential district, a business district, a manufacturing district and a “special” district. Section 7-01 of the ordinance permitted the continuation of nonconforming activities on the property, but prohibited their extension or enlargement. This ordinance permitted Federal to continue its mining operation within the “AG Special Aggregate District.” In 1992, the town repealed its 1969 zoning ordinance, adopting new zoning laws that were amended in 1996 and 1997; none of these ordinances altered the boundaries and relevant regulations of the AG district.

In 1998, BCS went to court seeking a declaratory judgment that zoning restrictions applicable to the unexcavated areas of its property were void. The town moved for summary judgment and for a declaration that its zoning ordinances were enforceable. BCS then cross-moved for summary judgment on its claims.

The trial court held that subparcels within the town's AG district were entitled to nonconforming use status, and thus quarrying in those subparcels was permissible. The court further held that two other subparcels, south of the AG district and in a residential zone, were entitled to prior nonconforming usage because they were subject to quarrying permits issued by the town before the 1969 ordinance. However, the court did not grant such status to parcels located to the east (subparcel 5) and to the west (subparcel 25D).

The Appellate Division modified that decision by additionally granting the town summary judgment as to the subparcels in the south, holding that these subparcels were not entitled to prior nonconforming usage because BCS had not mined them prior to 1969. Two justices dissented as to these subparcels, stating that BCS should not be required to demonstrate actual quarrying activities on each contested subparcel and these subparcels should generally be viewed in the context of the entire property as a whole. The dissent further stated that BCS and its predecessors had engaged in substantial quarrying activities on the entire 280-acre property for many years; had never utilized the land for any other purpose; and these subparcels were contiguous to BCS's excavation sites. Thus, the dissenters concluded that BCS had satisfied the prior nonconforming use standard. BCS appealed as of right.

Court of Appeals Ruling

In its decision, the Court of Appeals explained that prior nonconforming uses in existence when a zoning ordinance is adopted are, generally, constitutionally protected even though an ordinance may explicitly prohibit such activity. Property owners engaging in a particular activity may have secured a “vested right” to use their land accordingly, although nonconforming uses “may not be enlarged as a matter of right.” Indeed, the Court noted, courts strive to see that “the public interest in eliminating nonconforming uses at a legally opportunistic time is placed in reasonable balance

ANTHONY S. GUARDINO is a partner with the law firm of Farrell Fritz. Resident in the firm's Uniondale office, he can be reached at aguardino@farrellfritz.com.

with the owner's interest in not having a property investment abruptly altered or terminated."

The Court also pointed out that a party advancing a prior nonconforming use exception to a zoning ordinance must establish specific actions constituting an overt manifestation of its intent to utilize the property for the ascribed purpose at the time the zoning ordinance became effective; a mere contemplation of purpose, lacking supportive evidence of undertakings to effectuate such intentions, will not suffice. Importantly, the Court observed that "[e]very inch of the land need not have been employed for the asserted purpose," but utilizing just a portion of the property will not necessarily trigger the protections of this doctrine. Central to this standard is "an examination of the nature of the particular nonconforming use in issue as well as the activities engaged in by the landowner in effectuating that use prior to the adoption of the restrictive ordinance."

The Court noted that, in its 1980 decision in *Syracuse Aggregate*, it held that a quarrying company was entitled to prior nonconforming use status because its activities sufficiently demonstrated an intent to appropriate an entire parcel of land for excavation and quarrying prior to the passage of a restrictive zoning law. There, the landowner purchased a 25-acre parcel of land in 1978 that had been used as a quarry for more than 50 years. The land was zoned as a residential district in 1961. In discussing the nature and character of quarrying, the Court stated that, "a prior nonconforming use for quarrying cannot be limited solely to the land that was actually excavated before the zoning law, because—in this unique type of industry—landowners commonly leave portions of their land as mineral reserves to be excavated at a future time." A landowner that engages in "substantial quarrying activities" within its property and demonstrates an intention to do so in other portions of the land "may sufficiently establish a prior nonconforming use extending to the boundaries of that property, notwithstanding the fact that quarrying may not have actually begun in that specific area."

In this case, the Court found that BCS and its predecessors acquired the property exclusively for mining and quarrying operations—"[n]o part of the land was ever dedicated to a use other than . . . quarrying." Additionally, the Court pointed out, BCS constructed a processing structure in the center of the 280-acre property, where bulk materials were removed for decades, and service roads constructed to move the materials after they are processed. Further, the processing plant contains a building for packaging materials, a repair shop and offices. The Court noted that in *Syracuse Aggregate*, it determined that "given such outward manifestations of intent and in light of the unique character of the business engaged in, it can only be concluded that the nonconforming use extends throughout the property even though the principal excavation was limited to a five-

acre portion of the parcel." It found the "same pertinent factors" present in BCS.

The Court then examined the various parcels at issue. With respect to subparcel 5, it reiterated that because of the nature and character of the quarrying industry, landowners commonly quarry one portion of their land at a time and leave other areas as reserves. Reviewing BCS's quarrying activity both in the center of its property and in the respective subparcels, the Court found that it was clear that it "manifested an intent to quarry subparcel 5." It also found that although a road separated subparcel 5 from the aggregate zone, the road was "relatively narrow" (24.5 feet) and it ruled that it was "not a physical impasse" that cut off subparcel 5 from the contiguous parcels and it did not substantially alter the nature and character of the property as a whole.

With respect to the two subparcels south of the AG district, the Court found that these areas had been cleared, grubbed and stripped of topsoil before 1969. Further, they were the subject of quarrying permits before 1969. Accordingly, the Court held that BCS had made clear its intent to quarry these areas at a future time, as it was already making preparations to undertake quarrying activity by 1969. Thus, the Court conferred prior nonconforming use rights to these subparcels, as well.

While the Court's recent ruling was a significant victory for the property owner, and a clear indication that quarrying companies should find it easier to demonstrate nonconforming uses in the future, the Court recognized that quarrying companies do not have "carte blanche" to engage in future excavation of their lands contrary to the zoning regulations.

The Court added that, regarding subparcel 25D, Federal had leased this subparcel from a Dr. Reinstein for the sole purpose of mining. This subparcel was contiguous with areas that had been extensively quarried, although BCS had not quarried or acquired a permit to quarry this subparcel before the 1969 ordinance. The Court then ruled that although mining permits were strong evidence of a manifestation of intent to mine a given area, they were not necessary in determining the manifested intent of the quarrying company. It held that an issue of fact remained as to when BCS received legal title to this land. The Court decided that if this subparcel was part of a subparcel actively quarried, then it would be entitled to prior nonconforming use. On the other hand, if it was not, and if BCS acquired

it in 1991, as the town contended, then it would not be so entitled.

Importantly, the Court concluded that, given the "peculiar nature" of quarrying, it was unrealistic and unreasonable to require BCS to have actively mined all areas within its 280-acre property prior to the passage of the 1969 zoning ordinances to establish prior nonconforming use protection for its mining operation. "Quarrying contemplates a gradual unearthing of the minerals in the land, and so excavation of portions of the land may be sufficient to manifest an intention to conduct quarrying on the property as a whole," the Court stated. The Court stated that of "crucial importance" was the fact that BCS and its predecessors, quarrying companies, had exclusively, and for decades, utilized the land for quarrying. Additionally, they exhibited the "usual indicia" of a quarrying enterprise, showing preparations to quarry the subparcels in dispute. Therefore, the Court held that BCS was entitled to a declaration that the subparcels at issue were subject to prior nonconforming usage, except for subparcel 25D (and certain other limited areas), where issues of fact had to be unresolved.

Conclusion

While the Court's recent ruling was a significant victory for the property owner, and a clear indication that quarrying companies should find it easier to demonstrate prior nonconforming use in the future, the Court recognized that quarrying companies do not have "carte blanche" to engage in future excavation of their lands contrary to zoning regulations. The BCS decision demonstrates that the facts are crucial to analysis of prior nonconforming uses, and explaining those to judges while keeping the legal factors in mind is crucial to persuading a court one way or the other.



1. 2009 N.Y. Slip Op. 5370 (June 30, 2009).
2. 51 N.Y.2d 278 (1980).