IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

MICHAEL E VERBILLION,	:	CASE NO. **18CV0519**
Plaintiff,	:	JUDGE DALE A. CRAWFORD, visiting
v.	:	
ENON SAND AND GRAVEL LLC, et al.,	:	DECISION GRANTING INJUNCTION
Defendants.	:	

Plaintiffs commenced this action pursuant to Rev. Code 303.21 on October 10, 2018 alleging that they are adjacent or neighboring property owners who will be specially damaged if defendant is permitted to engage in surface mining on specified property[1] in violation of Clark County Zoning regulations which went into effect on November 3, 1964. Specifically, plaintiffs allege that without obtaining a conditional use permit, defendants will be in violation of Chapter 1, Section 1 of the Clark County Zoning Regulations in addition to sections 303.01-303.25 of the Ohio Revised Code. Plaintiffs further allege that Defendant sought a conditional use permit for the specified property but was denied such use and never appealed that decision.

Defendant asserts that with respect to Parcel A and the northern most 26.86 acres of Parcel B it has a prior non-conforming use (prior to November 3, 1964) of surface mining and it is not subject to the zoning law that requires it to obtain a conditional use permit to engage in surface mining.

Because of COVID-19, the Court conducted its evidentiary hearing on two separate days—March 16, 2020 and July 27, 2020. Testimony was taken and numerous exhibits were admitted, mostly without objection. The Court ruled on pre-trial and limine objections, some of which remain pending and will be resolved herein.

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[1] The specified property which is the subject of this action consisted of two parcel: (A) Parcel A consists of five parcels—1) 12.27 acre Parcel No. 180-11-29-0-010; 2) 1.67 acre Parcel No. 180-11-23-0-003; 3) 27.75 acre Parcel No. 180-11-23-0-001; 4) 18.5 acre Parcel No. 180-11-29-0-007; 5) 11.32 acre Parcel No. 180-11-29-0-009—(B) Parcel B consists of a 114.19 acre parcel (Demmy-Keifer) No. 180-11-23-0-62 (referred to as Parcel B).

Prior to trial, plaintiffs sought leave to file a Supplemental Pleading to add a parcel which defendant purchased during the litigation. The Court hereby grants the motion.

Preliminary Matters

This case is before the Court pursuant to Rev. Code 303.24, which provides, in part:

> "In case … any land is or is proposed to be used in violation of sections 303.01 to 303.25 inclusive, of the Revised Code … any adjacent or neighboring property owner who would be specially damaged by such violation: may institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such … use."

Plaintiffs in this action are Michael E. Verbillion, Jolyn B. Verbillion, Beth Zainey, Carol E. Culberson and Charles D. Swaney. It is not disputed that the plaintiffs are adjacent or neighboring property owners. However, defendant disputes that any of the plaintiffs would be specially damaged by the proposed surface mining on the subject property and argue that they thus lack standing to prosecute this case. Defendant purchased five subject parcels and combined them into parcel A in 2015. Parcel B was also purchased in 2015 by defendant as a result of joining Demmy and Keifer properties into a 114.19 acre parcel. Defendant takes the position that with respect to Parcel A, and 25.86 acres of Parcel B, it has a legal non-conforming use pursuant to Rev. Code 303.19 and Clark County zoning regulation Chapter 1 Section 1(4). Rev. Code 303.19 provides:

> "the lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with the provisions of such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of land shall be in conformity with sections 303.01 to 303.25, inclusive, of the Revised Code. The board of county commissioners 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."

Chapter 1, Sec. 1(4) of the CCZR provides:

> "All non-conforming buildings, structure, or uses of land which were lawfully exiting prior to the adoption of these regulations may be maintained or shall be kept in repair, provided no structural alterations shall be made except such as required by law or authorized by the Board of Zoning Appeals."

The parties agree that the application of a non-conforming use is a right protected by the United States and State of Ohio constitutions. (See City of Akron v. Chapman (1953), 160 Ohio St. 38). Defendant further asserts that the right to a non-conforming use applies not only to the property whereupon the use is active but also to property held in reserve for future use. Plaintiffs assert that except for the 25.86 acres of Parcel B, a

non-conforming use of surface mining was not in existence in 2015 when the properties were purchased nor was there a non-conforming use on November 3, 1964 for Parcels A or B: and, if there was, the non-conforming use was abandoned by the then owners of the parcels. The Court believes that plaintiffs have the burden to prove that they are adjacent or neighboring property owners that will be specially damaged by defendant in violation of the Clark County Zoning Code. Without citing specific historical authority, it appears that the Courts place the burden on plaintiffs, under similar cases pursuant to Rev Code Chapter 519, to prove their claim by clear and convincing evidence. Ghindia v. Buckeye Land Development, 2007 Ohio 779 (CA 11, 2007) and Benton Township v. Rocky Ridge Dev. Co., 2020 Ohio 4162 (CA 11, 2020). Since plaintiffs do not deny this high burden the Court will apply it. The parties also agree that the burden is upon the defendants to prove by a preponderance of the evidence, that it has a non-conforming use upon the subject property and plaintiffs have the burden to prove, by a preponderance of the evidence, that defendant, or its predecessors, voluntarily abandoned the non-conforming use. (Aluminum Smelting & Refining Co. v. Denmark Township Zoning Board, 2002 Ohio 6690.

Issue Preclusion and Collateral Estoppel

Defendant asserts that plaintiffs are precluded from making their statutory claim because the issues presented herein (prior non-conforming use) have been previously litigated and determined in the federal case entitled Enon Sand and Gravel LLC v. Clark County Board of County Comm., et. al., Case No. 3:17-CV-00324 USDC SD Ohio WD). In this Court's October 23, 2019 Decision Overruling Defendant's Motion for Summary Judgment, the Court found that there were issues of material fact on this issue. After the hearing on the merits the Court finds that no new evidence was presented on this issue and finds plaintiffs are not precluded by issue preclusion or collateral estoppel from pursuing their claim.

Collateral estoppel is a legal concept that is intended to preclude re-litigation of an issue that has been previously decided. "Under collateral estoppel, once a Court decides an issue of fact and law necessary to its judgment, that decision precludes re-litigation of the same issue on a different cause of action between the same parties." (Kremer v. Chemical Const. Corp. (1982), 456 U.S. 461, 466-467). See also Parklane Hosiery v. Shore (1979), 439 U.S. 322, 327). The purpose of collateral estoppel is to protect litigants (or parties in

privity) from the onerous task of re-litigating an identical issue and to promote judicial economy. (Norris v. Grosvenor Marketing Ltd., 803 F.2d 1281, 1286 (2nd Cir. 1986). The Restatement (Second) of Judgments, 827 (1982) provides that "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action."

The Courts in Robinette v. Jones, 476 F.2d 585, 589 (CA 8th 2007) and Syverson v. IBM, 472 F.3d 1078 (CA 9th 2007) appropriately set forth the standards to be applied in resolving the doctrine of collateral estoppel: (1) the party sought to be precluded in the second quest must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment.

The Ohio Supreme Court, in Norwood v. McDonald (1943), 142 Ohio St. 299, held, in it's syllabus, "[C]ollateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a Court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action … the essential test in determining whether the doctrine of collateral estoppel is to be applied is whether the party against whom the prior judgment—is being asserted had full representation and a full and fair opportunity to litigate that issue in the first action." State ex rel Bradford v. Ohio Dept. of Rehab. and Correction, 2017 Ohio 7300, at ¶10 (CA 10th, 2017), see also State of Ohio v. CA [Defendant], 2015 Ohio 3437 at ¶18 (CA 10th 2015), Hopp v. Gallagher NO. 1:18CV507 USDCND Feb. 20, 2019 and Bay Mechanical v. 2D Construction, 2019 Ohio 1170 (CA 9th 2019).

The evidence in this case shows that after the county issued its decision on May 1, 2017 (Ex 49), advising defendant it needed a conditional use permit to conduct surface mining, defendant filed suit in federal court against the county seeking a declaration that the property in question was subject to a non-conforming use. The defendants in the lawsuit were the Clark county board of County Commissioners and Thomas A. Hale,

Clark County Zoning Administrator. No property owner was a party to the suit and when a property owner sought to join in the suit the Court upon motion of the defendant, precluded him from doing so. The case was eventually concluded by way of a judgment entry adopting a settlement agreement entered into by the plaintiff (defendant herein) and the Board of Commissioners. In essence, the settlement agreement provided that surface mining on the property that is the subject of this action is a legal non-conforming use and will be permitted on property delineated therein. The settlement agreement also provides that if a citizen action precluded implementation of the settlement, the agreement would be null and void. (Settlement Agreement paragraph 5 – Ex III).

While defendant agrees that no plaintiff was a party to the federal case, the plaintiffs herein had a sufficient mutuality of interest to be precluded from bringing this case. (citing Johnson's Island Inc. v. Bd. of Township Trustees (1982), 69 Ohio St.2d 241). In Johnson's Island the issue of a non-conforming use was actually litigated with a finding rendered. In the federal case at bar, there was no litigation of the issue nor was there an independent finding by the Court. An agreement by the parties was reached in settlement of the case and such settlement was adopted by the Court. With respect to mutuality of interest, the Supreme Court in O'Nesti v. DeBartolo (2007) 113 Ohio St.3d 59 held at ¶ 9:

> For claim preclusion to apply, the parties to the subsequent suit must either be the same or in privity with the parties to the original suit. *Johnson's Island*, 69 Ohio St.2d at 244, 23 O.O.3d 243, 431 N.E.2d 672. Privity was formerly found to exist only when a person succeeded to the interest of a party or had the right to control the proceedings or make a defense in the original proceeding. *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 114, 49 O.).2d 435, 254 N.E.2d 10, overruled in part on other grounds, *Grava*, 73 Ohio St.3d 379, 653 N.E.2d 226. An interest in the result of and active participation in the original lawsuit may also establish privity. *Id.* Individuals who raise identical legal claims and seek identical rather than individually tailored results may be in privity. *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248, 730 N.E.2d 958. This Court has since stated that privity is a somewhat amorphous concept in the context of claim preclusion. *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, ¶8, citing *Brown*, 89 Ohio St.3d at 248, 730 N.E.2d 958. A "mutuality of interest, including an identity of desired result," might also support a finding of privity. *Brown* at 248, 730 N.E.2d 956. Mutuality, however, exists only if "the person taking advantage of the judgment would have been bound by it had the result been the opposite. Conversely, a stranger to the prior judgment, being not bound thereby, is not entitled to rely upon its effect under the claim of *res judicata* or collateral estoppels." (Johnson's Island, 69 Ohio St.2d at 244, 23 O.O.3d 243, 431 N.E.2d 672.)

[See also, Hearland Federal Credit v. Horton, 2013-Ohio-2931 (CA 2d 2013) and Anthony Damen v. Palmer Admin. Services, 770 Fed. Appx. 746 (CA 6th 2019) citing O'Nesti, supra].

While the plaintiffs in this case had an interest in the federal case, their interest was not the same as the Board's or Defendant's. Property owners' rights are delineated in Rev. Code 303.24 and those rights are not public rights, they are private in nature and the rights sought thereunder "do justice primarily to the parties rather than the general public." (Mich v. Level Propane Gasses, 168 F.Supp.2d 804, 811 applying Rev. Code 713.13-see also Camp Washington Community Board v. Rece, 104 Ohio App. 3d 750 (CA 1st 1995).

Testimony of Daniel Demmy

Defendant sought to introduce, at trial, the former deposition testimony of Daniel Demmy which was taken by the parties in the federal case. The Court precluded the introduction of the testimony by way of a motion in limine and a written decision entitled "Decision Excluding the 'Former Testimony' of Daniel Demmy." As previously stated by the Court, the exception to the hearsay rule set forth in Evid. R. 804(B) provides that Mr. Demmy's former deposition would be admissible "if the party against whom the testimony is now offered [plaintiffs] or … a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Defendant's direct the Court, to para. 36 of Cline v. Rogers Farm Enterprise LLC, 2017-Ohio-1379 for a definition of "predecessor-in-interest" stating it's a "shared interest in the material facts and outcome of the case." (Defendant post hearing brief at p.17). The Court does not see this quote from Cline in the decision; however, Cline is a case involving successor property owners of real estate and has nothing to do with Evid. R. 804(B).

Whether one defines "predecessors in interest" as persons in privity or who has a mutuality of interest the Court believes the mutuality of interest is to be defined as previously set forth in this Court's quote from O'Nesti v. DeBartolo, supra at para 9. Finding that the plaintiffs are not "predecessors in interest", the previous deposition will not be admitted in evidence. (See Burkhart v. H.J. Heinz Co. (2014), 140 Ohio St.3d 42 at para 27: "it's not enough that a prior litigant [Clark County Board] had an opportunity and similar motive to develop the testimony. There must be some legally recognized interest shared by the parties to assuage the historical concern that it is generally unfair to impose upon the party against who the hearsay evidence is offered responsibility for the manner with which the witness was handled by another party.")

Plaintiff's Standing (Special Damage)

Plaintiffs have the burden to prove not only that they are adjacent or neighboring owners of the subject property but also that they will be specially damaged if defendants are permitted to do surface mining on the property. Defendant does not dispute that Michael and Jolyn Verbillion, Beth E. Zainey, Carol Culberson and Charles D. Swaney are adjacent or neighboring property owners. (See Wilkins v. Village of Harveysburg, 2015-Ohio-5472 (CA 10th 2015).) Defendant disputes that the surface mining will specially damage them or their property.

Specially damaged, for the purposes of Rev. Code 3030.24, is not defined. However, the Courts (and parties) agree that it is not damage that is shared with the public in general—i.e., like general increase in traffic.(Conkle v. S. Ohio Med. Center, 2005-Ohio-3965 (CA 4th, 2005); Cleveland Elec. Illum. Co. v. Village of Mayfield, 53 Ohio App.2d 37 (CA 8th, 1977) and Kroger v. Standard Oil Co., unreported, No. C.A. 88-11-086, 89 L.W. 2539 (CA 12th, 1988). While general community concerns about surface mining are not sufficient to establish special damage, dimunition of value is sufficient to establish special damage. (Cleveland Electric supra, Kroger supra, and Helms v. Koncelek, 2008 Ohio 5073 (CA 10th, 2008) and Amergh v. Baycliff's Corp., 127 Ohio App.3d 254 (CA 6th, 1998).

This Court has previously held that property owners have a right to render their own opinions as to the value of their property and the loss of value to their property by the proposed mining operation. (See Smith v. Padgett (1987), 32 Ohio St.3d 344 and Conkle v. Southern Ohio Medical Center, 2005-Ohio-3965, para 16, (CA 4th, 2005)). However, the Court has determined that a statement that their property will generally be diminished will not be sufficient to establish special damage. Jolyn Verbillion testified her property may be valued at $500,000 before mining and $150,000 after mining, is given little credence. Beth Zainey testified her property is valued at $750,000 but gave no opinion of the after-mining value. Carol Culbertson testified that the value of her property now is $230,000 and maybe $150,000 after mining. All property owners testified that their property would be damaged by the increased traffic, noise and dust. The Court does find that none of the property owners' opinion testimony regarding diminished value was specific enough, or based upon credible evidence, to establish by itself special damage by way of diminished value. The Court finds the testimony of

Jeff Harvey, regarding a general diminution of value of plaintiffs' properties very credible. However, without an opinion of the loss of value of each property because of noise, traffic and dust, the Court does not believe the testimony is sufficient alone to establish special damages.

With regard to truck traffic and noise, clearly property owners whose property borders on Fairfield Pike, where 100 trucks per day will travel (testimony of Dennis Garrison), will be damaged in a manner not experienced by the general community who do not live on that road. In addition, the Court can take judicial notice that if blasting occurs on property adjacent to yours you will be specially damaged by way of a diminished value. (See Evid. R. 201(B) and testimony of Jeff Harvey and James Matthews regarding the blasting).

The most significant testimony regarding special damages comes from hydrologist, Brent Huntsman who testified that in his opinion all of plaintiffs' wells will be adversely affected by defendant's surface mining. The Court has reviewed Mr. Huntman's impeccable credentials (Ex 5), his testimony and reports (including Exhibits 6-19), and has determined by clear and convincing evidence that all of plaintiffs' wells will be significantly impacted if the proposed surface mining takes place. The most impacted will be the Verbillion well (Ex 15) which could go dry even if a new well is drilled. In addition, the Zainey, Culberson, and Swaney properties will be significantly dewatered. The Court finds all plaintiffs have proved by clear and convincing evidence that they will be specially damaged if surface mining takes place on the subject property.

Non-Conforming Use

The subject property is zoned agricultural and surface mining on any of the subject properties would constitute a non-conforming use (Testimony of Alan Neimayer – Ex 49) unless such mining was in existence on November 3, 1964 when the Clark County Zoning Regulations took effect. "The right to continue to use one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established is within the protection of Sec. I, Art. XIV Amendments, United States Constituion, and Section 16, Art. 1 of the Ohio Constitution, providing that no person shall be deprived of life, liberty, or property without due process of law." (City of Akron v. Chapman (1953), 160 Ohio St. 382 and State ex. Rel. Sunset Estate Prop. V. The Village of Lodi (2015), 142 Ohio St.3d 351). However, this right

to a non-conforming use exists only if the use existed at the time of the enactment of the zoning ordinance (Booghier v. Wolfe, 67 Ohio App.3d 467 (CA 2nd, 1990). A non-conforming use is "disfavored" (Aluminum Smelting & Refining Co. v. Denmark Township Zoning Board, 2002-Ohio-6690 (CA 11, 2002) and can be extinguished if the owner voluntarily abandons it and/or it is "voluntarily discontinued for two years or more." (Rev. Code 3030.19). The burden is on the defendant to prove it has a non-conforming use and the burden is on plaintiffs to show the non-conforming use was abandoned. Abandonment must be voluntary. "Abandonment requires affirmative proof of the intent to abandon coupled with acts or omissions implementing intent. "Non-use alone is insufficient to establish abandonment" (Sunset Estate, supra at para 15). The property owner must have intended to abandon or discontinue the non-conforming use (Aluminum Smelting, supra at para 15).

Plaintiffs agree with defendant that there was surface mining on parcels 001, 003, 007, 009 and 010 (Parcel A) prior to 1964. Except as provided with respect to the northern 25.86 acres, they do not agree that there was mining on Demmy II (Parcel B). Plaintiffs and defendants submitted extensive exhibits (charts and photos) and eye witness testimony regarding the land use from the period of 1964—present. Allen Neimayer testified there is no evidence in the Clark County records that there was mining on Parcel A in 1964. Ronald Parks and Wilma Goodbar testified that they lived adjacent to Parcel A and there was no mining on the property in 1964. Richard Pennington, a reclamation inspector for the Ohio Department of Natural Resources testified that he reviewed all of the records of the department and found no surface mining activity up until 1997 where some trees were removed and the start of mining on 003 and 010 parcels. Defendants claim that there is evidence of a 1964 non-conforming use on all of Parcel A and the northernmost 25.86 acres of Parcel B. To support this argument it has submitted the deposition testimony of the late Daniel Demmy which this Court has excluded. In addition, defendant submitted aerial photographs and topographical maps to show there was some surface mining on the property prior to 1964 (Exs G, G-1, N, N-1, O, O-1, H, H-1, P, P-1, K, K-1, Q, Q-1, R, R-1). The submitted photographs and maps show that there was some surface mining on the subject property prior to 1964 but the evidence does not show there was mining taking place on November 3, 1964 or any other time in 1964.

Plaintiffs have stipulated that there "may have been mining" on the northern 26.86 acres of Parcel B (See Plaintiff's brief at p.21) in November, 1964. Charles Swaney testified that he believed there was mining on the 26.86 acre portion of Parcel B but that mining did not exist after 1970.

The Court finds that the evidence does not support a finding of surface mining taking place on any subject property (Parcels A and B and newly acquired parcel) on November 3, 1964 except the northern 26.86 acre parcel on Parcel B).[2]

Abandonment and Property Held in Reserve

Assuming there was surface mining on the northern 26.86 acres of Parcel B on November 3, 1964 such surface mining was abandoned by the previous owners and/or the uses were "voluntarily discontinued" for two years or more..." (Rev. Code 303.19).[3]

Charles Swaney and Richard Pennington both testified that no mining of the 25.86 acres took place after the 1970's. The owners of the property after 1977 had mining permits (No. 375) which all noted (up to 1997) "Abandoned Quarry" (Ex. 28 (a)-(w)). Mining maps in 1998 (Ex. 42(i) & (j)) show some mining activity at that time, long after previous mining had been abandoned. It should be noted that "Courts have upheld both the denial of the right to resume a non conforming use for a period of non-use." (State ex rel. Sunset Estate Prop. v. Village of Lodi (2015) 142 Ohio St.3d 351). As previously noted, abandonment requires a finding of subjective intent coupled with objective implementation of that intent. (Sunset, supra). The unrebutted evidence of the property owners' intent can be found in the notations of abandonment on the mining permits coupled with the many years of no mining activity.

Defendants seek to couple properties of non mining activity with the parcels that evidence mining or the theory of being held in reserve pursuant to the doctrine of diminished assets. Citing the case of Torok v. Rubber City Sand & Gravel Co., 9th Dist. Summit No. 9136 (CA 9th, 1979). Defendant asserts that since there was surface mining on the northern 26.86 acres of Parcel B, all other parcels in Parcel A & B should be included in the lawful non-conforming use. This Court has held that any non-conforming use in existence in 1964 had been

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[2] There was evidence of trees being removed from two parcels, possibly in preparation for mining but the tree removal took place well after 1964.

[3] If other mining were found to have taken place in 1964 (Demmy deposition) the Court should find that abandonment on these properties also took place.

abandoned by the then property owners. However, the Court will address this argument. The Ohio Supreme Court in Davis v. Miller (1955), 163 Ohio St. 91, held in its syllabus:

> "Where it is found that land owned by a person and bisected by a public highway comprises two separate and distinct parcels, one of which was used for the quarrying and crushing of stone before the enactment of a county zoning resolution prohibiting such activity, a determination that the other parcel, after the enactment of such zoning resolution, may not be devoted to such prohibited use is justified and proper."

In Smith v. Juilleral et al. (1954) 161 Ohio St. 424, the Supreme Court held in a strip mining case:

> "Where no substantial nonconforming use is made of property, even though such use is contemplated and money is expended in preliminary work to that end, a property owner acquires no vested right to such use and is deprived of none by the operation of valid zoning ordinance denying the right to proceed with his intended use of the property." (See also Booghier v. Wolfe, 67 Ohio App.3d 467, (CA 2d, 1990)).

The Court agrees with defendant's proposition that when someone purchases and develops a part of the land with the intent to expand its operations on other portions of the same parcel the nonconforming use should apply to all portions of the purchased property. (City of Columbus v. Union Cemetary Assoc. (1976), 45 Ohio St.2d 47, Cincinnati Inc. v. Hamilton County Board of Zoning Board, Appeal No. C.070477, June 11, 2008, (CA 1st, 2008) and Union Limestone Inc. v. Bumgarner, 110 Ohio App. 173 (CA 3, 1959). Parcels A &B have always been separate until 2015 when defendant purchased them. Defendant's intent when it purchased the land is not relevant to the issue of the intent and use of the owners prior to 1964 when the zoning ordinances took effect. The Court has before it no evidence of the intent of the owners when Parcels A & B were originally purchased. With respect to Parcel A there was no evidence of mining on the property in 1964. With respect to Parcel B there is evidence that mining was taking place on 25.86 acres of a 114 acres tract but no evidence that the owners in 1964 had an intent to have the remaining acres held in reserve for future mining. Regardless, the Court has determined that any mining use of Parcels A and/or Parcel B in existence in 1964 was abandoned by the owners.

Conclusion

The Court finds that all plaintiffs are adjacent or neighboring owners of Parcels A & B and will be specially damaged if surface mining in violation of the Clark County Zoning ordinances takes place. The Court further finds that defendant's proposed surface mining violates Clark County Zoning Ordinances. The Court

further finds that but for the 26.86 acre property in Parcel B, no surface mining took place on the subject property on November 3, 1964. Any surface mining taking place on that date was abandoned by the then owners of the property.

The Court will hereby issue an injunction enjoining surface mining on the subject property. Counsel shall prepare an entry reflecting this decision by December 31, 2020.

12/8/20
DATE

VISITING JUDGE DALE A. CRAWFORD

Copies to:
PAUL KAVANAUGH, ESQ.
MATTHEW HARPER, ESQ.