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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0443

AIM Development (USA), LLC,
Appellant,

vs.

City of Sartell,
Respondent.

Filed December 7, 2020
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Stearns County District Court
File No. 73-CV-16-8962

Brian S. McCool, Joseph J. Cassioppi, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for appellant)

John M. Baker, Katherine M. Swenson, Aaron P. Knoll, Greene Espel PLLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

This declaratory-judgment action regarding the scope of nonconforming-use rights is before us for the second time. Following the supreme court's reversal of our earlier decision affirming the district court's grant of summary judgment to respondent-city based

on an expansion theory, we consider the city's argument that the judgment can still be affirmed because, applying the correct legal standard, the undisputed evidence shows that appellant-landowner discontinued its legal nonconforming use for more than one year. We also consider appellant-landowner's arguments regarding volume and area limitations in the district court's order. We agree with the district court that there are genuine issues of material fact about whether the use was discontinued, and we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

The facts underlying this appeal are thoroughly set forth both in the supreme court's opinion and in this court's previous opinion. *See AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330 (Minn. 2020) (*AIM II*); *AIM Dev. (USA), LLC v. City of Sartell*, 925 N.W.2d 255 (Minn. App. 2019) (*AIM I*), *rev'd*, 946 N.W.2d 330 (Minn. 2020). We provide a summary below.

Beginning in 1984, AIM's predecessor in title operated a storage and disposal facility for nonhazardous, nontoxic industrial waste (the landfill), which was a permitted use at that time. *AIM II*, 946 N.W.2d at 333. In 1989, the city of Sartell rezoned the property and the landfill continued operating as a legal nonconforming use from 1989 to 2012, collecting waste generated exclusively as part of the operation of an adjacent paper mill. *Id*. AIM bought the paper mill and landfill properties in 2013, after a fire damaged the paper mill, ceasing operations. *Id*. In 2014, AIM sought authorization from the Minnesota Pollution Control Agency (the MPCA) to accept a wider variety of industrial waste in the landfill, without limitation as to the source or nature of the waste. *Id*. at 334.

Sartell opposed the application, arguing that the request would alter the nature and source of waste and be an unauthorized expansion of the legal nonconforming use.

AIM filed a declaratory-judgment action against Sartell seeking a declaration that its proposed use of the landfill was within its legal nonconforming-use rights. *Id*. The parties cross-moved for summary judgment about: (1) the sources of waste; (2) the types of waste; (3) the volume of waste accepted each year; (4) the area of land used for waste disposal; and (5) whether the nonconforming use has been discontinued. *Id*. The district court denied cross-motions for summary judgment on the discontinuation issue, determining that there were genuine issues of material fact as to whether AIM discontinued the legal nonconforming use, and if so, whether AIM's failure to continue the use constituted abandonment. *Id*. at 334 n.5. But the district court granted summary judgment in Sartell's favor "on the issues of the source, type, and volume of waste." *Id*. at 334. The district court determined that the landfill was limited to waste generated by the paper mill and that disposal of any other waste was an unlawful expansion of the use. *Id*. The parties stipulated to the entry of final judgment against AIM and in favor of Sartell, and the district court entered judgment.

The parties cross-appealed the district court's judgment, raising many of the same arguments they made to the district court. We concluded that allowing waste from non-paper-mill sources would impermissibly expand the legal nonconforming use, and affirmed the district court's grant of summary judgment to Sartell on that basis. *AIM I*, 925 N.W.2d at 261-62. Because this conclusion resolved the appeal, we did not reach Sartell's argument that summary judgment could be affirmed on the alternative ground that the legal

nonconforming use had been discontinued. *Id*. at 262 n.6. Nor did we reach AIM's arguments about the annual volume and size limitation of the landfill. On remand following the supreme court's determination that AIM's proposal to accept waste from other generators of nonhazardous, nontoxic industrial waste was "a non-expansionary continuation of its nonconforming use," *AIM II*, 946 N.W.2d at 340, we now turn to these remaining issues.

D E C I S I O N

Summary judgment is proper if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. "A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party." *Leeco, Inc. v. Cornerstone Bank*, 898 N.W.2d 653, 657 (Minn. App. 2017), *review denied* (Minn. Sept. 27, 2017). We review a grant of summary judgment de novo, viewing "the evidence in the light most favorable to the nonmoving party and resolv[ing] all doubts and factual inferences against the moving part[y]." *Maethner v. Someplace Safe, Inc*., 929 N.W.2d 868, 874 (Minn. 2019) (quotation omitted). We also review questions of statutory interpretation de novo. *Cilek v. Office of Minn. Sec'y of State*, 941 N.W.2d 411, 415 (Minn. 2020).

I. The district court appropriately determined that there are genuine issues of material fact about whether AIM discontinued the prior nonconforming use of the property, but the court erred by considering the issues of abandonment and intent.

Sartell argues that, although AIM's proposed use of the landfill is a continuation of the legal nonconforming use, *AIM II*, 946 N.W.2d at 338, Sartell is still entitled to summary

judgment because the district court applied the wrong legal standard, and the legal nonconforming use was discontinued for more than one year. AIM counters that it has continuously used the landfill since purchasing the property in 2013, or in the alternative, that there are genuine issues of material fact on this issue. We address each argument in turn.

a. The district court erred in including an abandonment requirement in the determination of whether a nonconforming use has been discontinued.

Sartell challenges the district court's determination that if AIM discontinued its use, AIM could show that it did not abandon the use because it intended to continue the use, or that its failure to continue the use was beyond AIM's control. We agree that this determination is erroneous.

The district court found that since AIM complied with MPCA landfill regulations and made statements that claim its intent to continue the nonconforming use, "a question of fact exists as to whether AIM abandoned the nonconforming use." The district court explained:

> If the nonconforming use has not been discontinued, AIM may continue the nonconforming use of the landfill in a manner consistent with the rest of this Order. If the jury determines that the nonconforming use has been discontinued, AIM must prove that they either intended to continue the nonconforming use or were unable to continue the use because of circumstances outside their control.

Under Minn. Stat. § 462.357, subd. 1e(a)(1) (2018), an existing nonconformity may continue unless "the nonconformity or occupancy is discontinued for a period of more than one year." After that time, any subsequent use of the property "shall be a conforming use

or occupancy." *Id.*, subd. 1e(b) (2018). Sartell's zoning ordinance also addresses the termination of nonconforming uses through discontinued use:

> Discontinued Use: If any such nonconforming use of land ceases for any reason for a period of more than ninety (90) days, any subsequent use of such land shall conform to the regulation specified by this [zoning ordinance governing nonconforming uses] for the district in which such land is located.

Sartell, Minn., City Code § 10-13-5(C). The interpretation of a statute or ordinance presents a question of law, which we review de novo. *Eagle Lake of Becker Cnty. Lake Ass'n v. Becker Cnty. Bd. of Comm'rs*, 738 N.W.2d 788, 792 (Minn. App. 2007).

The case of *County of Isanti v. Peterson* instructs our analysis. 469 N.W.2d 467 (Minn. App. 1991), *overruled on other grounds by Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54 (Minn. 1993). In that case, the appellants stored houses on parcels of land in Isanti County, which was not a permitted use of the land under the county's zoning ordinance. *Id.* at 468. The parties disputed whether appellants continuously used the land to store houses. *Id.* The appellants argued, among other things, "that a nonconforming use may be terminated by abandonment,[1] but not by mere discontinuance." *Id.* at 469. We rejected this argument based in part on the state statute and the county ordinance. *Id.* at 469-70. The county's zoning ordinance clearly stated that if "a non-conforming use of any building or premises is discontinued or its normal operation stopped for a period of one (1) year, the use of the same shall thereafter conform to the regulation of the district in

[1] "Abandonment ordinarily entails two factors: (1) intent to abandon, and (2) an overt act or failure to act indicating the owner no longer claims a right to the nonconforming use." *Peterson*, 469 N.W.2d at 470.

which it is located." *Id.* at 469 (citation omitted). We recognized that "[m]unicipal ordinances are drafted in terms of 'discontinuance,' rather than 'abandonment,' to avoid the necessity of proving intent to abandon a nonconforming use." *Id.* We reviewed caselaw from other states and noted that "[t]he courts of most states interpret 'discontinuance' to mean 'abandonment.'" *Id.* at 469-70. Even so, we were more persuaded by a "growing minority of state courts" which "appl[ied] discontinuance provisions according to their plain meaning." *Id.* at 470 (quotation omitted). Based on the plain language of the state statute and the county zoning ordinance, we determined that "[t]his court cannot amend these unambiguous provisions [of the state statute or the county ordinance] by placing upon counties the burden of having to prove that a landowner intended to abandon a discontinued nonconforming use." *Id.*

Moreover, "the question of an existing business or other use at the time zoning restrictions become effective must be considered in the light of the principle that the law is concerned, not with a mere plan or intention, but with overt acts or failure to act." *Hawkinson v. County of Itasca*, 231 N.W.2d 279, 283 (Minn. 1975) (quotation omitted). Thus, "mere intentions or plans at the time a zoning ordinance becomes effective to use particular land or dwellings for a certain use does not entitle one to that use in contravention of the ordinance." *Id.* (quotation omitted).

Here, both Minnesota statute and Sartell's city ordinance are drafted in terms of discontinued use rather than abandonment. *See* Minn. Stat. § 462.357, subd. 1e(a)(1) (providing that an existing nonconformity may continue unless it is "discontinued for a period of more than one year"); Sartell, Minn., City Code § 10-13-5(C) (articulating

standard for “[d]iscontinued [u]se”). Neither the state statute, nor Sartell’s city ordinance, requires the parties to show that the nonconformity has been abandoned. *See Peterson*, 469 N.W.2d at 470 (“[O]ur case law does not require proof of abandonment.”).

As *Peterson* recognizes, it is not for this court to amend the state statute or Sartell’s zoning ordinance to compel Sartell to demonstrate that AIM intended to stop using the landfill. 469 N.W.2d at 470. If the legislature and Sartell’s city council intended to require a showing of abandonment, and not mere discontinued use, they could have said so. They did not. And we cannot add words to a statute or ordinance that the legislative body omitted. *Cilek*, 941 N.W.2d at 415. The district court’s conflation of a discontinued use and an abandoned use differs from the plain language of the statute and the ordinance, and is thus erroneous. We therefore reverse this portion of the district court’s order.

b. We agree with the district court that fact issues remain about whether the prior nonconforming use was discontinued.

Having determined the correct legal standard for assessing whether the legal nonconforming use was discontinued, we now address whether the district court properly determined that there are genuine issues of material fact on this dispute. Sartell argues that it is entitled to summary judgment as a matter of law because the record demonstrates that AIM discontinued using the property for more than one year. AIM argues that, although it has not deposited waste in the landfill since its purchase in 2013, it has nevertheless “used” the landfill by monitoring and maintaining it. The district court determined that a fact issue remained over whether AIM discontinued its use of the landfill, and both parties appealed this determination.

Use and discontinuation are generally questions of fact. *See Peterson*, 469 N.W.2d at 468, 471 (affirming district court's determination that landowner's nonconforming use of property was discontinued based on witness testimony and presentation of evidence at trial). But we recognize that the supreme court in *AIM II* noted that "[t]he plain language of the statute reveals that [the] Legislature defined the term 'continued' to include certain activities, such as 'repair, replacement, restoration, maintenance, or improvement,' so long as those activities were non-expansionary." 946 N.W.2d at 337 (citing Minn. Stat. § 462.357, subd. 1e(a)).

On this record, we cannot hold as a matter of law that AIM's maintenance-related activities constitute a continuation of its previous use. Summary judgment "is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Osborne v. Twin Town Bowl, Inc*., 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted). We conclude that reasonable fact-finders could disagree whether AIM's activities constituted a continuation of its use of the landfill. Because genuine issues of material fact preclude summary judgment on this issue, we affirm this portion of the district court's order.

II. We remand for further development of the record about the volume of the waste, and we do not reach AIM's area-limitation argument.

The district court's order briefly addressed the volume and area limitations of the landfill. The district court limited AIM to depositing approximately 5,000 cubic yards of waste in the landfill per year. The district court also stated that AIM could use 27 of its 70 acres of land for landfilling activities. In its supplemental brief, AIM (1) argues that the

district court erred by limiting the volume of waste AIM could deposit in the landfill, and (2) asks this court to affirm the district court's determination that AIM can use 27 acres of land for its landfilling activities.

As for the annual volume limit, AIM contends that the district court's decision to limit the amount of waste to 5,000 cubic yards per year was erroneous. There is insufficient evidence in the record for us to review this determination, which was not thoroughly litigated below. We therefore remand this issue for reevaluation given the supreme court's opinion in *AIM II*. *See, e.g.*, *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 619 (Minn. 2012) (remanding for "further development of the record in the district court" rather than answer question based on incomplete record).

As for the area limitation, Sartell moved for summary judgment seeking to limit the physical area in which permitted waste could be disposed. The district court denied Sartell's summary-judgment motion and determined that the area constituting the permitted nonconforming use was the 27 acres contained within the 70-acre property. AIM urges us to affirm the district court's order denying summary judgment on this issue, but it has not presented any argument explaining why its request for a ruling on this issue is procedurally proper. *See, e.g.*, *Advanced Delivery Sys., Inc. v. Jaime*, 774 N.W.2d 176, 177 (Minn. App. 2009) (noting that we do not ordinarily consider a decision denying summary judgment). The issue has not been adequately briefed or presented. As a result, we do not consider it.

Affirmed in part, reversed in part, and remanded.