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Court of Appeals of Minnesota.

COUNTY OF ISANTI, Respondent,
v.
Keith Allen KIEFER, Appellant.

A17-0326
|
Filed August 14, 2017
|
Review Denied October 25, 2017

Isanti County District Court, File No. 30-CV-11-589

Attorneys and Law Firms

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Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Florey, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant-landowner challenges the district court's order on remand, arguing that the court erred by concluding that certain items stored on appellant's property were not preexisting nonconformities and that respondent-county did not commit an unconstitutional taking. Appellant also argues that the district court abused its discretion by denying his request to reopen the record on remand. We affirm.

FACTS

The facts and procedural history of this case are set forth in detail in our previous opinion, *Cty. of Isanti v. Kiefer*, No. A15-1912, 2016 WL 4068197 (Minn. App. Aug. 1, 2016). The following facts pertain to the issues addressed by the district court on remand.

Appellant Keith Allen Kiefer has occupied approximately 53 acres of property in Isanti County since 1992 and has owned this property since at least 1996. The property is currently zoned for agriculture/residential use, but, prior to 1996, it was solely zoned for agriculture use. Since 1992, Kiefer has used one acre of the property to store a regenerator and licensed and unlicensed vehicles. In 2007, the City of Ramsey transferred additional vehicles and miscellaneous items from another property owned by Kiefer onto Kiefer's property in Isanti County.

In 2011, respondent County of Isanti initiated a civil-abatement action alleging Kiefer's violation of the county's solid-waste and zoning ordinances. In response, Kiefer filed counterclaims against the county, alleging, in part, that the county's solid-waste and zoning ordinances, as applied in this context, resulted in an unconstitutional taking of his property. Following a court trial, the district court concluded that the presence of the items, with the exception of several licensed vehicles, a wooden box, a mobile home, and a semitrailer, violated the county's solid-waste ordinance. The district court also concluded that the presence of the items, excluding the above-noted exceptions, violated the county's zoning ordinance because the outdoor storage of such items did not fall within the uses that were currently permitted under the zoning ordinance. Lastly, the district court concluded that the county's enforcement of its ordinances did not result in an unconstitutional taking.

Kiefer appealed, and this court affirmed in part, reversed in part, and remanded to the district court. *Kiefer*, 2016 WL 4068197, at *6. Specifically, this court reversed the district court's conclusion that Kiefer's outdoor storage violated the county's solid-waste ordinance. *Id.* at *4. Although this court affirmed the district court's conclusion that Kiefer's outdoor storage is not currently permitted under the county's zoning ordinance, it remanded for the district court to determine whether such storage is a permissible preexisting nonconforming use. *Id.* at *5. Finally, this court reversed

the district court's ruling on Kiefer's takings claim and remanded the claim for reconsideration. *Id.* at *6.

On remand, the district court concluded that three items – a wooden box, an unlicensed vehicle, and a regenerator – on Kiefer's property were permissible preexisting nonconformities under the county's zoning ordinance. The district court further concluded that the miscellaneous items and a different unlicensed vehicle, all of which arrived at Kiefer's property in 2007, were not permissible preexisting nonconformities under the county's zoning ordinance. Finally, the district court again concluded that Kiefer's property had not been subject to an unconstitutional taking.

Kiefer appeals.

DECISION

I. The district court did not err by concluding that certain items stored on Kiefer's property were not preexisting nonconformities.

Three general rules of construction guide a court's interpretation of an ordinance: (1) "courts generally strive to construe a term according to its plain and ordinary meaning"; (2) "zoning ordinances should be construed strictly against the [county] and in favor of the property owner"; and (3) "[a] zoning ordinance must always be considered in light of its underlying policy." *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608-09 (Minn. 1980). "The interpretation and application of a[n] . . . ordinance is a question of

law, which we review de novo." *Cannon v. Minneapolis Police Dep't*, 783 N.W.2d 182, 192 (Minn. App. 2010) (quotation omitted).

It has already been determined that Kiefer's outdoor storage is not a use that is currently permitted under the county's zoning ordinance. *Kiefer*, 2016 WL 4068197, at *6. Nevertheless, the county's zoning ordinance states, "All legally established nonconformities as of the date of this Ordinance may continue, but they will be managed according to applicable state statutes and other regulations of this community for the subjects of alterations and additions, repair after damage, discontinuance of use, and intensification of use." Isanti County, Minn., Zoning Ordinance § 22, subd. 1 (Dec. 29, 2014). Kiefer argues that his outdoor storage on one acre of the property is permissible under the county's zoning ordinance and the district court erred by concluding that the 2007 addition of miscellaneous items and an unlicensed vehicle constituted an unlawful expansion of his preexisting nonconforming use.

As noted in Kiefer's initial appeal, the Minnesota Supreme Court has stated:

> It is a fundamental principle of the law of real property that uses lawfully existing at the time of an adverse zoning change may continue to exist until they are removed or otherwise discontinued. [A] residential zoning ordinance may constitutionally prohibit the creation of uses which are nonconforming, but existing nonconforming uses must either be

> permitted to remain or be eliminated by use of eminent domain.

Hooper v. City of St. Paul, 353 N.W.2d 138, 140 (Minn. 1984) (internal citations and quotation omitted). Here, the zoning ordinance states that legally established nonconformities "will be managed according to applicable state statutes." Isanti County, Minn., Zoning Ordinance § 22, subd. 1. The applicable statute provides, "Except as otherwise provided by law, a nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an official control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion." Minn. Stat. § 394.36, subd. 4 (2016).

Kiefer claims that he has always used one acre of the property for outdoor storage, and, therefore, because his outdoor storage continues to only occupy one acre, his preexisting nonconforming use did not expand following the 2007 addition of miscellaneous items and an unlicensed vehicle. However, this argument is unconvincing in light of Minnesota's proscription against the expansion of preexisting nonconformities and appellate-court precedent. *See Freeborn Cty. v. Claussen*, 295 Minn. 96, 99, 203 N.W.2d 323, 325 (1972) (noting that zoning ordinance may prohibit the creation, expansion, or enlargement of nonconforming uses, "but existing nonconforming uses must either be permitted to remain or be eliminated by use of eminent domain").

It is undisputed that Kiefer's outdoor storage has grown to include a greater number of items than he was storing in 1996 when the property was rezoned. Accordingly, the miscellaneous items and unlicensed vehicle that arrived at the property in 2007 amount to an expansion of Kiefer's preexisting nonconforming use. Such an expansion is impermissible under the county's zoning ordinance and Minn. Stat. § 394.36, subd. 4. However, as the district court properly noted, the items predating the county's zoning ordinance continue to constitute preexisting nonconformities and must be permitted to remain absent the county's use of eminent domain. Accordingly, the district court did not err by concluding that certain items stored on Kiefer's property, which arrived at Kiefer's property in 2007, were not preexisting nonconformities and therefore violated the county's zoning ordinance.

II. The district court did not abuse its discretion by not reopening the record on remand.

"[D]istrict courts are given broad discretion to determine how to proceed on remand, as they may act in any way not inconsistent with the remand instructions provided." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). "Appellate courts review a district court's compliance with remand instructions under the deferential abuse of discretion standard." *Id.*

Kiefer argues that the district court's refusal to reopen the record to admit additional exhibits on remand constituted an abuse of discretion. Kiefer sought to

offer several documents on remand; however, the district court denied his request after determining that such additional exhibits were unnecessary in light of the issues to be resolved.

This court's remand instructions did not require the district court to reopen the record, nor did this court indicate that the record was inadequate for resolving the remanded issues. When reopening the record is mandatory, such a direction is explicitly given. *See, e.g.*, *State v. Licari*, 659 N.W.2d 243, 255 (Minn. 2003) (remanding with instructions to reopen the record). Our previous opinion gave no such instructions. As a result, the district court did not abuse its broad discretion by determining that, "[i]n this case, reopening the record is unnecessary because the original trial record contains sufficient evidence to resolve the remaining legal and factual issues."

III. The district court did not err by concluding that the county did not commit an unconstitutional taking.

The United States and Minnesota Constitutions provide that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *see* Minn. Const. art. I, § 13. A property owner has a cause of action for inverse condemnation when the government has effected a taking of private property without formally using its eminent-domain power. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 487 n.2 (Minn. 2004). "The property owner

challenging the government's action has the burden of proving an unconstitutional taking or damage to the property." *Stenger v. State*, 449 N.W.2d 483, 485 (Minn. App. 1989), *review denied* (Minn. Feb. 28, 1990). "Whether a governmental entity's action constitutes a taking is a question of law that [appellate courts] review de novo." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007).

"It is well established that the government need not directly appropriate or physically invade private property to effectuate a taking." *Id.* at 632. "In limited circumstances, government regulation of property may result in a taking." *Id.* "[A] taking may result when the government goes 'too far' in its regulation, so as to unfairly diminish the value of the individual's property, thus causing the individual to bear the burden rightly borne by the public." *Id.* (quotation omitted). Analysis of regulatory taking claims generally considers (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978); *see also Wensmann Realty*, 734 N.W.2d at 633-40 (considering the *Penn Central* factors).

Kiefer argues that the county's wrongful enforcement of its solid-waste and zoning ordinances resulted in a taking. Specifically, Kiefer maintains that, "[t]o avoid further *criminal* prosecution pending the outcome of the instant underlying matter, Kiefer rented

and used personal property storage elsewhere. Kiefer should have been able to store his personal property on his designated one-acre of outdoor storage, but did not at his expense of $2,496."

Under the first *Penn Central* factor, the inquiry "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Wensmann Realty*, 734 N.W.2d at 634 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540, 125 S. Ct. 2074, 2082 (2005)). Although Kiefer may have incurred expenses by storing certain items in another location, Kiefer remains able to store a number of items on the property. Moreover, there is no indication that enforcement of the zoning ordinance has reduced the property's value.

These same considerations also relate to the court's analysis under the second *Penn Central* factor. "In examining a property owner's investment-backed expectations, the existing and permitted uses of the property when the land was acquired generally constitute the 'primary expectation' of the landowner regarding the property." *Id.* at 637 (quoting *Penn Central*, 438 U.S. at 136, 98 S. Ct. at 2646). Kiefer argues that he purchased the property "to use it for agricultural purposes, a single family home, and outdoor storage." At trial, Kiefer testified that the property's primary use has been agricultural. Although the zoning ordinance does restrict his ability to store certain items on the property, Kiefer is still able to store preexisting nonconforming items outdoors and use the property in a

number of manners, including for agricultural purposes and a single family home. *See* Isanti County, Minn., Zoning Ordinance § 6, subds. 2, 3 (Dec. 29, 2014) (listing permitted and conditional uses in agriculture/residential district).

Finally, under the third *Penn Central* factor, the court must consider the character of the government action. "[T]he appropriate focus of the character inquiry should be on the *nature* rather than the merit of the governmental action." *Wensmann Realty*, 734 N.W.2d at 639 (quotation omitted). "Although the relevant considerations may vary depending on the circumstances of the case, an important consideration involves whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners." *Id.* As discussed above, the county's actions were properly taken to enforce an applicable ordinance. Kiefer cites the county's failure "to present evidence to show that the County uniformly implemented county-wide the County's interpretation of its ordinances as applied to Kiefer." However, such a burden resides with Kiefer, not the county. *See Stenger*, 449 N.W.2d at 485.

Accordingly, because each of the three *Penn Central* factors weighs in favor of the county, the district court did not err by concluding that the county did not effect an unconstitutional taking.

Affirmed.

Filed in Tenth Judicial District Court

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF ISANTI	TENTH JUDICIAL DISTRICT

County of Isanti, Plaintiff, v. Keith Allen Kiefer, Defendant.	**ORDER** Court File No. 30-CV-11-589 (Filed Jan. 27, 2017)

The above-captioned matter came on for hearing on October 31, 2016, before the undersigned Judge of District Court, in the City of Cambridge, County of Isanti, and State of Minnesota. The file was taken under advisement at the conclusion of the hearing.

This matter came before the Court on remand following the Minnesota Court of Appeals decision *Cty. of Isanti v. Kiefer*, No. A15-1912, 2016 WL 4068197 (Minn. Ct. App. Aug. 1, 2016), requiring a determination of whether or not certain items of property located on Defendant's land are permissible preexisting nonconformities under the Isanti County Zoning Ordinance, and whether the application of the Isanti County Zoning and Solid Waste Ordinances in this case resulted in an unconstitutional taking. Attorney Erick G. Kaardal appeared on behalf of Defendant Keith Kiefer and

Assistant Isanti County Attorney Timothy C. Nelson appeared on behalf of Plaintiff Isanti County.

Based on the files, records, and proceedings herein, the Court hereby makes the following:

ORDER

1. The following items on Mr. Kiefer's land are permissible preexisting nonconformities under the 2014 Isanti County Zoning Ordinance:
   a. The wood box depicted in Exhibit 2
   b. The unlicensed vehicle depicted in Exhibit 15
   c. The regenerator depicted in Exhibit 12
2. The following items on Mr. Kiefer's land are not preexisting permissible nonconformities under the 2014 Isanti County Zoning Ordinance and must be removed within 60 days of the date of this Order:
   a. The miscellaneous debris depicted in Exhibits 1-9 and Exhibits 11-12, with the exception of the wood box in Exhibit 2 and the regenerator in Exhibit 12
   b. The unlicensed vehicle depicted in Exhibit 18
3. The vehicles depicted in Exhibits 10, 13-14, 16-17, and 19-23 are licensed. Licensed vehicles are not at issue and shall be permitted to remain.

4. The application of the Isanti County Solid Waste and Zoning Ordinances in this case did not result in an unconstitutional taking.

/s/ Amy R. Brosnahan
Brosnahan, Amy (Judge) 2017.01.28 14:20:26 -06'00'

Let judgment be entered accordingly.

HON. AMY R. BROSNAHAN
Judge of District Court

FINDINGS OF FACT

1. The Court hereby incorporates the prior Findings of Fact as laid out in its July 6, 2015 Order as if fully set forth. Since occupying the land at issue in this case, Defendant Keith Kiefer has stored various items of personal property on his land. Since 1992, Mr. Kiefer has stored a regenerator[1] and approximately four unlicensed vehicles[2] on his property. By 1995, there were a total of seven licensed and unlicensed vehicles on the property.[3] In October of 2007 the City of Ramsey transferred additional vehicles[4] and miscellaneous

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[1] Depicted in Exhibit 12. Tr. Transc. 187: 17-18.

[2] Tr. Transc. 217: 3-11.

[3] Tr. Transc. 172: 7-19.

[4] Depicted in Exhibits 10, 13-14, 16-21. Tr: Transc. 186:10-11; 190-194.

property,[5] including scrap metal and plastic, machinery, furniture, tires, and other debris, from another property owned by Mr. Kiefer onto the Isanti County property.

2. To date, there are approximately 17 cars[6] on Mr. Kiefer's property; the record contains conflicting evidence regarding which, if any, of those vehicles are licensed. Mr. Kiefer testified that most of the cars are licensed, and any unlicensed vehicles have been on the property since 1992.[7] He provided license plate numbers for all of the vehicles depicted in Exhibits 10 and 13-23 with the exception of a tractor truck brought by the City of Ramsey, depicted in Exhibit 18, and a Duster car stored on the property, depicted in Exhibit 15.[8] He testified that all of the license plates are currently valid.[9] Holly Nelson, an employee of the Isanti County Zoning Department, testified regarding the concern of the Zoning Department that some cars were unlicensed.[10] Mr. Kiefer's testimony is consistent with Ms. Nelson's notes dated August 7, 2009 and provided to the Court in Plaintiff's Witness and Exhibit List on July 10, 2014, which list license plate numbers for most of the vehicles. Photographs

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[5] Depicted in Exhibits 1-9, 11-12 with the exception of a wood box in Exhibit 2 and the regenerator in Exhibit 12.

[6] Tr. Transc. 217:5.

[7] Tr. Transc. 217: 5-11.

[8] Tr. Transc. 190-195.

[9] Tr. Transc. 195:9-10.

[10] Tr. Transc. 56-70.

of many of the cars, introduced as Exhibits 10 and 13-23, also depict license plates.

3. The other miscellaneous property identified above, with the exception of the wood box depicted in Exhibit 2 and the regenerator depicted in Exhibit 12, was moved onto the property in 2007 by the City of Ramsey.[11] The current narrow issue for the Court's consideration is whether Mr. Kiefer's storage of those unlicensed vehicles and miscellaneous property are preexisting nonconformities under the 1996 Zoning Ordinance, and whether the County's application of the Solid Waste and Zoning Ordinances to Mr. Kiefer's property resulted in an unconstitutional taking.

MEMORANDUM OF LAW

I. Reopening the Record to Consider Additional Evidence is Unnecessary.

4. Mr. Kiefer sought the admission of several new exhibits to supplement the record on remand, including a 1992 contract for deed, a survey of a parcel of Mr. Kiefer's land, a Google aerial photograph of the parcel, statements from several neighbors, an excerpt of the 1993 Isanti County Zoning Ordinance, and a value determination formula. "A [district] court's duty on remand is to execute the mandate of the remanding court strictly according to its terms." *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. Ct. App. 1988). "[T]he

[11] Tr. Transc. 182-187.

purpose of reopening the record on remand is generally to develop a record regarding a new issue." *In re Estate of LaSha*, No. A16-0071, 2016 WL 4497328, at *4 (Minn. Ct. App. Aug. 29, 2016). In this case, reopening the record is unnecessary because the original trial record contains sufficient evidence to resolve the remaining legal and factual issues. In particular, Mr. Kiefer's testimony identified when each item of personal property at issue was brought to his land. The additional proposed exhibits therefore need not be considered by the Court.

II. The Regenerator, the Wood Box, and All But One of the Unlicensed Vehicles on Mr. Kiefer's Property are Permissible Preexisting Nonconformities Under the Zoning Ordinance.

5. The miscellaneous property[12] brought by the City of Ramsey in 2007 and the unlicensed vehicles are not permitted under any Isanti County Zoning Ordinance in existence since at least 1996. Under the 1996 Zoning Ordinance, the listed Permitted Uses and Conditional Uses would not lawfully permit Mr. Kiefer's outdoor storage practices. Isanti County, Minn., Zoning Ordinance § 6, subds. 2-3 (1996). Mr. Kiefer argues that the storage of unlicensed vehicles constitutes parking space for passenger vehicles, which is

[12] Depicted in Exhibits 1-9, 11-12 with the exception of the wood box in Exhibit 2 and the regenerator in Exhibit 12.

identified in the 1996 Zoning Ordinance as a Permitted Accessory Use. Isanti County, Minn., Zoning Ordinance § 6, subd. 4 (1996). The Zoning Ordinance defines "accessory use" as "[a] use clearly incidental or accessory to the principal use of a lot or building located on the same lot as the accessory use." Isanti County, Minn., Zoning Ordinance § 4, subd. 2 (1996). In this case, the storage of unlicensed vehicles cannot be considered incidental or accessory to Mr. Kiefer's home or agricultural practices, and is therefore not a Permitted Accessory Use for purposes of the 1996 Zoning Ordinance. Since outdoor storage of unlicensed vehicles and miscellaneous property is not permitted under the 1996 Zoning Ordinance provisions governing agricultural districts, and because "whenever in any zoning district a use is neither specifically permitted nor denied, the use shall be considered prohibited," Mr. Kiefer's storage of the unlicensed vehicles and miscellaneous property has been a nonconformity under the Zoning Ordinance since at least 1996, and remains a nonconformity today. Isanti County, Minn., Zoning Ordinance § 4, subd. 1(4) (1996).

6. The 1996 and 2014 Zoning Ordinances do, however, contain a grandfathering provision, which states: "All legally established nonconformities as of [March 1, 1996] may continue, but they will be managed according to applicable state statutes and other regulations of this community for the subjects of alterations and additions, repair after damage, discontinuance of use, and intensification of

use." Isanti County, Minn., Zoning Ordinance § 23, subd. 1 (1996); Isanti County, Minn., Zoning Ordinance § 22, subd. 1 (2014). A zoning ordinance may prohibit the creation of nonconforming uses, but existing nonconformities must either be permitted to remain or be eliminated through eminent domain. *Hawkins v. Talbot*, 248 Minn. 549, 80 N.W.2d 863 (1957). In interpreting a zoning ordinance, this Court "must give weight to the interpretation that, while still within the confines of the term, is least restrictive upon the rights of the property owner to use his land as he wishes." *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608-09 (Minn. 1980). The Court must weigh the interests of the property owner against the public policy behind the doctrine of nonconforming use, which aims "to increase the likelihood that such uses will in time be eliminated due to obsolescence, exhaustion, or destruction," over time leading to "a uniform use of the land consistent with the overall comprehensive zoning plan." *Freeborn County v. Clausen*, 295 Minn. 96, 99, 203 N.W.2d 323, 325 (1972).

7. The parties dispute the scope of the preexisting nonconforming use provision. Mr. Kiefer reads the language of the Zoning Ordinance broadly; he argues that because he was lawfully using his property for outdoor storage prior to enactment of the 1996 Zoning Ordinance, any amount of outdoor storage is a lawful non-conformity. The County argues that the preexisting nonconforming use provision applies more narrowly to the specific items

stored on the land prior to March 1, 1996. The 1996 and 2014 Zoning Ordinance define "nonconforming use" as "any legal use, structure or parcel of land already in existence, before the adoption of official controls or amendments thereto that would not have been permitted to become established under the terms of the official controls as now written, if the official controls had been in effect prior to the date it was established." Isanti County, Minn., Zoning Ordinance § 4, subd. 2 (1996); Isanti County, Minn., Zoning Ordinance § 4, subd. 2 (2014). The Zoning Ordinances also define "use" as "[t]he purpose of which land or premises or building thereon is designated, arranged or intended, or for which it is or may be occupied or maintained." *Id.* Thus, the question for the Court's consideration is whether Mr. Kiefer's land was lawfully being occupied or maintained for the purpose of outdoor storage of unlicensed vehicles and miscellaneous property prior to March 1, 1996.

8. Mr. Kiefer testified and the Court finds that he has stored unlicensed vehicles and miscellaneous property on his land since at least 1992.[13] The earliest Isanti County Zoning Ordinance introduced at trial became effective on March 3, 1993.[14] Under the 1993 Zoning Ordinance, agriculturally-zoned land like Mr. Kiefer's had a number of permitted uses and accessory uses; the Court need not determine whether Mr. Kiefer's outdoor storage of

[13] Tr. Transc. 187; Tr. Transc. 217: 3-11.

[14] Ex. 116.

unlicensed vehicles and miscellaneous property was a lawful permitted or accessory use of agricultural land under the 1993 Zoning Ordinance because, in any event, the 1993 Zoning Ordinance permits the continuance of legally established nonconformities. Isanti County, Minn., Zoning Ordinance § 16, subd. 1 (1993). The County has failed to prove that Mr. Kiefer's outdoor storage of miscellaneous items and unlicensed vehicles beginning in 1992 was unlawful, and the Court finds that Mr. Kiefer's storage of such unlicensed vehicles and miscellaneous property, which includes the Duster car depicted in Exhibit 15, the wood box in Exhibit 2, and the regenerator in Exhibit 12, is a permissible preexisting nonconformity under the Zoning Ordinance because those items have been present on that property since 1992.

9. That determination, however, does not end the Court's inquiry. The 1996 and 2014 Zoning Ordinances both state that the grandfathering of preexisting nonconformities will be managed according to state statutes regarding intensification of use. Isanti County, Minn., Zoning Ordinance § 23, subd. 1 (1996); Isanti County, Minn., Zoning Ordinance § 22, subd. 1 (2014). Minnesota statute provides that "any nonconformity, including the lawful use of occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion." Minn. Stat. § 462.357,

subd. 1e(a). The Court must then determine whether the subsequent addition of unlicensed vehicles and other miscellaneous property in 2007 constitutes an expansion of Mr. Kiefer's outdoor storage subjecting those added items to removal.

10. In *Clausen*, the Minnesota Supreme Court found that the addition of a building was an unlawful expansion of a nonconformity. 203 N.W.2d at 325. There, a landowner had been using his property for the outdoor storage and repair of earth-moving equipment. *Id.* at 324. A decade later, the county where the land was located enacted a zoning ordinance which defined the outdoor storage of earth-moving equipment as a valid nonconforming use. *Id.* When the landowner began construction of a building to enclose the storage and repair of the machinery, the county argued that the building would violate the zoning ordinance. *Id.* The Minnesota Supreme Court agreed, and found that the construction of a new building was an expansion of nonconforming use, and furthermore would prolong the continuation of the conforming use and considerably lessen the likelihood that it would be eliminated in the foreseeable future. *Id.* at 326. In contrast, in *Hawkins* the Minnesota Supreme Court held that the continued excavation of a gravel pit was not an unlawful extension of a nonconforming use. 80 N.W.2d at 866. There, a landowner had used his property as a gravel pit prior to the establishment of a zoning ordinance which would have precluded such use of the land. *Id.* at 864-865. Over time,

the landowner sought to expand the size of the gravel pit and use a mechanical rock crusher, which nearby landowners argued was an expansion of the prior nonconformity. The Minnesota Supreme Court found that the enlargement of the gravel pit was not an expansion because gravel is a diminishing asset; if the landowner was limited to excavating the same area of land that was used at the adoption of the zoning ordinance, it would prohibit future use of the land as a gravel pit. *Id.* at 865. In that case, the use of machinery and the creation of a larger excavation pit was consistent with the "original nature and purpose of the undertaking" and was not an expansion of the nonconforming gravel excavation. *Id.* at 866. Here, Mr. Kiefer testified that the City of Ramsey brought a number of vehicles and miscellaneous items to his land in 2007.[15] Such an addition is not like the enlargement of a pit to preserve a diminishing asset as in *Clausen*; rather, it is an expansion similar to the addition of a building as in *Hawkins.* Any expansion of a nonconformity is unlawful under Minnesota Statute, absent exceptions not applicable here. Minn. Stat. § 462.357, subd. 1e(a). As analyzed above, the outdoor storage of unlicensed vehicles and miscellaneous property has been a nonconformity under the

[15] Mr. Kiefer testified that the items deposited by the City of Ramsey were the contents of a building on his other property, and it occupied entire box trucks. Tr. Transc. 178: 7-10. These items are depicted in Exhibits 1-21 with the exception of the wood box in Exhibit 2, the regenerator in Exhibit 12, and the Duster in Exhibit 15. Tr. Transc. 182-194.

Zoning Ordinance since at least 1996, and the addition of more unlicensed vehicles and miscellaneous items in 2007 is an unlawful expansion of the nonconforming storage; those items are thus subject to removal.

11. At trial the parties presented conflicting testimony about which of the cars depicted in Exhibits 10, 13-14, 16-17, and 19-23 are licensed. The Court must resolve these ambiguities in favor of Mr. Kiefer, and finds that the above-described cars are licensed. *See Faber v. City of Crystal*, No. A06-254, 2007 WL 152122, at *3 (Minn. Ct. App. Jan. 23, 2007) (finding that where record did not establish that prior use was nonconforming, court could not presume that such prior use was unlawful). The Duster car has been on the property since 1992,[16] making that vehicle subject to the clause of the 1996 and 2014 Zoning Ordinances permitting the continuance of lawfully established nonconformities. Isanti County, Minn., Zoning Ordinance § 23, subd. 1 (1996); Isanti County, Minn., Zoning Ordinance § 22, subd. 1 (2014). The only unlicensed car depicted in the photographs that is thus subject to removal is the truck tractor in Exhibit 18. Mr. Kiefer could not provide a license plate number for the truck, the photograph does not show a license plate, and he admitted it was brought by the City of Ramsey in 2007.[17] With respect to the

[16] Tr. Transc. 191:118.

[17] Tr. Transc. 192: 21-23.

miscellaneous items[18] brought onto the property by the City of Ramsey in 2007, those items are also unlawful expansions of the preexisting nonconformity, as analyzed above, and are subject to removal.

III. The Application of the Zoning Ordinance and the Solid Waste Ordinance to Mr. Kiefer's Outdoor Storage is Not an Unconstitutional Taking.

12. Mr. Kiefer also argues that the Isanti County Solid Waste Ordinance and the Zoning Ordinance, as applied in this context, results in an unconstitutional taking. The United States and Minnesota Constitutions prohibit the taking of private property "without just compensation." U.S. Const. amend. V; Minn. Const. art. I § 13. "[T]he government need not directly appropriate or physically invade private property to effectuate a taking." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007). Rather, excessive government regulation of property may result in a taking if done in such a way "as to unfairly diminish the value of the individual's property, thus causing the individual to bear the burden rightly borne by the public." *Id.* (quoting *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998)). In determining whether such a taking has occurred, the Court must weigh such factors as "[t]he

[18] Depicted in Exhibits 1-9, 11-12, with the exception of the wood box in Exhibit 2 and the regenerator in Exhibit 12.

economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Id.* at 632-633 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). These factors are flexible and balanced against one another. *Id.* at 633. Mr. Kiefer argues that the County's misapplication of the Solid Waste Ordinance and the Zoning Ordinance resulted in a taking because the County had no legal authority to regulate how Mr. Kiefer used his land and he was forced to spend $2,496 to rent comparable outdoor storage. As analyzed above, however, the Zoning Ordinance and related Minnesota statute provided the County with a legal basis for requiring Mr. Kiefer to remove some of the personal property from his land. Thus, there was not an unconstitutional regulatory taking of Mr. Kiefer's land on the basis that the County misapplied the Zoning Ordinance.

13. In addition, a review of the *Penn Central* factors further supports the Court's finding that the County's actions do not result in an unconstitutional taking. With respect to the economic impact of the Isanti County Solid Waste Ordinance and the Zoning Ordinance, the Minnesota Supreme Court has "repeatedly upheld zoning ordinances and other land use restrictions against allegations of unconstitutional taking, even where the value of the property declined significantly as a result of the restrictions." *McShane v. City of Faribault*,

292 N.W.2d 253, 257 (Minn. 1980). Here, Mr. Kiefer retains the right to store a number of items on his property under the Zoning Ordinance, including his vehicles, wooden box, mobile home, semi-trailer, and regenerator; the land thus retains economic value as Mr. Kiefer need not store those items elsewhere. Regarding Mr. Kiefer's investment-backed expectations, "the existing and permitted uses of the property when the land was acquired generally constitute the primary expectation of the landowner regarding the property." *Wensmann*, 734 N.W.2d at 637. Here, although Mr. Kiefer did use some of the land for outdoor storage when he first occupied it in 1992, the significant majority of the land is used for agricultural purposes. Finally, the third *Penn Central* factor considers the character of the governmental regulation, weighing "whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners." *Id.* at 639. There is no evidence that Mr. Kiefer has been disproportionately burdened by the County's application of the Solid Waste and Zoning Ordinances. Taken as a whole, the *Penn Central* factors, even in light of the County's misapplication of the Solid Waste Ordinance, support a finding that those ordinances as applied in this case do not constitute a regulatory taking in violation of the United States and Minnesota Constitutions.

A.R.B.

JUDGMENT

I hereby certify that the foregoing constitutes the Judgment of this Court.

TRACY GULLERUD
Court Administrator

Dated: 1/27/17 By: /s/ Gwen H. Williams
Deputy

STATE OF MINNESOTA

IN SUPREME COURT

A17-0326

County of Isanti,

Respondent,

vs.

Keith Allen Kiefer,

Petitioner.

ORDER

(Filed Oct. 25, 2017)

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Keith Allen Kiefer for further review be, and the same is, denied.

Dated: October 25, 2017 BY THE COURT:

/s/ Lorie S. Gildea
Lorie S. Gildea
Chief Justice