STATE OF WISCONSIN CIRCUIT COURT JACKSON COUNTY

Greg Krueger, Annette Krueger, Don Cramer, Mary Sue Cramer, Willard Schuld and Ginny Schuld

Plaintiffs

vs.

Allenergy Hixton, LLC

Defendant

Memorandum Decision and Order Granting Motion to Dismiss

Case No. 16CV11

Plaintiffs are residents of Jackson County and own residential property contiguous to the site of a proposed frac sand mining project in Jackson County. The mine is not yet operational. Allenergy has entered into a development agreement with the Town of Hixton dated December 28, 2015. The agreement purports to regulate the manner of operation of the proposed mine in ways that mitigate the impact on surrounding properties. Allenergy has purchased the property of 25 landowners to effectuate the mining operations. The plaintiffs are the three remaining property owners whose land Allenergy has sought to purchase. These three landowners have refused to sell their property to Allenergy and instead have commenced this litigation in an effort to stop the proposed mining operation.

This lawsuit calls into question inherent tensions in land use decisions. Allenergy has an interest in mining frac sand in a particularly suitable area so that they can fill public needs for energy and earn a profit; the 25 landowners who have made the decision to sell their property to Allenergy seek a ruling which will allow the sales to close; and of course the three neighbors who have opted not to sell their property, seek a ruling which will allow them to remain on their land and enjoy it without interruption.

Moreover, this lawsuit raises the question of who should assess the risk to property owners and determine in advance of any actual harm that a proposed land use will create a nuisance that is definite and certain-whether this determination should be made by state and federal agencies coupled with approval of the Township through development agreements and ordinances, or whether the Court should intervene based on the nature of the activity and proposed mode of operation.

The complaint alleges the mine would operate 24 hours a day, seven days a week. The complainants allege that similar frac sand minding operations are known to create nuisance conditions including toxic air pollution, water pollution, noise pollution, light

pollution, ground disruption and vibration due to blasting, destruction of agricultural and forested lands and landscapes and wetlands, adverse impact on endangered species, depletion of ground water traffic road and loss of property value. These allegations are supplemented by affidavits from landowners who have land contiguous to other mining projects and describe the impact of these operations on their homes and lifestyle. The Court has accepted these affidavits as a supplement to the complaint along with the Development Agreement and Ordinance. The affidavits allege the following harms:

- increase traffic and destruction of public roadways which has caused damage to vehicles;
- offensive light conditions requiring that extra materials be placed over windows at night;
- constant loud noises;
- physiological harm to animals;
- drinking water deterioration;
- appliance failure due to water impurities;
- increased mineral presence and water including lead, manganese and iron which affect the health of animals;
- increased expenses for animal treatment and purified water;
- emotional and psychological harm to citizens;
- physical harm to citizens;
- noxious smells;
- ground and structural vibrations;
- structural damage to buildings;
- offensive dust levels;
- increased living expenses to deal with the effects of water, air and noise;
- soil erosion;
- water table depletion;
- wetland depletion;
- property value depletion

The complaint alleges three claims:

1) Private nuisance: The plaintiffs allege private nuisance and negligence causing harm to the plaintiffs;
2) Declaratory Judgment: Plaintiffs seek a declaration that locating the mine as proposed would create a private nuisance and would interfere with the plaintiffs' interest in their real estate and property interests;
3) Perpetual Injunction: Plaintiffs seek an injunction enjoining Allenergy or their assignees or successors in interest from conducting and operating the proposed frac sand mine.

In response, Allenergy has filed a motion to dismiss alleging three grounds:

1) The complaint fails to set forth facts to sustain a private nuisance claim;

2) The complaint contains only a recitation of the elements of a nuisance claim, conclusory factual allegations and legal conclusions and fails to set forth facts which would support a nuisance claim.
3) The matter is not ripe for adjudication.

PRIVATE NUISANCE CLAIM

As a general rule, the Courts will intervene only to enjoin an actual and existing nuisance. However, Wisconsin permits the Courts to intervene in a threatened or anticipated nuisance when the prospective nuisance is inevitable and undoubted:

> *"The general rule is that an injunction will only be granted to restrain an actual existing nuisance; but where it can be plainly seen that acts which, when completed, will certainly constitute or result in a grievous nuisance, or where a party threatens, or begins to do, or insists upon his right to do, certain acts, the court will interfere, though no nuisance may have been actually committed, if the circumstances of the case enable the court to form an opinion as to the illegality of the acts complained of, and the irreparable injury which will ensue." Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516.*
>
> *See note found in 7 A. L. R. 749, from which we excerpt the following:*
>
> *"Generally, the court ought not to interfere, where the injury apprehended is of a character to justify conflicting opinions as to whether it will in fact ever be realized." "To authorize an injunction, it must be established by satisfactory evidence that the threatened or apprehended injury will probably result." "The complainant must make out a 'strong case of probability' that the apprehended mischief will * * * arise." "A showing of probable or contingent injury is insufficient: The injury must be inevitable and undoubted." Quoted in Wergin v. Voss 179 Wis. 603, 192 N.W. 51, 53 (1923).*

At issue then is whether the claims of anticipated harm set forth in the affidavits are so certain as to be inevitable and undoubted. The plaintiffs claim the associated harms are inherent in frac sand mining and cannot be minimized to acceptable levels through development agreement or other devices. Allenergy contends that each mining company, location, and other circumstances are unique and one cannot infer from the experience of other citizens with other mining companies in other locations that the same will be true of Allenergy's frac sand mine in Hixson.

In response, Allenergy cites to the development agreement between the Town of Hixton and Allenergy. The development agreement seeks to address the concerns raised in the affidavits by addressing the following issues:

- Buffer area of a minimum of 100 feet from extraction of nonmetallic minerals along property lines, minimum of 600 feet from extraction on non-metallic minerals from residence not owned by operator and minimum of 100 feet from nearest right of way of public roadways;
- Screening beams;
- Allenergy to be responsible for replacement, repair and maintenance of roads to the extent they are responsible for damage, wear and tear or shortened life span;
- Allenergy to be responsible for crossings of town road as approved by town board

- Noise minimization through best practice
    - Enclosed buildings for stationary processing equipment
    - Strobes and directional back up alarms instead of backup alarms on mobile equipment
    - Berms and vegetative barriers along sensitive property boundaries—approval by town board
    - Scheduled monitoring of noise levels at specified locations and remediation if exceed.
    - Noise standards
    - Measure within ½ mile of mine site at outside of residence
- Lighting Standards
    - Lighting to be shielded and directed away from neighboring homes and highways;
    - Berms and vegetative barriers
    - Comply with Mine Safety and Health Administration Standards;
- The agreement has similar standards from dust, blasting, and impact on water table; Allenergy is obligated to use best practices and use specific testing requirements to verify that harm not being done.
- Breach of Agreement Resolution Procedure: In the event of an alleged breach, the document contains a procedure to resolve accusations of a breach of the agreement including notice, an opportunity to cure, and reservation on the part of the town of all other legal and equitable remedies.

The Town of Hixton is satisfied that the provisions in the development agreement are sufficient to protect the Township and its residents. This court is being asked to overturn the judgment of the Township and find that the anticipated harm is substantial, inevitable and undoubted. And furthermore the Court is being asked to conclude that it is undoubted and inevitable that the breach provisions of Paragraph 11 will not be sufficient to remedy any violations.

Separately, the Town of Hixton has provided through ordinance requirements for non-metallic mine licenses issued by the Township. The Township has found that many of the potential harms cited by the plaintiffs are associated with non-metallic mining and the ordinance is designed to provide minimum standards to protect public health and safety, to preserve the scenic beauty of the town's landscapes, to protect ground and surface waters, to minimize or prevent adverse impacts, to preserve and protect the Town's natural beauty, farmland, and natural resources, a viable economic climate and promote the general welfare.

The ordinance provides for remedies including issuance of a stop work order, orders to remedy violations, citations for violations, injunctive relief and suspension or revocation of operator's licenses.

The plaintiffs have referred the court to an Illinois case, Whipple v. Village of North Utica and Aramoni LLC, 2017 IL App (3d) 150547-U issued on March 9, 2017, approving an anticipatory nuisance claim. The court however is not persuaded by this decision

inasmuch as the Illinois standard is lower than that established in Wergin—"high probability" vs. "inevitable and undoubted."

Accepting as true the allegations in the petition and the supplements accepted by the court, this court cannot find that the proposed mining activity will not cause the harms feared by the petitioners; however it is clear as well that the petitioners have not demonstrated that the proposed mining project will cause substantial harm and that the protections of the ordinance and development agreement will be insufficient to address any violations to a degree that is inevitable and undoubted.

This decision is consistent with the general principle that courts ought not to interfere except in the clearest of cases. This is particularly true in light of the approval of the Township of the development agreement and ordinance, signifying the township's conclusion that the interests of all parties are balanced through approval of the mine subject to the conditions in the development agreement. In the event an actual nuisance occurs, the petitioners may ask the Township to enforce the breach provisions and may resort to the courts upon a showing of an actual nuisance, the traditional mechanism afforded by law. The court would then have the authority to order damages or order a modification of the operating protocols of the mine so as to abate the nuisance.

SUFFICIENCY OF COMPLAINT

While the court is dismissing the petition based on a finding that the allegations of the complaint are insufficient to support a private anticipatory nuisance claim, the remaining arguments are addressed in the interest of completing the record.

A plaintiff must plead facts, which if true, would entitle the plaintiff to relief, Data Key Partners v. Permira Advisors LLC 356 Wis.2d 665, 849 N.W.2d 693 (2014). Therefore, in order for the complaint to be sufficient, the complaint must plead facts, which if true, would support a claim for private nuisance. Since the allegations in the complaint alleged harm to private property interests as opposed to harm sustained by the public at large, the nuisance claim rests on the concept of private nuisance. In Metropolitan Sewerage District v. Milwaukee, 277 Wis.2d 635, 660, 691 N.W.2d 658 (2005), the Wisconsin Supreme Court adopted the Restatement (second) of Torts providing the following elements for liability for private nuisance:

One is subject to liability for private nuisance if, but only if, his conduct is legal cause of an invasion of another's interest in the private use and enjoyment of land, in the invasion as either

(a) Intentional and unreasonable, or
(b) Unintentional and otherwise actionable under the rules controlling liability for negligent… Conduct… Metropolitan Sewerage District, 277 Wis.2d at 660.

The allegations in the complaint allege that Allenergy will in the future act in a negligent manner to create a nuisance. And the Court has accepted the affidavits, development agreement and ordinance as supplements to the complaint. With these supplements, the question is not whether the allegations are conclusory but rather whether they are sufficient to allege an anticipatory nuisance. This question is addressed in the preceding section.

RIPENESS

In Olson v. Town of Cottage Grove, 309 Wis.2d 365, 749 N.W.2d 211 (2008), the Wisconsin Supreme Court identified the four factors in a justiciable controversy: 1) the controversy is one in which a claim of right is asserted against one who has an interest in contesting it; 2) the controversy must be between persons whose interests are adverse; 3) the party seeking declaratory relief must have a legal interest in the controversy-that is to say, a legally protectable interest; and 4) the issue involved in the controversy must be ripe for judicial determination.

Only the fourth criterion, ripeness, is at issue here. A plaintiff seeking declaratory judgment need not actually suffer an injury before seeking a judicial determination Milwaukee District Council 48, 244 Wis.2d 333. What is required is that the facts be sufficiently developed to allow a conclusive adjudication, State ex rel Lynch v Conta 71 Wis.2d 662, 239 N.W.2d 313 (1976). The facts must be sufficiently developed to avoid Courts entangling themselves in abstract disagreements, Miller Brands-Milwaukee Inc. v. Case 162 Wis.2d 684, 694, 470 N.W.2d 290 (1991). Furthermore, the facts on which the court is asked to make that judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment, Miller Brands-Milwaukee, 162 Wis.2d at 694-95.

Allenergy has contended in its motion for bond that it is prepared to move forward and the only roadblock to constructing the mine is this lawsuit which is preventing Allenergy from securing financing. The development agreement sets for the operating conditions for the mine. The parties agree that Allenergy has obtained all necessary state and federal approvals with the exception of an air quality permit which cannot be issued until the mine is in operation. This court relies on the conditions of operation as a specific description of the terms of operation and concludes the project is sufficiently described so as not to be contingent or uncertain. The real question is whether the doctrine of anticipatory nuisance supports a judicial declaration that the proposed mine will create a nuisance and should be barred in advance. This question is addressed above. This matter is ripe for judicial determination.

For the reasons set forth above,

IT IS ORDERED that Allenergy's Motion to Dismiss the Complaint be and hereby is GRANTED.

Dated at La Crosse, Wisconsin, this _____ day of July, 2017.

BY THE COURT:

Electronically signed by Scott L. Horne

Circuit Court Judge

07/30/2017

SCOTT L HORNE
Circuit Judge – Branch 4