

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

NEIGHBORS OF OLD HICKORY, and)
TIM JESTER, JOE AND CHERYL COFFEY,)
CORY SHARP, JAMES SHARP,)
JEREMY SPICKARD, and)
ANNA ALEXANDER, individually,)

Plaintiffs,)

METROPOLITAN GOVERNMENT OF)
NASHVILLE and DAVIDSON COUNTY,)
And INDUSTRIAL LAND DEVELOPERS,)
LLC,)

Defendants.)

FO9A
Docket No. 16-301-IV

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MEMORANDUM AND ORDER

This matter is before the Court on Cross Motions for Summary Judgment filed in this action by Neighbors of Old Hickory, and others, Plaintiffs, Metropolitan Government of Nashville and Davidson County, Defendant, and Industrial Land Developers, LLC, Defendant. The Court heard each party's motion for summary judgment on July 21, 2016. In light of the pleadings, affidavits, exhibits, and arguments presented at the hearing, the Court has made findings of fact and conclusions of law as set forth herein.

PROCEDURAL HISTORY

Plaintiffs, Neighbors of Old Hickory, Jim Jester, Joe and Cheryl Coffey, Cory Sharp, James Sharp, Jeremy Spickard, and Anna Alexander, individually, filed their complaint for Declaratory Judgment and Injunctive Relief on March 28, 2016. On April 19, 2016, the Chancellor ordered Plaintiffs to file a verified complaint and/or affidavits in support of their request for injunctive

relief. On May 17, 2016, the Chancellor entered an Order denying the Plaintiffs' request for a temporary injunction. As a result, each party then filed motions for summary judgment.

APPLICABLE LEGAL STANDARD

Tennessee Rule of Civil Procedure 56.04 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04 (2015); see also *Rye v. Women's Care Ctr. Of Memphis, M PLLC*, 477 S.W.3d 235 (Tenn. 2015). A fact is material when it is among "those facts that must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993) (citing *Knoxville Traction Co. v. Brown*, 89 S.W. 319, 321 (Tenn. 1095)). A trial court should grant a motion for summary judgment "only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion." *Dick Broad. Co. of Tenn. V. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citations omitted).

For matters filed after July 1, 2011, Tennessee law states as follows:

In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:

- (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
- (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Tenn. Code Ann. § 20-16-101 (2015). If, however, the party moving for summary judgment is a plaintiff who bears the burden of proof at trial, the movant "shifts the burden by alleging

undisputed facts that show the existence of [the element for which summary judgment is being considered] and entitle the plaintiff to summary judgement as a matter of law.” *Hannan*, 270 S.W.3d 1, 9 (Tenn. 2008), *overruled on other grounds by Rye*, 477 S.W.3d 235 (Tenn. 2015).

When considering a motion for summary judgment, the court “must take the strongest legitimate view of the evidence in favor of the nonmoving party, allowing all reasonable inferences in that party’s favor, and discard all countervailing evidence. *See Byrd*, 847 S.W.2d at 210-11. If the moving party has shown the evidence required, the burden of production shifts to the nonmoving party, which is then “required to produce evidence of specific facts establishing that genuine issues of material fact exist.” *See Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); *see also* Tenn. R. Civ. P. 56.06. The nonmoving party may not rely on bare allegations made in their pleadings, but must set forth specific disputed facts – supported by the record – which demonstrate that there is a need for a fact finder’s decision at trial. *See* Tenn. R. Civ. P. 56.06; *see also Byrd*, 847 S.W.2d at 211. Any evidence set forth to dispute the movant’s statement of undisputed facts must be admissible in evidence. *See* Tenn. R. Civ. P. 56.06; *see also City of Memphis v. Tandy J. Gilliland Family, L.L.C.*, 391 S.W.3d 60, 65 (Tenn. Ct. App. 2012). “To permit an opposition to be based on evidence that would not be admissible at trial would undermine the goal of the summary judgment process to prevent unnecessary trials since inadmissible evidence could not be used to support a jury verdict.” *Byrd*, 847 S.W.2d at 216. The nonmoving party may satisfy the burden of production by:

- (1) Pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.3

Martin, 271 S.W.3d at 84 (quoting *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998)).

FINDINGS OF FACT

The following material facts are not in dispute between the parties and are established by the evidence presented to the Court:

1. Industrial Land is a Tennessee Limited Liability Company with its principal place of business in Davidson County, Tennessee. Industrial Land owns a one hundred fifty-five (155) track of land located at 771 Burnett Road, Old Hickory, Davidson County, Tennessee.
2. Plaintiffs are owners of property roughly adjacent to Industrial Land's property. They have joined together under the name Neighborhood of Old Hickory, an informal group of property owners who live in the Old Hickory area in Davidson County.
3. Industrial Land is attempting to construct a quarry on the ("property").
4. The proposed quarry site is within 1,250 feet of several private residences. There is also a Metro park within the vicinity of the proposed site.
5. The property which is the subject of this litigation is zoned IG (Industrial General). IG zoning permits the most intensive industrial, manufacturing, and extractive uses in all of Davidson County. The property has been zoned IG for many years. The property was purchased by Industrial Land with the objective of using it for extractive activities or a rock quarry, which included an asphalt plant and a concrete patching plant.
6. Prior to October 2014, counsel (Tom White) for Industrial Land met with William B. Herbert, IV, the Metropolitan Zoning Administrator for Davidson County, inquiring as

to the potential use of the property for a quarry. As the Zoning Administrator, Mr. Herbert is responsible for processing and reviewing applications for all zoning permits and site plans to ensure compliance with the provisions of the zoning regulations, the issuance of zoning permits, and certificates of zoning compliance, the enforcement of the provisions of the zoning regulations, keeping records and providing information and advising the general public regarding the provisions of Metropolitan Zoning ordinances.

7. On October 1, 2014, Mr. Herbert responded to counsel for Industrial Land by letter. In his letter, Mr. Herbert acknowledged the inquiry concerning the potential use of the property for a quarry and acknowledged the property could be used as such, including concrete plants and asphalt/cement mixing plants.
8. On December 4, 2014, John Gordon, a licensed engineer, wrote to Mr. Herbert on behalf of Land Industrial requesting approval for the use of the property for mineral extraction with accessory uses, including rock crushing, screening, storage of explosive, concrete patching and asphalt/cement mixing plants. Attached to Mr. Gordon's letter was a site plan which set forth phase 1 and phase 2 of the project.
9. On December 10, 2014, Attorney Tom White wrote Mr. Herbert requesting the issuance of a zoning permit and a certificate of zoning compliance. Mr. White's letter also included the final development plans for the project. Phase 1 included the concrete batching and cement mixing plants, and Phase 2 was the site for the quarry itself.
10. On December 15, 2014, Mr. Herbert issued a certificate of zoning compliance pursuant to the Metro codes. Industrial Land was given approval to begin to use the property for mineral extraction upon the approval of the other departments and issuance of the

use permit. Mr. Herbert informed Industrial Land the quarry itself would not require the obtaining of any further Metro permit; however, Industrial Land needed to obtain a building permit for the construction of the facility shown on Phase 1 of the final development plan.

11. On February 11, 2015, Industrial Land filed an application for a building permit with the Metropolitan Department of Codes. On April 24, 2015, Metropolitan Department of Codes issued a building permit for the construction of the office and maintenance facilities.
12. On May 15, 2015, the footings for the buildings were completed.
13. On June 10, 2015, Industrial Land applied for a use and occupancy permit for the quarry. The development plan was reviewed by the Metropolitan Codes Department and the zoning was approved.
14. On June 10, 2015, Industrial Land applied to the Tennessee Department Environmental and Conservation (“TDEC”) for a national polluting discharge and elimination system permit (“NPDES”) for the quarry.
15. On June 29, 2015, the framing for the buildings was completed.
16. On August 7, 2015, the Metropolitan Department of Codes issued a Building Use and Occupancy Permit to Industrial Land. The permit’s purpose specifically provides “Use and Occupancy Permit for New Quarry”, and specifically refers to the building permit issued on April 24, 2015, Permit Number 2015-05408.
17. On August 10, 2015, the Metropolitan Traffic and Parking Commission held a hearing with regard to the operation of the quarry. During the hearing, two of the plaintiffs, Cory Sharp and Tim Jester appeared and spoke in opposition to the quarry.

18. On October 22, 2015, a temporary use and occupancy permit was issued for the buildings on the property.
19. In early November 2015, Councilman Larry Hagar introduced an amendment to Metro Ordinance 2015-13. Said amendment provided for a more restrictive setback for quarries.
20. On November 20, 2015, Metro Ordinance 2015-13 was passed and became effective. The ordinance specifically provided that no quarry activity could occur within 1,200 feet of a residential structure or within 2,000 feet of the property line of a park.
21. On December 9, 2015, a final use and occupancy permit for the buildings on the property was issued.
22. On March 28, 2016, the U.S. Army Corps of Engineers issued a technical paper pertaining to its analysis of the potential vibration impact to the Old Hickory Lock and Dam from the proposed quarry operations of Industrial Land. In its paper, the Corps stated “the analysis showed the quarry can be operated without impact to the dam... we have no concern regarding the safety of the concrete structures.”
23. The Department of Environment and Conservation for the State of Tennessee issued a National Pollutant Discharge Elimination System (“NPDES”) Permit and Certification Approval, including the issuance of a Mining Permit on June 15, 2016.

CONCLUSIONS OF LAW

The issue in this case revolves around the application of the recently enacted Tennessee Vested Property Rights Act of 2014 (“VPRA”) to the actions of Industrial Land and the subsequent responses of The Metropolitan Zoning Department (“Metro”) to Industrial Land’s application for permits¹. Plaintiffs argue Industrial Land has no vested rights to use the property located at 771 Burnett Road in Davidson County as a rock quarry. Plaintiffs’ position is that the VPRA is inapplicable and that the Common Law Vested Rights Doctrine controls. Therefore, Industrial Land may not proceed with a rock quarry in the face of the more restrictive Metro ordinance regarding quarries which became effective November 20, 2015.

Plaintiffs assert since the actions of Industrial Land and Metro fall short of the requirements set forth in the VPRA, the Court should use the existing common law analysis found in *Ready Mix, USA, LLC v. Jefferson County*, 380 S.W.3d 52 (Tenn. 2012). Under those principles, Plaintiffs argue Industrial Land has not taken substantial steps necessary to constitute a preexisting, non-conforming use under the requirements of T.C.A. § 13-7-208. In other words, in order to vest rights prior to the VPRA (even where a building permit has been issued or other plans approved), the owner of the property must also have engaged in substantial construction on the site. Unless the property owner had completed substantial construction, there was no right to continue the development in the event of a new zoning regulation which allowed for more restrictions than the owner could meet for the proposed development. Under the common law, the expense of site preparation and even the commencement of construction activities were deemed insufficient.

¹ Metro has filed its own motion for summary judgment in which it joins in the motion by Industrial Land.

In 2014, the Tennessee General Assembly sought to strike an appropriate balance between private property owners' expectation and the public interest by the passage of the Tennessee Vested Property Rights Act of 2014. The Act provides in part as follows:

A vested property right shall be established with respect to any property upon the approval, by the local government in which the property is situated, of a preliminary development plan or a final development plan where no preliminary development plan is required by ordinance or regulation or a building permit allowing construction of a building where there was no need for prior approval of a preliminary development plan for the property on which that building will be constructed. During the vesting period described in subsections (c) (d), the locally adopted development standards which are in effect on the date of approval of a preliminary development plan or the date of approval of a building permit, as described by this subsection (b), shall remain the development standards applicable to that property or building during the vesting period...

T.C.A. § 13-3-413 (b)

A local government may, by ordinance or resolution, specifically identify the type or types of development plans within the local government's jurisdiction that will cause property rights to vest; provided, that regardless of nomenclature used in the ordinance or resolution to describe a development plan, a plan which contains any of the information described in subdivision (k)(5) or (k)(6) shall be considered a development plan that will cause property rights to vest according to this section. Any such ordinance or resolution shall also specify what constitutes approval of a development plan within its jurisdiction. If a local government has not adopted an ordinance or resolution pursuant to this section specifying what constitutes a development plan that would trigger a vested property right, then rights shall vest upon the approval of any plan, plat, drawing, or sketch, however denominated that is substantially similar to any plan, plat, drawing, or sketch described in subdivision (k)(5) or (k)(6)...

T.C.A. § 13-3-413(e)

A vested property right shall attach to and run with the applicable property and shall confer upon the applicant the right to undertake and complete the development and use of such property under the terms and conditions of a development plan, including any amendments thereto or under the terms and conditions of any

building permit that has been issued with respect to the property...

T.C.A. § 13-3-413(j)

“Development Standards” means all locally adopted or enforced standards, regulations or guidelines applicable to the development of property...

T.C.A. § 13-3-413(k)(4)(A)

Does not include standards required by Federal or State law; or building construction safety standards which are adopted pursuant to authority granted under subsection 68-120-101.

T.C.A. § 13-3-413(k)(4)(B)

“Final Development Plan” means a plan which has been submitted by an applicant and approved by a local government describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property...

T.C.A. § 13-3-413(k)(5)(A)

“Preliminary Development Plan” means a plan which has been submitted by an applicant that depicts a single-phased or multi-phased planned development typically used to facilitate initial public feedback and secure preliminary approvals from local governments...

T.C.A. § 13-3-413(k)(6)

In this case, some time prior to October 1, 2014 representatives of Industrial Land met with the Metro Zoning’s administrator, William B. Herbert, and inquired as to the potential use of the property for a quarry. After receiving Mr. Herbert’s acknowledgment that the property could be used for a quarry, Industrial Land began the approval process with Metro for the use of the property as a quarry. In his cover letter to Mr. Herbert dated December 4, 2014, John Gordon, the engineer for Industrial Land states:

We are submitting this letter as part of the final application package for approval of the use of this property for mineral extraction with accessory uses, including accessory rock

crushing, screening, storage of explosives, concrete batching and asphalt/cement mixing plants.

In addition, the application contained a site plan which sets forth two phases. Phase 1 includes the buildings to be used for the rock quarry, and Phase 2 shows the site for the rock quarry itself.

On December 15, 2014, Mr. Herbert on behalf of Metro responded to Industrial Land's request and gave approval to begin to use the property for mineral extraction upon the approval of the other departments and issuance of the Use Permit. On April 24, 2015, Metro issued a building permit to construct an office building and a utility building as set forth in Industrial Land's application to be used in conjunction with the quarry. On June 10, 2015, Industrial Land applied for a Use and Occupancy Permit which specifically provides "for new quarry" and references Building Permit 2015-05408. On August 7, 2015, Metro issued a Building Use and Occupancy Permit to Industrial Land. The permit's purpose specifically provides "Use and Occupancy Permit for new quarry."

In order for Industrial Land to come under the VPRA, it must either demonstrate the approval by Metro of a development plan (Preliminary/Final) or a building permit allowing construction of a building where there was no need for prior approval of a preliminary development plan. In this case, Industrial Development took the "belt and suspenders" approach in its effort to comply with the Act. Firstly, Industrial Land submitted a development plan which was approved by Metro. The development plan (both preliminary and final) described with reasonable certainty the type and intensity of use for this tract of land. The development plan completely described for Metro the use of this land for a quarry, the buildings to be constructed in conjunction with its use as a quarry, the location and dimensions of the buildings, and the location and perimeter of the quarry. These plans were submitted to Metro on December 4, 2014, on December 10, 2016, and

again on June 10, 2015. Each time Metro issued its approval. The Use and Occupancy Permit issued on August 7, 2015 represents the final approval by Metro of the development plans submitted by Industrial Land. This conclusion is due to the fact that the application for the Use and Occupancy Permit included the site plan for the quarry which was reviewed by John Tyler, an employee of the Codes Department and the zoning which was approved by Richard Thomopoulos, also of the Codes Department.

The second method for an owner to qualify in a vested right occurs when the local government body issues a building permit allowing construction of a building. Plaintiffs' contend the building permit issued on April 24, 2015 does not specifically include language indicating that the use of the buildings are in conjunction with a quarry and therefore Industrial Land cannot qualify under this provision of the Act. The Court finds this interpretation of the Act under these facts is not within the purpose of the Act as expressed by the Legislature to "provide for the establishment of certain vested property rights in order to ensure reasonable certainty, stability, and fairness in the land development process, secure the reasonable expectations of landowners, and foster cooperation between the public and private sectors in the area of land-use planning and development."

After receiving the building permit from Metro for the construction of the buildings in connection with the quarry, Industrial Land then applied for a "Building Use and Occupancy Permit" which stated as its specific purpose: "permit for new rock quarry...see permit 2015-05408" (the building permit). On August 7, 2015, Metro issued the "Building Use and Occupancy Permit" for a new quarry and referenced the specific building permit to 2015-05408. The issuing by Metro of a building permit for the construction of the buildings which Industrial Land consistently represented were to be used in conjunction with the proposed quarry and Metro's

approval of not only the building permit, but also the Use and Occupancy Permit for a quarry, which specifically references the building permit, meets the second method for establishing a vested property right.

A secondary issue in this case is which party has the burden of proof on these cross motions for summary judgment. The determination of this issue depends upon whether the Vested Property Rights Act applies. While Plaintiffs are correct that a party seeking to establish a non-conforming use has the burden of proof, that analysis is not applicable in this case. Here, the VPRA applies. Where the property owner has applied and received approval, by the local government, of a development plan or building permit, a party challenging the existence of the vested property right has the burden of proof. Since they are challenging whether Industrial Land has a vested property right after approval by Metro of its development plan and building permit, the burden is on the Plaintiffs to demonstrate there is no vested right under the Act.

Plaintiffs also contend the failure of Industrial Land to obtain an individual National Polluting Discharge Elimination System Permit from the Tennessee Department of Environment and Conservation prior to the adoption of the more restrictive Metro ordinance on November 20, 2015 prohibits Industrial Land from falling within the protection of the VPRA. Plaintiffs cite *Fartower Sites v. Knox County*, 126 S.W.3d 52 (Tenn. App. 2003) in support of their argument. The Court finds *Fartower Sites* is not applicable to the VPRA. The VPRA specifically provides development standards do not include standards required by federal or state law. T.C.A. §13-3-413(k)(4)(B). Thus, the permit issued by TDEC after the passage of the new zoning ordinance is irrelevant to the issue of whether Industrial Land has a vested right under the VPRA. The VPRA only applies to municipal and county standards, regulations or guidelines, not federal or state requirements.


At oral argument, all of the parties acknowledged there was no requirement for the Plaintiffs to pursue an appeal under the Administrative Procedures Act since there were no material issues of fact to be tried. All parties also acknowledged there was no purpose to be served in questioning the standing of the individual plaintiff, Tim Jester.

The Court finds Industrial Land has established a vested property right pursuant to T.C.A. § 13-3-413 and T.C.A. § 13-4-310 and therefore, has a vested property right which attaches to and runs with the property located at 771 Burnet Road, Old Hickory, Davidson County, Tennessee. This vested property right confers upon Industrial Land the right to undertake and complete the development of the quarry as set forth in the development plan which was approved by the Metropolitan Government of Nashville and Davidson County.

It is therefore **ORDERED, ADJUDGED, AND DECREED** that Defendants' Motions for Summary Judgment are granted. Plaintiffs' Motion for Summary Judgment is denied. This case is dismissed with costs taxed to Plaintiffs.

The Clerk of this Court shall mail by U.S. Mail (first class) or personally deliver a copy of this filing to each party's attorney of record, or if a party is self-represented, to the individual party.

ENTERED this 29 day of July, 2016.


ROBERT E. LEE DAVIES, Senior Judge

CERTIFICATE OF SERVICE

Pursuant to Rule 58 of the Tennessee Rules of Civil Procedure, I hereby certify that I have mailed a copy of the foregoing Judgment to the parties/counsel at the addresses listed below, this the 8 day of August, 2016.

Maria M. Salas, Clerk and Master

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