

Landfill plan for Sartell gets reprieve from justices

By Todd Nelson

Plans to operate a former paper mill's waste site in Sartell as a commercial landfill are back on under a Minnesota Supreme Court decision seen as having significant implications for landowners and municipalities regarding nonconforming-use rights on owners' property.

In the long-running legal dispute, the court in *AIM Development LLC v. City of Sartell* concluded that AIM's plan to accept waste from more than one source represents continuation of its nonconforming-use rights and does not constitute an impermissible expansion of those rights.

The majority opinion, written by Justice Anne McKeig, further found that the lawful landfill use in place when a 1989 zoning change converted the former Verso paper mill's landfill into a legal nonconforming-use defined the scope of AIM Development's rights.

The July 15 finding reversed a Minnesota Court of Appeals ruling that agreed with the city's argument that the terms of a Minnesota Pollution Control Agency (MPCA) permit — which limited the landfill to accepting waste from the paper mill — applied to AIM Development's use of the property. Justice Natalie Judson concurred in part and dissented in part, with Justice Margaret Chutich joining in both.

The outcome in favor of AIM Development was a "pleasant surprise," the company's attorneys, Brian McCool and Joseph Cassioppi of Fredrikson & Byron, said in an interview.

'Landfilling is landfilling'

Ultimately "landfilling is landfilling," Cassioppi said, and doesn't change the land use fundamentally.

"There is some case law particularly from the federal courts in Minnesota and the 8th Circuit interpreting Minnesota law that was fairly restrictive on at what point changing what you're doing on a piece of property becomes an expansion of a nonconforming use rather than a continuation," Cassioppi said.

"We worked really hard in our briefing and at oral argument to show that at least with respect to this facility changing of the name on the side of the trucks driving in waste that isn't a material change," he said. "Landfilling is landfilling whether it's the Verso paper company dropping off waste at the facility or it's the city of St. Cloud bringing construction debris out there. It doesn't change the fundamental land use that's taking place."

Municipalities typically desire to get rid of nonconforming uses, McCool said, and have been "tightening the screws over time" in taking increasingly restrictive views of what owners can do with nonconforming uses, how they can continue to use their property and what would be an expansion of such uses.

"It feels like maybe a re-leveling of the playing field a little bit here between municipalities and landowners," McCool said. "This AIM decision gives landowners a new opportunity to say, 'Wait, we have some really valuable rights and they're maybe not as narrow as you were telling us they are.' That we think is ultimately [what] could be significant for a fair number of landowners in the state of Minnesota."

The court, however, remanded the case to the appeals court to decide whether a limit that the District Court set on the volume of waste that the landfill can accept is too low, whether AIM Development can use two previously unused landfill cells at the site, and whether AIM had abandoned use of the landfill because nothing had been dumped there for several years, according to Cassioppi.

The power of eminent domain, McCool said, also serves as a check on nonconforming uses.

Easier to regulate than buy

"If a government makes a decision that this use is not one that we can have in our community any longer, if we make that policy decision and the owner has a constitutional right to continue that eminent domain rights will trump that," McCool said. "They can always come in and buy. ... (But) it's a lot easier to regulate out a use



Minnesota Supreme Court Justice
Anne McKeig

than it is to buy away the use."

Attorney John Baker of Greene Espel, who represented the city of Sartell with Aaron Knoll, declined to comment. In Baker's supplemental brief to the appeals court, he argued that AIM Development's acceptance of waste in new places would constitute an impermissible expansion of the nonconforming use. Discontinuing a prior nonconforming use for a year or more extinguishes protections for that use under the state's zoning ordinance statute, Baker stated in the brief, and the landfill last took in waste eight years ago.

"The Supreme Court did not come close to ruling that AIM should win this case," Baker stated. "Its holding was especially narrow."

The dispute is about "more than the parties' individual interests and landfill regulation," and will have "significant, statewide impact," according to Susan Naughton, an attorney for the League of Minnesota Cities, who wrote in an amicus brief to the Supreme Court. "This case is more broadly about cities' authority to enforce their current zoning regulations — regulations that have been adopted to protect the health, safety and welfare of Minnesota residents."

The dispute centers on a land where a paper mill had operated along the Mississippi River in Sartell for more than 100 years.

In 1984 the mill's owner applied for and received an MPCA permit to construct a 70-acre storage and disposal facility for nonhazardous, nontoxic industrial waste on its property, according to court documents. That same year the city rezoned the proposed landfill site from a residential district to a light-industrial district. It then approved an ordinance allowing an MPCA-permitted landfill to operate in a light-industrial district and the landfill began accepting paper mill waste in 1987.

Landfill becomes nonconforming use

In 1989, though, the city removed landfills from permitted uses of land in light-industrial districts but the mill's landfill continued operating as a nonconforming use.

The mill stopped production after suffering significant fire damage in 2012, with AIM Development buying the mill and property containing the landfill in 2013. The MPCA approved the change in ownership and issued an amended permit in the company's name.

In 2014, AIM Development applied to renew the amended permit, seeking authorization to accept a wider variety of non-hazardous industrial waste from new sources and to build addition fill area to increase the amount of land used for disposal. The city opposed the application, arguing that the nonconforming use had been discontinued, because the landfill had not accepted waste for more than a year. It also argued that the proposal constituted an impermissible expansion of the company's nonconforming-use rights, contending that the only source of waste for the landfill could be the demolished paper mill.

The Court of Appeals agreed with the city that the MPCA permit in effect in 2012 when the fire destroyed the paper mill, which limited the source of waste to the paper mill, defined AIM Development's nonconforming use rights.

The Supreme Court, however, found that the city's 1989 zoning change that converted the landfill to a legal nonconforming use defined AIM Development's nonconforming-use rights, which would allow waste from other sources.

AIM Development's proposal to take in waste constitutes a continuation of the landfill's nonconforming-use rights, the court ruled, not an expansion of those rights. The company's actions to repair, replace, restore, maintain and improve the landfill demonstrated a continuation of that legal nonconforming use.