

ORAL ARGUMENT – 11/6/01
00-1015
BOARD OF ADJUSTMENT V. WENDE

ROBERTSON: The question in the case is, did Mark Marietta have nonconforming use rights under the City's Unified Development Code, which is our zoning code. And it is in large part, a case about definition and definitions in the construction _____.

O'NEILL: If we were to believe that acquiring operations do constitute a construction or a proposed construction, and I understand you don't agree that that's the case, but if we were to find that like a parking lot or something else that acquiring could be within the definition of a construction, then would you agree with the CA that your reading of the definitional piece of the ordinance would read out of existence 35-3067?

ROBERTSON: No, not at all. 35-3067 is an extra limitation and an extra requirement of nonconforming use owners when they intend to complete construction on newly annexed property or start construction on newly annexed property. The director of the board said that this was not construction. It did not need requirements. It's digging the hole. It's the opposite of construction.

O'NEILL: But the premise to my question was, if we were to find that acquiring was construction, then would you agree with the CA that your construction of the definitional piece of use verses nonconforming use would read out of existence 35-3067?

ROBERTSON: No, I still don't, because it's misread. They picked out intention. It's the method in the way the CA reached their decision. They picked out the word intention, _____ subjective intention as constituting a nonconforming use, which they did not like, and which may be agreed with them by most all people.

Intention is not the basis of the nonconforming use of Martin Marietta in this case. It's a hypothetical situation.

O'NEILL: But I believe you said in your brief that you think planning would fit intention.

ROBERTSON: No, there was no planning here either. Planning may evidence intention. But what we're talking about is leasing of property for a particular use, which is covered by the definition in use and nonconforming use of the code.

O'NEILL: Are there any parameters to your interpretation of what nonconforming use is?

ROBERTSON: Yes. I agree that subjective intention alone should not support a nonconforming use. Absolutely.

O'NEILL: And that's why I thought your brief said that it has to be planned. I thought I read that.

ROBERTSON: I think that's what the court said. They said, if you are planning to do something, you're intending to do something. And what we're talking about is a person who buys a piece of property or leases a piece of property, and then all of a sudden for no specific purpose at all the city annexes the property and he says, oh well I intended from the very beginning to put a junkyard there. So therefore I have a nonconforming use. No, there has to be a cutoff. I agree with that. But is not met in this case. We have an objective act: going out and buying a lease to continue operating a 60 year old quarry here.

O'NEILL: I'm still not sure I understand your answer to my first question. If we find this is construction, if we disagree with the director below that acquiring is construction, tell me how then does 35-3067 then fit into the scenario, because if we do consider that construction, then under your argument we would read out 35-3067?

ROBERTSON: No, I don't think so, because that's not the purpose of 35-3067. 35-3067 is merely a statute that requires someone who is going to do construction to go through that process.

O'NEILL: That's what I'm saying. If we consider this a proposed construction under the lease, would you then agree that you would have to go through, because it's a proposed construction, 35-3067?

ROBERTSON: I think we probably would. But it is not construction under the code.

O'NEILL: So your argument does to a certain extent hinge on our interpretation of what a proposed construction would be?

ROBERTSON: I don't think the result of the case depends upon it. Not at all. Not my argument. No. If you hold that it is a construction, this is merely a procedural faux pas that Martin Marietta should have gone through 35-3067. It doesn't change the fact of nonconforming use.

O'NEILL: So you would say then you would get another chance to go do it through those procedures?

ROBERTSON: I'm not so sure. I haven't thought about what would be the posture of the case, and I'm not so sure what you're going to rule, so I can't answer the question.

O'NEILL: Under the CA's remand to reconsider two particular items, does the amended statute apply to the reconsideration?

ROBERTSON: You mean 43.002?

O'NEILL: Yes.

ROBERTSON: No. I don't think it does at all. 43.002, is a prohibition statute against cities. It doesn't create nonconforming uses. It doesn't use the word or the term nonconforming uses. 42.003 merely says, cities cannot prohibit a continued use in the event of annexation if there is a certain set of circumstances.

O'NEILL: My understanding is, you think you would be entitled to nonconforming rights on these tracts under 43.002(a)(2).

ROBERTSON: No, that's what they argue. I don't agree with that at all.

O'NEILL: You don't think that would then allow you nonconforming rights?

ROBERTSON: Probably would. It may do that. But I think the court has to consider 43.002 as a very - it doesn't apply to this case anyway.

O'NEILL: But if it did on remand under both of your constructions, you would get a nonconforming use?

ROBERTSON: I don't think because of 43.002. I think because of the definitions of use and nonconforming use in the code. Because Martin Marietta had a lease, that's why.

OWEN: I'm trying to understand interplay between 35-3067 and the other sections. If I had bought property in this area that was about to be annexed and intended to build a home on it. I could have filed I supposed under the same section that Martin Marietta did and said I planned to build a home there. But under 35-3067, I couldn't actually construct a new home on it unless within 60 days I also complied with 35-3067. Is that correct?

ROBERTSON: 35-3064 is the registration of nonconforming uses instructions. That is general, and I think it applies to annexations, and I think it also applies to rezoning amendments when there's a nonconforming use.

OWEN: My question is, let's say I bought this property specifically to build a home on it. I had my plans, and I bought this property. It was annexed by the city and it was zoned something other than residential. So I filed for my nonconforming use under 35-3604. But I can't actually go ahead and build my home on it unless I also file under 35-3067.

ROBERTSON: I believe that's right. And the reason being is that the city wants the building permits in these newly annexed areas, or whatever buildings are done, that they be up to code. And there's a very good reason behind that.

OWEN: But I would have to do it in 60 days.

ROBERTSON: I think that's correct.

OWEN: So I might have a nonconforming use of residential property, but that's meaningless because I didn't also meet the 60 day requirement?

ROBERTSON: I believe that's correct.

HANKINSON: But couldn't that lead to inconsistent results since if you filed timely under 35-3604, then you're going to be entitled to a nonconforming use, and yet 35-3067 requires an application that must be approved. Don't you already have a nonconforming use approved?

ROBERTSON: Yes, you have a nonconforming use of what is there.

HANKINSON: I don't understand how that works in response to the questions that Justice Owen is asking.

ROBERTSON: You have a nonconforming use of the property, but if you intend to build, you have to file follow the city ordinances, because it is now in the city.

HANKINSON: I understand. But for example, under 35-3067(b)(1) proposed construction, proposed construction may be completed upon a finding by the zoning commission that sufficient evidence exist that planning for the proposed use was in progress prior to annexation. Which reads to me like one of the requirements for a nonconforming use that would be permitted. Doesn't that render 35-3604 meaningless?

ROBERTSON: No. I do not believe it does. It doesn't in our case because we weren't going to construct something. But let's assume that we were going to construct something. We would have to follow 35-3067.

HANKINSON: So you don't have to go under 35-3064 at all?

ROBERTSON: No. I don't believe so. You could perhaps do both. I haven't really thought that through. Because in our minds, we're not doing construction. We are digging a hole.

O'NEILL: Let's say you're building a parking lot there. Would you be required to get any permits from the city?

ROBERTSON: You probably would because they have some rigid construction on parking lots like lighting and safety and drainage.

O'NEILL: Are there any permits that you would need under this zoning regulation in order to quarry there? Do you need to build roads in there?

ROBERTSON: No.

O'NEILL: Do we know that from the record as a matter of law?

ROBERTSON: I think you know it just from what is in the record.

O'NEILL: And is it because there are no building or structure permits that are required that you believe this is not a proposed construction?

ROBERTSON: That's right.

O'NEILL: I can picture a scenario where you would need to construct things out there to allow you to quarry that could come within a city's permit authority.

ROBERTSON: That's right. But the city would not have required it in this case because the director of building permits said that it was not necessary.

O'NEILL: That's in the record? There are no permits necessary to quarry?

ROBERTSON: Oh, yes. Absolutely. For a nonconforming use.

O'NEILL: Well that begs the question.

ROBERTSON: But if it existed before there are no permits. Of course if I went out and bought a piece of property and it was zoned residential right now and I said I want to do a quarry on it, well yes I would have to make an application for a zoning change.

OWEN: If you were to rezone this property would the quarry be a nonconforming use? Let's suppose it was not a nonconforming use now. If you were to rezone the property would it be a nonconforming use then?

ROBERTSON: Well it has been rezoned. As you will notice they have...

OWEN: No, it's been rezoned to quarry. Now it's rezoned to residential. Would it be a nonconforming use then?

ROBERTSON: It's now zoned for a quarry.

OWEN: Let's suppose that it was not a nonconforming use when it was zoned as a quarry. It's now a quarry. It's zoned as a quarry. You rezoned to change it to residential.

ROBERTSON: You would have to go before the planning commission and get a rezoning.

OWEN: And so it is not a nonconforming use if you were to change the zone? If the city changed the zone tomorrow to residential will this quarry be a nonconforming use?

ROBERTSON: It would have a nonconforming use with 52 restrictions on its use. That's a point I want to make about mootness here. Martin Marietta does not have nonconforming use rights. Nonconforming use rights are immutable. They're unassailable if you had them. What they had before the CA acted was absolute right to use this as a quarry without any restrictions on them.

What have they got now since what the CA did? They don't have those nonconforming use rights. The present ordinance can be attacked by anybody, including the respondents within 3 years under the new validation statutes. And if it's void for any reason like spot zoning or like not the proper notice was given, it can be attacked even after 3 years by collateral attack. And if that were to happen and the ordinance was set aside, then it would be too late for them because you have to file these nonconforming use rights in one year.

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RESPONDENT

FLECK: This has been a hotly contested case. There's no question about that. But it's not hotly contested anymore. And that's the reason we have presented to this court our position that the case is moot.

OWEN: What about his argument that if the ordinance was set aside for some reason, or what if the city decided to rezone and change this from a quarry zone to something else, where would that leave Martin Marietta?

FLECK: They would have nonconforming rights, or they can apply for nonconforming rights with the director of building inspections, because they are conducting quarry operations on the property.

HECHT: They have a CA opinion that says they don't have nonconforming rights.

FLECK: Yes, but...

HECHT: How do they get out of that?

FLECK: Because they got the property rezoned. The property has been rezoned since the CA's opinion came out and it's been rezoned for quarry district zoning. So they are allowed to do quarrying on the property. They have full rights to do that.

OWEN: But it gets rezoned again. How does that affect their rights?

FLECK: At which point they've been using the property as a quarry. They would be

conducting a nonconforming - the use that they would be using on the property would not conform with residential property use. And then they could proceed and apply for nonconforming rights on the property pointing out all of the different things...

OWEN: Are there additional restrictions that would apply to them under that scenario that don't apply to them now if this is a nonconforming use now?

FLECK: I don't agree with that position. And the reason I don't agree with that position is I think there has to be some definition of what their nonconforming rights are. Certainly they have defined them vis-a-vis their registration. Certainly the San Antonio city code defines them, vis-a-vis what it considers quarry operations. Simply because someone has nonconforming rights to conduct quarrying on a piece of property does not mean that they have an unfettered ability to use their property in a way that could harm or damage or somehow cause difficulties for others around them.

O'NEILL: What greater protection would they be afforded in this instance by nonconforming rights?

FLECK: I don't believe they are afforded any greater protection. That's the reason I think - certainly the quarry zoning that was applied to this property is under what's called the special use permit. There are certain restrictions that have been applied under this special use permit.

OWEN: It would not apply if it's a nonconforming use?

FLECK: It would not apply. That's correct.

O'NEILL: So they would have greater rights if it were determined to be a nonconforming use or greater protections.

FLECK: I'm not so certain of that.

O'NEILL: If you're operating under a special permit and it's rezoned are you entitled to nonconforming use rights as a preexisting use if you're operating under a special permit?

FLECK: Yes you are. You would be in this case. They could go to the city of San Antonio building inspector, make their application and say, we've been using this property as a quarry, and these are the different ways we've been using it, and we're entitled to continue using it as a nonconforming use, because it's been zoned previously as a quarry. Now that it's residential, we are not in conformity with the zoning and as result we should be allowed to continue that use.

HECHT: So you contend now that because of the rezoning, Martin Marietta has all of the rights that they claim in this case?

FLECK: I'm not exactly sure what additional rights they claim.

HECHT: So you're not going to concede that?

FLECK: No.

HECHT: So it doesn't sound like the case is moot if you're not going to concede that.

FLECK: I don't think that they could do anything more on the property than they are doing now. If that's the question you're asking.

HECHT: No, I'm asking do they have all the rights they claim?

FLECK: I'm not certain of that. I can't say with certainty because I don't know what additional rights they are claiming under their nonconforming use rights. And I think that actually goes to their initial registration. I think you have to compare their initial registration for nonconforming rights with what's statutorily allowed under the special use permit for a district zoning that they were subsequently able to obtain.

But we don't believe that's the only reason this case is moot. We believe that this case has been rendered moot by the fact that we've settled the controversies that we have with Martin Marietta concerning the expansion of their quarry.

HANKINSON: If this case is now moot, then you're asking us to dismiss the case as moot?

FLECK: Yes.

HANKINSON: And that also requires us to vacate the CA's opinion in connection with doing that because the case in its entirety has gone moot while it was still pending in court. Isn't that what we would have to do?

FLECK: I'm not certain about what the procedural mechanism is for that. So we believe that there are two reasons, these two reasons that make this matter moot. For our purposes we've been satisfied. The controversies that we have with Martin Marietta about the expansion of their quarry have been addressed. Moreover, we think they've been further addressed by recent enactment of the legislature. Now I know it was brought up the question of whether or not if on remand this was sent back to the board of adjustment would §43.002 of the Texas Local Gov't Code apply in this situation? I don't believe it would since that was enacted and took effect Sept. 1, 1999, and these properties were annexed and zoned in 1998. However, be that as it may, the legislature has addressed the issue and the question of planning and intent to use a property in a particular fashion, and to protect nonconforming rights. As a result, we don't think there's any continued need to address that issue in this forum since the legislature has very ably addressed it in another.

So as a result, we think that again it's moot for the three reasons that we've set forth.

HANKINSON: You say you've settled your difference with Martin Marietta. Have you settled this case?

FLECK: No.

HANKINSON: Well what do you mean when you say you settled your differences? Is there an agreement? Have you all agreed to keep his case alive? What does that mean?

FLECK: There's been two settlement agreements entered into between Martin Marietta and the City of Shavano Park. And what those settlement agreements involve: one is a monetary cash settlement to settle a couple of related suits that have been involved - a nuisance suit and a federal lawsuit brought by Martin Marietta against some individual council members; the other involved, however, an operating agreement, which places significant restrictions upon the ability of Martin Marietta to conduct certain quarrying operations on the expanded properties. And specifically that agreement references the existing litigation between the parties.

HANKINSON: Are there releases contained in it with respect to this litigation or does it in any way touch upon what the rights of the parties would be in this litigation after those agreements?

FLECK: No it does not. We believe that it settles as far as we're concerned any controversies that we may have...

HANKINSON: Including this lawsuit?

FLECK: Yes.

O'NEILL: And so if we were to find nonconforming use as they have requested that we do, then they would still be bound by the parameters of the settlement agreement is what you're saying regardless of our finding?

FLECK: Yes, regardless of your finding.

HECHT: Well a settlement agreement takes two as I understand it. One side says well I'm fine, and the other side says I'm not, then it's not settled. And we're trying to understand what's the not about it?

FLECK: For us, as far as we are concerned...

HECHT: Well I'm sure that's true. But they are not. And can you explain why they should be even though they are not?

FLECK: They should be satisfied because they've gotten the zoning they need. They've been allowed to quarry the property without any continued opposition from the City of Shavano Park.

OWEN: Would you be willing to sign an agreed judgment then that says, this is a nonconforming use _____ they take the CA opinion?

FLECK: I don't know that we would be willing to...

OWEN: Why not if it's settled? If it's moot? If they are not claiming broader rights why wouldn't you be willing to agree to that?

FLECK: I can't say whether we would be willing to agree to that or not. I think we probably would. It hasn't been something we've actually considered. This initially was in the settlement agreement as we originally contemplated. It was taken out of the settlement agreement at the request of Martin Marietta. And as far as we were concerned, it didn't matter one way or the other whether it was in the settlement agreement. Because we were satisfied.

O'NEILL: Can you give me your argument as to why you think this quarry would be a proposed construction?

FLECK: For one thing, it's set forth very clearly in their own registration of nonconforming use. They talk about all sorts of structures which they believe constitute quarrying. They talk about an asphalt plant. They talk about concrete batch plants. They talk about rock crushers in their registration.

O'NEILL: And those would require building permits?

FLECK: I believe they would.

O'NEILL: And that's all in the record?

FLECK: Yes.

HANKINSON: Are the findings of fact in this case adequate here for appellate review of the issues that are presented?

FLECK: We think they are, yes.

OWEN: You say the rock crushers would require permitting. Is that from the city or from the TNRCC?

FLECK: That would be from the TNRCC.

OWEN: Are there any city permits that would be required to operate this quarry?

FLECK: I don't know the answer to that question.

OWEN: So that's not in the record as far as you know? You didn't put in the record anywhere that there would be some permits required to operate this as a quarry?

FLECK: No, I don't think I discussed that issue specifically. I think I may have referenced the fact that they do talk about concrete bash plants, asphalt plants, and things of that nature.

OWEN: But those are TNRCC regulated, not city regulated?

FLECK: I believe that they would require city permits to be built.

ENOCH: The only thing I heard Mr. Robertson say was that having it rezoned to permit quarrying as opposed to an acknowledgment that it was a nonconforming use when the zoning was applied to it is that this rezoning is now subject to challenge for several years for any number of technicalities that might ultimately leave them without the authority to quarry. Whereas, had this been declared a nonconforming use at the time the zoning was applied, they would not be subject to losing their ability to quarry. It seems to me I understand that to be their problem. Their problem is that if they concede that the case is moot now, they open themselves up to losing the authority of the quarry where they are because the only authority now to do it is under a zoning statute. So I understand that's what they are disagreeing with why this case is moot. So why is that not a problem for them?

FLECK: I don't think it's an issue. Again it's a justiciability issue. I don't think that's an issue that's right or even necessarily before the court at the moment, or that it ever necessarily will be. It's a hypothetical question in nature.

ENOCH: But under the posture of the case as it currently stands, do you agree that having property now zoned to permit quarrying is a different interest they now have from an original declaration of quarrying under a nonconforming use when new zoning is applied?

FLECK: No, I don't think that's true.

ENOCH: They would be subject to the same risks in the future whether it had been a nonconforming use at the time the zoning was acquired or when they changed zonings that now permit quarrying?

FLECK: I think there's got to be some definition and some parameters placed on even what the nonconforming use is. And I think those are going to be determined by reference to the city code, just as the zoning itself is determined by reference to the city code. I don't know how it would

be otherwise regulated in any form or fashion.

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REBUTTAL

ALEXANDER: On merits, let me start with the question that Justice O'Neill has, because I think it frames it up. If the only reasonable interpretation of §35-3067 is that we did not jump through the proper hoop, we lose. Two, if the only reasonable interpretation is that 35-3067 does not apply here, which is our position and the position that the board of adjustment took and the director of building inspections testified to, then we have a collision between the plain meaning rule and the absurd results principle of statutory construction.

O'NEILL: And that was where I was going with this. So if we do find proposed construction, then that sort of wipes out your argument.

ALEXANDER: We're dead.

OWEN: He said that this would require permits from the city to build asphalt plants. Is that true or not?

ALEXANDER: Well the key here, and if you look at 35-3067, the language that is used in there and this is the reason that the director of building inspectors came to what he did was building permits. We're talking about building structures that require building permits. He testified that there were no permits of that type that were required for this operation. So we don't fit under 35-3067.

HANKINSON: You can build an asphalt plant without a building permit?

ALEXANDER: Well the asphalt plant/rock crusher yes. That's correct. Those were actual items of personal property.

O'NEILL: How do we know that? How do we address this? Is there anything in the record that we can hang our hat on to say that for an asphalt plant you do or do not need city permits other than a director's...

ALEXANDER: I think that all you can rely on, and perhaps what we need to do is to provide you with that cite, is the testimony of Camargo that no building permits are required here.

O'NEILL: But other than an individual's opinion as to that, is that all we have to go on?

ALEXANDER: Maybe the way to look at it is in terms of burden of proof. We don't have any evidence to the contrary. We do not have any evidence in the record that building permits as required under 35-3067 are required for anything that we are doing on this property. And the way it sets up in terms of the shifting burdens, they have the burden if they were challenging this in front

of the board of adjustment to establish that 35-3067 applied and killed us. And they didn't do it. There is no evidence in the record that a building permit is required.

O'NEILL: But their argument in response to that is going to be you were required to get nonconforming use to go under the proper provision, which you didn't do.

ALEXANDER: Well and our answer to that is absolutely we did. If you look at the reply brief on the merits, at pages 18 and 19, that's where the testimony is laid out from Camargo. And he explains that in the circumstance that we have here, as he understood it, and as there is no evidence to contradict it, no building permits were required for this particular operation; therefore, we did not fall under 35-3067. We fell under registration 35-3064.

HANKINSON: _____ that's the legal conclusion. Why shouldn't that have been a matter of fact in terms of developing what types of buildings were going to be done so that the appropriate ordinances could be applied to make that determination? That sounds like just nothing more than a bare legal conclusion. I've looked at the building codes. I don't think you have to do anything.

ALEXANDER: Again, I think that it was competent testimony from the very individual whose job it is to issue building permits. And it's a huge record. But he talks about, you know, we had 15 people out there crawling all over the property and these people did not require anything that would bring them within the ambit of 35-3067.

OWEN: But they didn't even make that argument did they, that you should have gone under 35-3067, and you didn't, so you're out?

ALEXANDER: They do and they don't. Basically what happened was, the curious thing about this is that the CA opinion did not say that the literal application of the statute kills us. They merely said that the result of the literal application produced an absurd result.

OWEN: I understand the difference. The construction problem is one issue, but they never did argue that to quarry out there you've got to - it's proposed construction and you have to - you should have gone under 35-3067. They never made that argument.

ALEXANDER: I think that's correct, and they certainly didn't establish that as part of their attack on the registration, which is their burden in order to obtain something like an 11-1 vote.

Look at local gov't code §51.003. On the mootness point there is really two things. One on nonconforming use, we have a greater bundle of rights than zoning because of the restrictions. That's point one.

OWEN: And what are those? Can you be specific?

ALEXANDER: I think that we have now attached the zoning ordinance to it. And special

blasting permits, special hours. I can't remember what all it is. But the more fundamental one, and the reason I want to talk about 51.003, is that for a period of three years anyone who is effected by this rezoning from residential to quarry district can come in and attack it. So for a period of three years our rezoning to quarry district is vulnerable to attack and litigation. The settlement doesn't settle that because it is only binding on - (a) it doesn't cover this case; (b) it is not of course binding on anybody who is not a party to the settlement.

HANKINSON: If this lawsuit ends with Martin Marietta having nonconforming use rights, then will Martin Marietta then proceed under those rights or must he proceed under the _____ rights and obligations tied to the zoning?

ALEXANDER: I cannot speak for my client as to whether if it's confirmed nonconforming rights it will or will not continue to comply with the use restriction restricted placed on the zoning.

HANKINSON: Legally what must it do?

ALEXANDER: Legally, he would not be required to do that I don't think, because it would have whatever rights you obtained by nonconforming rights. As a practical matter, as a matter of comity to the city, it may well elect to continue to operate with those restrictions. But the key here, I think, and I think that the more fundamental point on mootness is, that for a period of three years, we are vulnerable to having this zoning quarry district revert back to residential.

HANKINSON: Then do nonconforming use rights once you have them do they then withstand _____ zoning change or any restrictions that may be associated with zoning for all time? So once you have nonconforming use rights, then the city just gives up control over that piece of property forever?

ALEXANDER: It gives up control of that property with respect to zoning modifications. It does not give them up with respect to other things that are ordinarily available: nuisance; failure to comply with TNRCC regulations; and other - basically pretend that the annexation had never occurred. What could this quarry district do and not do? There are restrictions that are in fact placed on quarry districts that are near cities. And what we're saying is that the mere _____ of the annexation as a practical matter ties the hands of the city beyond that in terms of impacting that with the zoning ordinance. But we would still be stuck with whatever restrictions we would otherwise have.

HANKINSON: But Martin Marietta has in fact settled all its disputes with the opposing parties to this litigation?

ALEXANDER: No. They did not settle this case. They settled a nuisance claim and some claim for defamation, or something like that. But this case is left out of the settlement.

ENOCH: Several questions have said it looks like Mr. Fleck's position is reasonable

reading of the statute. You've said if that's a reasonable reading statute, you're dead.

ALEXANDER: No. Only reasonable reading.

ENOCH: The second point you said if the statute is read according to the position that the board of adjustment necessarily takes, that leads to a collision of absurdity verses a determination and then you stopped. You said how come you would lose . Now tell me how you win?

ALEXANDER: The third one is, if there are two reasonable interpretations. In other words their interpretation is reasonable. Our interpretation is reasonable. Then what you need to look at is Berry v. State Farm case, which is the case that says if a statute can be reasonably read as the agency has ruled and that reading is in harmony with the rest of the statute, then we are bound to accept that interpretation even if other reasonable interpretations exist. And in this case, I think that the amicus brief points up why we have that rule.

Now if there are two reasonable interpretations what is the harm of going with the interpretation given by the enforcing agency? There is none really. There is harm though if we don't go with it because we have builders/developers who rely on those interpretations. And that's one of the reasons that we have the rule.

O'NEILL: Is the settlement agreement a rezoning?

ALEXANDER: No.

O'NEILL: Why not? Because I understood Mr. Fleck to say it's been rezoned now.

ALEXANDER: Two independent things happened. The city rezoned; and there was a settlement agreement with Shavano Park. Those were independent actions.

O'NEILL: But there has been a rezoning?

ALEXANDER: There has been a rezoning.

O'NEILL: Why doesn't that moot this controversy because then there won't be any reverting back? If anyone tries to attack the rezoning, you've got nonconforming use.

ALEXANDER: No, we don't. Let's assume that somebody comes in and says, we are attacking - this property was zoned residential, I'm a nearby resident, I'm not a part of this lawsuit, I am attacking this rezoning to quarry district. And let's assume they win. What do we have?

O'NEILL: How long do they have to attack?

ALEXANDER: Three years. Local Gov't Code, §51.003. So for a period of three years,

Martin Marietta is vulnerable to having this - what they now have, the ability to revert back to residential. And the settlement agreement doesn't indemnify us.

O'NEILL: If it's been rezoned and it's attacked, they cannot come in and say we have a nonconforming use now based on the rezoning?

ALEXANDER: Correct. Let's assume we don't have nonconforming use because you've said it's moot. So we wiped out everything. We don't have nonconforming rights. We do have our zoning quarry district. We're out there happily digging dirt. And then somebody comes along and attacks it and wins. We're back to residential. And we've lost it all, and they have not indemnified _____ in the settlement agreement. The millions of dollars at risk are gone.

ALEXANDER: Where does it say 3 years?

ALEXANDER: Local Gov't Code, §51.003 says the governmental act or proceeding of a municipality is conclusively presumed as of the date it occurred to be valid if (a) the third anniversary of the effective date of the act or proceeding has expired; and 2) a lawsuit to annul or invalidate the act has not been filed on or before that third anniversary.

HANKINSON: When will the third anniversary be for this?

ALEXANDER: From the rezoning, which occurred three months ago. So for 3 years, as we watch the calendar, we are looking at our rezoning being vulnerable. And if it's attacked, if any lawsuit is filed before the third year and ultimately they win, then once again we are dead.