2011 IL App (2d) 100654-U
No. 2-10-0654
Order filed December 6, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE COUNTY OF BOONE,	)	Appeal from the Circuit Court
	)	of Boone County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-CH-214
	)	
DONALD K. BUSCH and	)	
MICHAEL D. BUSCH,	)	Honorable
	)	Eugene G. Doherty,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justice McLaren concurred in the judgment.
Justice Bowman concurred in part and dissented in part.

ORDER

Held: The trial court did not err in finding that: (1) defendants' use of their property for a quarry was a legal nonconforming use predating the relevant ordinance amendment; (2) their use was not abandoned; and (3) the use was not impermissibly expanded. Affirmed.

¶ 1 Plaintiff, the County of Boone, filed a complaint for an injunction against defendants, Donald K. Busch and Michael D. Busch, seeking to enjoin defendants from operating a quarry on their property in violation of section 4.7.2(A) of the Boone County Zoning Ordinance (the Ordinance) (Boone County Zoning Ordinance § 4.7.2(A) (eff. July 9, 2008)). Following an

evidentiary hearing, the trial court denied plaintiff's request for injunctive relief, finding that defendants possessed the right to a legal nonconforming use of the property, that defendants had never abandoned that use, and that defendants had not impermissibly expanded that use. Plaintiff appeals, arguing that: (1) the trial court's finding that defendants established a legal nonconforming use was against the manifest weight of the evidence; (2) even if a legal nonconforming use had been established, the trial court's finding that it had not been abandoned was against the manifest weight of the evidence; and (3) the court committed an error of law and fact in finding that defendants had not expanded the scope of the nonconforming use. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On May 12, 2009, plaintiff filed a complaint for an injunction against defendants. The complaint alleged that defendants, the owners of property located at 1297 Bloods Point Road in unincorporated Boone County (the property), were operating a quarry on the property, which is zoned A-1, in violation of section 4.7.2(A) of the Ordinance, which provides that: "The extraction of earth materials (gravel, peat, sand and stone) may be allowed as a Special Use in any I-2 District and shall follow the procedure for Special Uses as specified in Section 2.7 or this Ordinance, as well as the provisions of this Section 4.7." Boone County Zoning Ordinance § 4.7.2(A) (eff. July 9, 2008). Plaintiff asked that defendants be enjoined from operating a quarry; that defendants be required to remove all quarry equipment from the property; and that defendants be fined $500 per every day that they remain in violation of the Ordinance, plus costs.

¶ 4 On August 7, 2009, defendants raised an affirmative defense. Defendants argued that the property had been used as a quarry continuously since the 1930s, prior to the adoption of the

Ordinance, and thus the quarrying of the property is a legal nonconforming use, which is allowed under section 4.4.3 of the Ordinance. Boone County Zoning Ordinance § 4.4.3 (eff. July 9, 2008).

¶ 5 A hearing took place on March 15, 2010. Plaintiff presented the following relevant evidence. Drew Bliss, a senior building inspector for the Boone County building department, testified that he inspected the property (from an adjoining road) on March 14, 2009, in response to a complaint about quarrying activities. He observed heavy machinery, such as backhoes and front-end loaders, moving sand and gravel. Defendants had not obtained a special use permit from the county, which is required for this type of activity. Defendants could not have applied for a special use permit, because the property was zoned A-1, not I-2, which is the classification needed to be eligible for a special use permit. Bliss met with defendants after sending them a violation letter, at which time defendants "admitted they were using [the property] as a quarry; that they were hauling sand and gravel; that they were not doing any blasting, only screening; no washing." Defendants also stated that they used the property as a "borrow pit" from time to time. No soil, air quality, geologic, or traffic studies were conducted of the property.

¶ 6 Diane Zimmerman, a zoning officer with the Boone County building department, testified that she visited the property in November 2008 in response to a complaint. She met with defendants, who told her that they were operating a quarry for their own landscaping business. She observed excavating machinery and piles of sand and gravel.

¶ 7 Kenneth Freeman, a Boone County board member, testified that he was born in 1961 and had lived next to the property since that time. He had witnessed the use of the property on a daily basis. Freeman was currently an operating engineer with William Charles Construction and had worked for Plote Excavating. In 1978, Freeman worked for John Vowles, the "farmer"

who owned the property at that time, baling hay and straw. From 1979 through 1986, he worked for Charles Lee & Sons as an operator and a truck driver. Charles Lee & Sons had a quarry. When he worked for Charles Lee & Sons, Freeman went onto what later became defendants' property about 15 to 20 times per year to "haul out the bank run rock that was there." At that time, there was no processing, stripping, sorting, screening, crushing, or washing of materials; "[t]hey just dug into the bank." There was no scale on the property at that time. Freeman stated that the property was always a farm with a "borrow pit" that they would haul "bank run out of." "Bank run gravel" is "sand and gravel, but it is not a processed sand and gravel. It is dug right out of the side of a hill." Freeman would haul out the material and take it to another quarry owned by Charles Lee & Sons for processing. The only piece of equipment that he had observed on the property, prior to defendants' purchase of the property, was an end-loader.

¶ 8 Freeman testified that, in the late summer of 2009, he noticed that the use of the property had changed, and he made a complaint to the zoning officer. According to Freeman, he noticed a lot of dirt being relocated and stripped; he saw materials being placed in piles. He saw "numerous pieces of construction equipment," such as an "excavator and dozer and off-road truck and some front-end loaders." He saw a permanent scale and a screening plant. Based on his experience, he stated that the property was now being used as a gravel pit providing processed materials. He stated: "the property has been stripped and some materials have been processed. Basically, it has been turned into—from what I can tell, it has been turned into an aggregate sales." He testified that, prior to the summer of 2009, he had never observed any relocating and stripping of dirt or sorting of materials. He had never seen materials being stored on the property. He had never observed any large machinery for excavating. On cross-

examination, Freeman acknowledged that he had worked for William Charles Construction for the past 19 years and had not been on the property in that time.

¶ 9 Defendants presented the following relevant evidence. Beth L. Jodun testified that she lived on the property from her birth in 1954 until 1972. Her parents were John and Helen Vowles. Her parents had owned the property until her mother passed away on December 31, 2007. According to Jodun, her parents grew crops and raised various animals on the property. There were gravel pits on the back part of the property. She did not remember a time that the gravel pits were not in use. Her uncle, Ivan Vowles, had been a road commissioner, and he removed material from the property. He would drive a dump truck to the gravel pit and fill the truck with gravel. Jodun testified that she was familiar with Charles Lee & Sons, because they were her neighbors and they leased the gravel pit from her parents. The lease ended in June 2008.

¶ 10 During Jodun's testimony, defendants attempted to introduce into evidence a copy of an agreement for a warranty deed for the property. Jodun testified that she had found it among her mother's things after her mother passed away and that it showed the transfer of the property from the sellers, Alfred Wilson and Beatrice Wilson, to Jodun's parents. The court reserved ruling on its admissibility and, at the close of the hearing, allowed its admission into evidence. It is not in the record; however, the court referenced it in its order as follows:

> "Defendants' Exhibit 3 is an Agreement for Warranty Deed executed June 4, 1949, relating to the subject property. The purchasers were John and Helen Vowles. The document suggests that there was quarrying activity of some sort at about this time, as the document notes that '[n]o gravel shall be sold by the sellers from said premises from the date of this agreement without the prior consent of the said buyers.' "

¶ 11 Donald K. Busch testified that he owned the property with his son, Michael. Donald learned of the property from an auctioneer, who told him that the property "had a quarry, a gravel pit." On the day that the property was up for auction, Donald inspected the property and saw two gravel pits and an access road located on the south end of the property. The pits were about 40 to 50 feet deep. He noticed that "[t]hey ha[d] been working the pit." He could tell that they had been excavating the property, because he saw sand and tire marks. He also saw piles of materials. His intention when he purchased the property was to continue to use the quarry. After purchasing the property, they installed a grain bin to store grain. They also installed a scale house and a scale to weigh grain, rock, and sand. They closed the access road located in the back of the property and began to use Bloods Point Road. They have continued to extract gravel, dirt, and sand from the property. They do not perform washing or crushing; however, they do use a screening machine to screen the earth and separate the material.

¶ 12 Michael D. Busch testified that he owned the property with his father, Donald. On the day the property was auctioned, Tom Lee and Cary Lee (of Charles Lee & Sons) showed him the gravel pits and told him that they were leasing the pits. They "were leasing the property to take out material." Michael saw tracks left by front-end loaders and piles of material that had been extracted from the pits. In court, he identified pictures of material that had been extracted by the previous operators of the quarry and material that had been extracted by his company after purchasing the property. When Michael began mining the pits for materials, he brought in excavation machinery such as end-loaders, bulldozers, dump trucks, and excavators. He testified that no blasting or washing of materials had occurred on the property. He has not performed crushing, but crushing has been done on the property. They also installed a permanent scale.

¶ 13 Charles Klinefelter testified that he had leased the farm portion of the property from the previous owners, John and Helen Vowles, from 1979 through 2008. He raised corn, beans, and hay. He also rented buildings on the property for his animals. After defendants purchased the property, the buildings were knocked down. While he was on the property farming, he observed activity taking place in the gravel pits. He saw loaders and trucks taking out sand and fill from the pits. He stated that, from 1979 through 2008, "[t]hey might haul out of there steady for a week and then they might be gone for a month." He never saw anything during that time to lead him to believe that the gravel pits were not being used. After defendants purchased the property, he saw a scale and screening of materials.

¶ 14 Stan Fowler testified that he had been employed by Charles Lee & Sons in the early 1980s and had worked full time for them for 14 years. He became road commissioner in 1992 and, since that time, he continued to work part time for Charles Lee & Sons. When employed by Charles Lee & Sons, Fowler worked on the property, running a loader and hauling material, "mainly bank run, sand and gravel, stone, mixed." One time in the 1990s, Fowler also set up a screening plant at the site for Charles Lee & Sons. He cannot recall a time that Charles Lee & Sons was not using the property; they used it every year to keep it active. After 2000, Fowler hauled rock out of the property for Charles Lee & Sons.

¶ 15 Richard Book testified that the rear portion of the property abuts his property, where he has lived for almost 20 years. When he first moved in, his children rode their bikes on the property until Helen Vowles complained. When he went to investigate, he saw big holes in the ground. He testified, "It looked like a quarry to me." About 10 years ago, Charles Lee & Sons installed a road on Book's property to access the quarry on the property. He allowed them to install the road on his property. He saw trucks "pretty much" consistently traveling to and from

the property, such as dump trucks, 18-wheelers, and loaders. He has no knowledge of Charles Lee & Sons ever discontinuing their use of the property before it was purchased by defendants in 2008. There would be only "a day here and a day there where [he] didn't see a truck."

¶ 16 At the conclusion of the testimony, the court found that plaintiff made a *prima facie* showing that defendants were in violation of the Ordinance and that defendants must now meet their burden of establishing their affirmative defense of a legal nonconforming use. The court granted the parties time to file written arguments.

¶ 17 On May 25, 2010, the court issued its memorandum of decision, finding that defendants possessed the right to a legal nonconforming use of the premises and that defendants had not abandoned that right. The court further found that defendants had not impermissibly expanded the use of the property, stating that "[i]t is of the same general character as that which preceded it." The court stated:

> "The Court will not examine with a microscope all of Defendant[s'] methods to ensure that they are exactly the same as those used in 1964; the purpose here is to scrutinize the essence of the use, not to focus inordinately on the tools used to effectuate that use."

Quoting *County of Du Page v. Elmhurst-Chicago Stone Co.*, 18 Ill. 2d 479, 484 (1960), the court stated that "the question is whether any new methods employed by Defendants 'change the original nature and purpose of the [original] undertaking.' " The court found that: "Defendants[']methods do not change the original nature and purpose of the undertaking to extract gravel and sand from the subject premises which existed prior to 1964 and which has continued since." Thus, it denied plaintiff's request for an injunction. Plaintiff timely appealed.

¶ 18 II. ANALYSIS

¶ 19 The standard of review in zoning cases is that the findings of the trial court will not be disturbed unless they were against the manifest weight of the evidence. *Pioneer Trust & Savings Bank v. County of Cook*, 71 Ill. 2d 510, 516-17 (1978). A judgment is against the manifest weight of the evidence only when an opposite conclusion is clearly evident or the factual findings on which it is based are unreasonable, arbitrary, or not based on the evidence. *1350 Lake Shore Associates v. Mazur-Berg*, 339 Ill. App. 3d 618, 628-29 (2003).

¶ 20 A defendant challenging the application of a zoning ordinance bears the burden of proof. *County of Cook v. Monat*, 365 Ill. App. 3d 167, 171-72 (2006). Here, defendants are claiming that they are not subject to the provisions of the ordinance, because their use of their land as a quarry is a legal nonconforming use that predated the 1964 amendment to the Ordinance.[1] "A legal nonconforming use is a use that is not permitted under the current zoning ordinance but is allowed to continue because it predates the ordinance." *City of Marengo v. Pollack*, 335 Ill. App. 3d 981, 986 (2002). Section 4.4.3 of the Ordinance recognizes and permits legal nonconforming uses of land and provides as follows:

> "4.4.3. Non-conforming Uses of Land. Where at the time of passage of this Code or subsequent more restrictive amendment hereto, a lawful use of land exists which would not be permitted by the regulations imposed, the use may be continued so long as it remains otherwise lawful, provided:

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[1]The amendment subjected the following to its special use provision: "Mining of clay products, gravel, humus, peat, sand and stone; loading and hauling of sand, gravel, topsoil or other aggregate; screening and washing yards; temporary 'borrow pits' for top soil [*sic*], gravel or sand and other uses incidental thereto with temporary structures incidental to same, subject to such set backs as may be required." Boone County Zoning Ordinance § 4, A2 (adopted Nov. 10, 1964).

> A. No such non-conforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this Code.
>
> B. No such non-conforming use shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment Code [*sic*].
>
> C. If any such non-conforming use of land ceases for any reason for a period of more than one (1) year, any subsequent use of such land shall conform to the regulations specified by this Code for the district in which such land is located." Boone County Zoning Ordinance § 4.4.3 (eff. July 9, 2008).

¶ 21 A. Legal Nonconforming Use

¶ 22 The first question is whether the trial court's finding that defendants established a legal nonconforming use of the property was against the manifest weight of the evidence. The court found that defendants' use of the property as a quarry predated the 1964 amendment to the Ordinance prohibiting such use. We conclude that this finding was not against the manifest weight of the evidence, as it was supported by Jodun's testimony and the 1949 agreement for warranty deed.

¶ 23 Plaintiff asserts the "inherent unreliability" of Jodun's testimony "extending from her infancy until the age 10" and also notes that Jodun "included no specific dates of when materials were actually mined." We disagree with plaintiff's argument that Jodun's testimony was deficient. Jodun testified that she was born in 1954 and lived on the property with her parents until 1972. She testified that she remembered her uncle removing gravel from the property, and her testimony was clear and uncontroverted that, while she resided on the property, the gravel

pits were always in use. Moreover, as noted by the trial court, the 1949 agreement for warranty deed provided that "[n]o gravel shall be sold by the sellers from said premises from the date of this agreement without prior consent of the said buyers." This supports a reasonable inference that, when the Vowles purchased the property, it was being used as a source of gravel. This evidence certainly supports a conclusion that the property's use as a quarry predates the 1964 amendment.

¶ 24 B. Abandonment of Nonconforming Use

¶ 25 Next, we address whether the court's finding that the use of the property as a quarry had not been abandoned was against the manifest weight of the evidence. Subsection 4.4.3(C) of the Ordinance provides that: "If any such non-conforming use of land ceases for any reason for a period of more than one (1) year, any subsequent use of such land shall conform to the regulations specified by this Code for the district in which such land is located." Boone County Zoning Ordinance § 4.4.3(C) (eff. July 9, 2008). The court found that the evidence showed continuous, albeit variable, use of the property and that there was no evidence to support a finding that the use was interrupted for more than one year. We conclude that this finding was not against the manifest weight of the evidence.

¶ 26 Plaintiff argues that there was a seven-year period from when Jodun left the property in 1972 until the next referenced activity, when Freeman hauled gravel on the property from 1979 to 1986, and that, because of this gap, defendants did not establish that the activity continued during this time. However, plaintiff overlooks other relevant testimony from Freeman. Freeman, who was born in 1961 and lived next to the property since that time, testified that he had witnessed the use of the property on a daily basis. Although he testified specifically concerning his work on the property from 1979 through 1986 for Charles Lee & Sons, "haul[ing]

out the bank run rock that was there," he also testified concerning his observations of the property "[a]s a neighbor to th[e] property for *** approximately 46 years." He stated: "It was always just a bank run hole over there that, you know, you would haul bank run out of." He explained that "bank run" is "sand and gravel *** that is dug right out of the side of a hill." From this testimony, the court could have reasonably inferred that the activity was taking place on the property for as long as Freeman could remember, which included the seven-year period prior to his beginning work with Charles Lee & Sons.

¶ 27 C. Expansion of Nonconforming Use

¶ 28 Last, we address whether the trial court erred in finding that defendants had not impermissibly expanded or enlarged the scope of the preexisting nonconforming use. Plaintiff argues that the trial court's refusal to "examine with a microscope all of Defendant[s'] methods to ensure that they are exactly the same as those used in 1964" was in contravention of *Elmhurst-Chicago Stone Co.*'s mandate. In addition, plaintiff argues that defendants have expanded the "scale of the operation" by "converting the use of the gravel pits on the property from a casual, intermittent source of fill to a dedicated commercial enterprise providing graded materials." Plaintiff also argues that defendants have physically expanded their use of the property by tearing down the buildings used to house the farm animals and by closing off the back access road. For the following reasons, we conclude that the trial court did not err in its assessment of this issue.

¶ 29 In *Elmhurst-Chicago Stone Co.*, the supreme court stated:

> "[T]he rules applicable to nonconforming uses are well settled. To show a right to such use it is not enough that both the old and the new uses fall within the same general classification. It is the particular business that governs. [Citations.] Hence the

> mere fact that the property may have been used for some kind of manufacturing purpose on and prior to passage of the ordinance does not entitle defendant to devote it to a different one, even though it may be in the general category of manufacturing. So also an expansion of a use to land not formerly used, or the employment of new methods or instrumentalities, may be beyond the scope of a previous nonconforming use, where it operates to change the original nature and purpose of the undertaking. [Citation.]" *Id.* at 483-84.

¶ 30 Preliminarily, we reject plaintiff's claim that the trial court erred by failing to carefully examine defendants' current use of the property to ensure that it is not beyond the scope of the previous use as required by *Elmhurst-Chicago Stone*. Although the trial court stated in one portion of its findings that it would not parse defendants' methods, its point, as reflected in its subsequent comments and quote from *Elmhurst-Chicago Stone* was that the pertinent inquiry was to "scrutinize the essence" of defendant's use, which is not contrary to the law stated in that case.

¶ 31 We turn next to the question whether the court's finding that defendants' "methods do not change the original nature and purpose of the undertaking to extract gravel and sand from the subject premises" was against the manifest weight of the evidence. The testimony concerning the use of the property prior to defendants' purchase established a regular use of the property as a source for gravel and sand. Jodun testified that her uncle would drive a dump truck to the gravel pit, located at the rear of the property, fill the truck with gravel, and remove the gravel from the property. Testimony concerning Charles Lee & Sons' use of the property established a similar use. Freeman testified that, from 1979 through 1986, he worked for Charles Lee & Sons and went onto the property about 15 to 20 times a year to "haul out the bank run rock that was

there." Freeman took the material to a quarry owned by Charles Lee & Sons where it was processed. Fowler, also a Charles Lee & Sons employee, testified that he, too, hauled rock out of the property.

¶ 32 The testimony concerning defendants' use of the property established that defendants are now doing more on the property than had been done in 1964. The testimony revealed that defendants are using the gravel pits on a more frequent basis; that defendants have brought additional (but unspecified quantities of) heavy equipment onto the property such as end-loaders, bulldozers, dump trucks, and excavators; that defendants have installed a permanent scale to weigh materials; that defendants are screening materials on the property; and that defendants are piling the screened materials on the property. However, defendants are not conducting any blasting or washing on the property.

¶ 33 In *Elmhurst-Chicago Stone*, the supreme court held that, where quarrying had been conducted on the defendant's property across the street from the subject property before the ordinance's enactment, where switchtracks had been maintained connecting the subject property to the property across the street, and where stone had been stockpiled for years on the subject property, the subject property, which housed a cement production factory and asphalt plant upon acquisition and from which no stone was removed before the ordinance's enactment, "must be considered part of a single enterprise or business." *Elmhurst-Chicago Stone Co.*, 18 Ill. 2d at 485 (reversing grant of injunctive relief). In assessing the owner's entitlement to the protection of a lawful nonconforming use, the court went to great lengths to distinguish quarrying from other businesses. *Id.* at 484. After noting the general rule that the property be in actual, as distinguished from contemplated, use when an ordinance becomes effective, the court

emphasized that zoning cases are very fact specific and, essentially, disregarded the general rule because a quarry was at issue:

> "We think that in cases of a diminishing asset the enterprise is 'using' all that land which contains the particular asset and which constitutes an integral part of the operation, notwithstanding the fact that a particular portion may not yet be under actual excavation. It is in the very nature of such business that reserve areas be maintained which are left vacant or devoted to incidental uses until they are needed. Obviously, it cannot operate over an entire tract at once." *Id.* at 484-85.

See also *Bainter v. Village of Algonquin,* 285 Ill. App. 3d 745, 751-52 (1996) (recognizing *Elmhurst-Chicago Stone*'s holding that mining companies constitute an exception to the general rule).

¶ 34 In *Village of Lake Villa v. Fargo Ice & Sons, Inc.*, 90 Ill. App. 3d 545, 546 (1980), the zoning ordinance prohibited the enlargement or alteration of an existing nonconforming structure or use of land. The property at issue had a legal nonconforming use of ice *manufacturing and delivery*. When the use became nonconforming, the property owner used one pickup truck and one delivery truck. After purchasing the property, the defendants switched to ice *purchasing* (from an outside source) and ice *storage*, parked two refrigerated semi-trailers on the premises for ice storage, and operated six to seven large delivery trucks, which were also parked on the property. In addition, the defendants on occasion allowed inoperable or unlicensed vehicles to remain on the premises. In response to the Village's petition for injunctive relief, the trial court enjoined the parking of the inoperable or unlicensed vehicles and enjoined the defendants from keeping any semi-trailers on the property unattended or overnight, except for a reasonable period for unloading. The court further ordered that the defendants could keep only one pick-up and

one delivery truck on the premises. On appeal, the court agreed with the defendants that a "mere increase in the volume of business is not a prohibited expansion" of a nonconforming use and that a change from ice manufacturing to ice purchasing and storage "does not in itself constitute an illegal enlargement of a nonconforming use." *Id.* at 546. However, relying on *Village of Burr Ridge v. Elia*, 65 Ill. App. 3d 827, 830 (1978), which held that an increase in the number of vehicles and a change in the use of the land (from a small landscaping operation to a large paving business) constituted an unlawful expansion, the *Fargo Ice* court affirmed the trial court's finding that the use of large trailers for outside storage constituted an enlargement or alteration of a previous use. *Fargo Ice*, 90 Ill. App. 3d at 546-57. The court concluded that, while the defendants could use newer and larger trucks for delivery, the increase in the number of vehicles stored on the property was an impermissible expansion of the nonconforming use, even though the general classification of use had not changed. *Id.* at 547.

¶ 35 *Fargo Ice* illustrates the principle that an increase in the volume of material extracted from defendants' quarry is not a prohibited enlargement of the nonconforming use. *Id.* at 546. Significantly, the case also illustrates that a change in business activity is not necessarily an illegal enlargement of the nonconforming use. *Id.* at 546 ("Fargo has not engaged in a different activity on the premises. Merely buying ice from an outside source and storing it on the premises does not in itself constitute an illegal enlargement of the nonconforming use"); *cf. Dube v. City of Chicago*, 7 Ill. 2d 313, 321-22 (1956) (use not only greatly expanded but also more intensive and of a different character and, thus impermissible, where manufacture of small items gave way to machinery fabrication and manufacture of larger items; operations expanded to outdoor property; heavier machinery was employed; and plant employed more than twice as many employees). Here, the testimony established that some piles of screened materials are now

on the property, that *limited* processing of material had recently commenced on the property (weighing and screening, but no blasting or washing), and that additional excavation machinery (of an unspecified quantity) and a scale are being used. We conclude that this evidence supports the trial court's finding that defendants did not impermissibly expand the nonconforming use of the property. The original nature and purpose of the quarry business has not been significantly altered by the employment of machinery to effectuate the limited processing of the sand and gravel at the site. The evidence reflected that defendants do not, for example, have a processing plant and that they do not conduct blasting or washing.

¶ 36 *Fargo Ice*'s holding concerning the number of vehicles stored on the property is not controlling here. First, the case did not involve a quarry, which, as *Elmhurst-Chicago Stone* instructs, may be treated differently. Second, the vehicles at issue were engaged in a function (*i.e.*, ice storage) in which the defendants had not previously engaged. Here, in contrast, the machinery at issue continues to engage in excavation and hauling, albeit at a higher volume. Third, the *Fargo Ice* court had before it evidence concerning the precise number of vehicles stored on the property, whereas, here, the record does not reflect the precise increase in the machinery added by defendants.

¶ 37 Further, the addition of a scale to the property is not an expansion of the legal nonconforming use. In *Bainter v. Village of Algonquin*, 285 Ill. App. 3d 745, 754 (1996), an appeal from a section 2-619 (735 ILCS 5/2-619 (West 2008)) dismissal, the ordinance at issue provided that a " 'permitted use also allows uses, buildings and structures incidental thereto if located on the same site.' " *Id.* at 754 (quoting McHenry County Zoning Ordinance § 3(3) (1962)). The property at issue was a unmined tract adjoining several other mined tracts, one of which included a processing plant (that crushed, screened, and washed the gravel). The court

held that, although "crushing" was not permitted under the relevant ordinance, the *limited* on-site crushing at issue was merely an *incidental* use to the permitted use of mining, loading, and hauling of gravel and, therefore, allowed. *Id.* at 754-55 (limited crushing at unmined tract was conducted to facilitate hauling the gravel, via a conveyor, to the processing plant). Elsewhere in *Bainter*, the court, relying on *Elmhurst-Chicago Stone*, held that the tract at issue, which was never mined, was an *integral* part of the defendant's mining operations, which consisted of several other tracts, including one that contained a processing plant; the tract at issue was part of a single enterprise devoted to mining gravel. *Id.* at 752-53 (holding that the defendant could mine the tract at issue as a legal nonconforming use). We are not troubled by the fact that the Ordinance here, unlike that in *Bainter*, does not specifically permit incidental uses. *Elmhurst-Chicago Stone* states that quarry reserve areas may be devoted to incidental uses until the land is needed. *Elmhurst-Chicago Stone*, 18 Ill. 2d at 484-85. Further, *Bainter* notes that the case law defines incidental uses as " 'anything usually connected with the principal use, something which is necessary, appertaining to, or depending upon the principal use.' " *Bainter*, 285 Ill. App. 3d at 754 (quoting *County of Du Page v. K-Five Construction Corp.*, 267 Ill. App. 3d 266, 271 (1994)). We do not find unreasonable a determination that limited processing is usually connected with the extraction of sand and gravel.

¶ 38 Finally, we address plaintiff's argument concerning defendants' decision to tear down existing farm houses and to close off the back access road. According to plaintiff, by doing so, defendants have physically expanded the area of the property dedicated to quarrying. Plaintiff is correct that, under the section 4.4.3(B) of the Ordinance, defendants may not move the nonconforming use in whole or in part to any other portion of the property. While there was testimony that defendants have torn down certain farm houses, there was no evidence that

defendants have expanded the quarrying activities to these locations. Further, as to the back access road, we note that it was used by Charles Lee & Sons under an agreement with Book; there is no indication that defendants have any legal rights to access the property under that agreement. Accordingly, we have no reason to conclude that defendants' use of the main access road amounts to an impermissible expansion.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed.

¶ 41 Affirmed.

¶ 42 JUSTICE BOWMAN, concurring in part and dissenting in part:

¶ 43 I agree with the majority that the trial court did not err in finding that defendants established a legal nonconforming use of the property as a quarry before the enactment of the relevant ordinance amendment. I also agree that the trial court's finding that defendants did not abandon that use was not against the manifest weight of the evidence. However, I would hold that the trial court's finding that the use was not impermissibly expanded was against the manifest weight of the evidence.

¶ 44 As the majority recognizes, the testimony concerning the use of the property prior to defendants' purchase established a mostly intermittent use of the property as a *source* for gravel and sand. *Supra* ¶ 31. The majority also recognizes that defendants are doing much more on the property than had been done in 1964, in that they: have brought additional heavy equipment on the property; have installed a permanent scale to weigh materials; are screening materials on the property; and are piling screened materials on the property. *Supra* ¶ 32.

¶ 45 I believe that *Fargo Ice* supports the conclusion that defendants have enlarged the nonconforming use of the property beyond the extraction and removal of gravel and sand. In

that case, we found that while the defendants could use newer and larger trucks for delivery, the increased number of vehicles stored on the property was an impermissible expansion of the nonconforming use, even though the general classification of use had not changed. *Fargo Ice*, 90 Ill. App. 3d at 547. Based on *Fargo Ice*, I would find that while defendants' activities may fall under the general category of quarrying, defendants' particular use of the property amounts to an enlargement of the nonconforming use of the property, in violation of subsection 4.4.3(A) of the Ordinance.

¶ 46 The majority relies on *Elmhurst-Chicago Stone* to distinguish *Fargo Ice*, reasoning that quarries are treated differently than other property. However, *Elmhurst-Chicago Stone* held that quarries are unique in that the land itself is a diminishing asset, so land that was kept in reserve for quarrying may be considered part of a legal nonconforming use, even though it was not in actual use at the time a zoning restriction became effective. *Elmhurst-Chicago Stone Co.*, 18 Ill. 2d at 484. *Elmhurst-Chicago Stone* did not hold that quarries could make unlimited types of uses of their property. The majority also states that the vehicles at issue in *Fargo Ice* were engaged in a new function of ice storage, while the machinery here continues to engage in excavation and hauling. However, in 1964, when the use of the property became nonconforming, the gravel pits were being used as a source of gravel and sand; parties extracted material from the pits and removed it from the property. Now, defendants are doing much more with the material than merely hauling it away, like screening, weighing, and sorting. Under the facts of this case, I do not believe that these activities are merely incidental to the extraction and removal of gravel. The majority also attempts to distinguish *Fargo Ice* on the basis that here there was no evidence of the exact number of vehicles stored on the property. However, it is clear that a scale and screening equipment were added, as well as several pieces of heavy

equipment, which I believe amounts to an impermissible enlargement of the nonconforming use. Under the reasoning of *Fargo Ice*, while defendants may use newer and additional equipment to extract and haul away the material, defendants may not conduct additional quarrying activities on the property, install additional equipment, or store additional vehicles. See also *Elia*, 65 Ill. App. 3d at 830 (increase in the number of vehicles stored by the defendants on their property was an extension of the alleged nonconforming use of the property as a landscaping business). Accordingly, I would reverse the trial court's finding that the property's use was not impermissibly expanded, and I would remand for the trial court to enter an injunction prohibiting defendants from: conducting quarrying activities on the property beyond extracting and hauling; installing additional equipment; and storing additional vehicles or heavy equipment on the property.