

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

FRIENDS OF GRASS LAKE TOWNSHIP,
a Michigan nonprofit corporation,
Appellant,

17-003036-AA
Hon. John G. McBain (47476)

v.

GRASS LAKE CHARTER TOWNSHIP,
PLANNING COMMISSION,
Appellee,

and

L & L Development, LTD,
Intervenor-Appellee,

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OPINION ON APPEAL TO THE CIRCUIT COURT

**PROCEDURAL HISTORY AND ANALYSIS OF THE LEGAL ISSUES
PRESENTED**

This case is an appeal from the decision of the Grass Lake Charter Township Planning Commission which issued a written Final Decision on October 12, 2017 approving with conditions, an application for a Special Land

Use Permit for an aggregate mining operation and/or gravel pit extraction site on property located at Norvell Road, Grass Lake, Michigan (The property legally described as Parcel ID NO: 000-15-09-200-002-00).

Chapter 18 of the Grass Lake Charter Township Zoning Ordinance provides that the Grass Lake Charter Township Zoning Board of Appeals may only hear appeals of Planning Commission decision as they pertain to site plan reviews.

Moreover, MCR 7.122 “governs appeals to the Circuit Court from a determination under a zoning ordinance by any officer, agency, board, commission, or zoning board of appeals, and by any legislative body of a city, village, township, or county authorized to enact zoning ordinances. MCR 7.122(G)(2) provides that “in an appeal from a final determination under a zoning ordinance where no right of appeal to a zoning board of appeals exists, the court shall determine whether the decision was” **authorized by law** and the findings were **supported by competent, material, and substantial evidence on the whole record**” presented to the Planning Commission and/or the Grass Lake Township Board.

Since there is no right of appeal to the Grass Lake Charter Township Zoning Board of Appeals regarding the issuance of special land use permits, it is clear that appellate jurisdiction is properly in the Jackson County Circuit Court. (MCR 7.122)

As noted by the Appellant, where no statute authorizes review of a local government’s administrative zoning decision, an appeal to Circuit Court is

available under Article 6, Section §28 of the Michigan Constitution of 1963. *Carleton Sportsman's Club v. Exeter Township*, 217 Mich App 195, 200-201 (1996). Article 6, 28 dictates the standard of review. *Id.* At 203.0

Article 6, Section 28 provides as follows:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are **supported by competent, material and substantial evidence on the whole record.**

Accordingly, pursuant to MCR 7.122 and Article 6, Section 28 of the Michigan Constitution, the Circuit Court is the proper court to review the Planning Commission's approval of the Special Land Use Permit at issue.

The Claim of Appeal was filed with this Court on November 13, 2017.

On April 20, 2017, William Lester, on behalf of L&L Development, LTD filed an application for a Special Use Permit for aggregate mining operation to be located on an 80 acre parcel located on Norvell Road in Grass Lake Township. (Legal Description previously detailed)

Appellant argues, on October 12, 2017 the Planning Commission held a hearing after board member John Lesinski resigned and was not replaced with a Member of the Grass Lake Township Board as required by the bylaws, and

that the Planning Commission was improperly constituted when they approved the Special Land Use Permit at issue in this case.

Appellant argues that pursuant to its bylaws, the Planning Commission must be composed of (7) members appointed by the Township Supervisor with the approval of the Township Board. Appellant maintains William Lester was and remains a member of the Township Board.

Moreover, the Appellant argues that when board member John Lesinski resigned shortly before the vote, and not filling the vacancy, violated the bylaws and requires the Court to vacate the Planning Commissions decision to issue the Special Use Permit.

Grass Lake Charter Township Planning Commission referred hereafter as the Appellee argues that there was a legal quorum present on October 12, 2017 and that Michigan law does not require the Township Board to immediately fill the vacancy before the Township Board could legally approve a Special Use Permit.

From the standpoint of the vacancy on the Township Board, the Court is not of the opinion that this caused the Boards vote to violate the bylaws since a properly constituted quorum of Commission Members was present to approve the Special Use Permit at issue in this case.

The Court, however, is concerned about the involvement of William Lester a Township Board Member and a proprietary owner of Lester Brothers and L&L Development who was seeking the Special Use Permit. It is not clear to the Court that he disqualified himself. It is not clear to the Court what

contact and influence he had with other Township Board Members or members of the Planning Commission. Clearly William Lester had a financial interest in this project and should have had no involvement in the decision making surrounding the Special Use Permit.

This matter needs to be investigated and could lead to an issue whether the Planning Commissions vote to approve the Special Use Permit should be set aside on this basis alone.

The issue was not sufficiently factually developed for the Court, and all sides should have an opportunity to provide the Court with the applicable law.

As this case is being directed back to the Township on a number of issues and lack of adequate findings, on this limited issue, the Court does order that William Lester is disqualified from any future involvement with this case. He is to have no contact with any Township Officials about this case or involved with any factual determinations that may need to be addressed on this case in the future, Mr. Lester may, however, appear and address the Township on this case as a member of the public, but not in his capacity as a Township official.

William Lester has served the Township with distinction for many years. To avoid even the appearance of impropriety he should have resigned from the Township Board when it became apparent that a potential for conflict of interest might be involved. At the very least he should have disqualified himself on this case, and been "China Walled" off from any interaction with the officials involved in making this decision on this Special Use Permit.

The next issue to be resolved on appeal is whether Friends of Grass Lake Township, referred to hereafter as Appellant had proper legal standing in this lawsuit.

In 2010 the Michigan Supreme Court restored the standing doctrine to an approach that is consistent with the limited, prudential approach used historically in *Lansing School Education Association v Lansing Board of Education*, 487 Mich 349,355 (2010). The Michigan Supreme Court in this case held that “under this approach, a litigant has standing whenever there is a legal cause of action....Where a cause of action is not provided at law, then a Court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. *Id.* At 372.

In contrast with several cases cited and argued by the Appellee Township, Appellant (FOGLT) has presented multiple specified injuries, different from those that would be suffered by the citizenry at large, that would result from the proposed mining operation, including air and noise pollution, detrimental effects on the water table, substantial, quantifiable decreases in property values, particulate levels higher for adjoining properties that could cause documented health complications, traffic congestion and unduly high road wear that that would disproportionately impact contiguous properties of the mining operation.

Appellee Township argues *Little Tree Sushi Bar, Inc v Royal Oak* (Docket No. 341606, July 21, 2018) This case is highly distinguishable from the case at bar. Appellants in this case failed to establish a legal right to the surface parking at issue or an actual verifiable injury, let alone one that was different from the “citizenry at large”.

This is a very different situation to the citizens of Grass Lake township who by way of local laws, regulations, and zoning ordinances have a legal right to be free from hazardous or disturbing land uses that would result in a mining operation located so closely to residential development specifically, but not limited to the Eagle Crest Subdivision, Matt Fisher Homestead, Calkins Homestead, Eyry of the Eagle Farm Wedding Venue and most importantly Grass Lake High School .95 miles, 1.18 miles George Long Elementary School, 1.33 miles Grass Lake Middle School, 1.69 miles Village of Grass Lake, 1.95 miles Grass Lake and the surrounding high density residential development around it. The mileage set forth is in a straight line from the proposed mining pit to the enumerated locations in a straight line. The Court is attaching to its opinion aerial photographs displayed at the hearing and attached to Appellant’s Brief.

Clearly, the Appellant (FOGLT) have legal standing to be a party to this appeal and the Court is puzzled by the efforts of the Grass Lake Charter Township Planning Commission to have FOGLT dismissed and excluded as a party to this lawsuit/appeal.

Appellant also argues on appeal that the Planning Commission made its decision before the conclusion of the required public hearing(s). Specifically, Appellant (FOGLT) argues the Planning Commission violated Section 14.05(A) of the zoning ordinance, which requires the Planning Commission to make its decision **following the required public hearing**. According to Intervenor Appelle L&L's that most of the approximately 275 people attending and offering testimony at the October 12 hearing spoke against the issuance of the Conditional Use Permit, "further noting that this represented 4.838% of Grass Lake Township's population".

The Court understood many complicated concerns were delivered by 275 citizens over a multiple hour hearing. There were also numerous exhibits, studies and expert reports presented. At the end of the hearing the Planning Commission, released an 8 page, single spaced Final Decision was read aloud at the end of the hearing. The facts persuade the Court that the Planning Commission's Final Decision was typed up word for word prior to the beginning of the hearing on October 12, 2017.

The critical element provided by the zoning ordinance requires a Final Decision to be issued **following** a public hearing. This protects the rights of an affected party to present arguments and evidence in support of its position before a decision is rendered and final action is taken. *Huges v Almena Twp.*, 284 Mich App 50, 69 (2009)

The Court finds, that the Planning Commissions decision approving the Special Use Permit for the proposed mining operation was made **prior to the beginning** of the hearing on October 12, 2017.

Therefore, the Final Decision violated Section 14.05 (A) of the Zoning Ordinance, because it was not made **following** the required public hearing and was therefore improperly promulgated and/or not authorized by law. Therefore, it is ordered that the aforementioned Final Decision is reversed and vacated on this ground, and other grounds discussed, or to be discussed.

The Final Decision issued on October 12, 2017 was further in violation of Section 14.05 (b) of the Zoning Ordinance as set forth in Appellant's brief because it was **issued despite the lack of compliance** with the Review Standards in Section 14.06 and Section 14.07 of the Zoning Ordinance.

The Court concludes, Section 14.05 (B) provides that a Special Land Use Permit shall not be issued for the uses specified in this Section unless complying with the General Review Standards of Section 14.06 and the Specific Standards of Section 14.07 collectively referred to as "the Standards". Despite this requirement, the Final Decision granted the Special Use Permit, conditioned on an ***after the fact demonstration*** of complete compliance with those Standards, to be demonstrated after the public hearing by subsequently submitted materials. The pre-approval of this Special Use Permit was not authorized by law, and it violated Township Ordinance requirements. While the Ordinance allows the Final Decision to impose ***additional*** conditions (i.e., in addition to the required Standards), the Ordinance ***does not*** allow a Special

Land Use permit to be issued conditioned on complying with the Standards *themselves*. The Zoning Ordinance does not allow a Special Land Use permit to be granted on the condition that the Standards “can be met” at a later time after the public hearing (Adm. Record p. 0216 and 0218).

Therefore, the Planning Commission violated the law by granting the Special Land Use Permit before determining compliance of all the standards required by the aforementioned zoning ordinance.

As Appellant persuasively argues, the Final Decision also fails to consider all of the required standards in the applicable zoning ordinance.

A Final Decision by a Planning Commission is not “authorized by law” if it failed to properly consider all of the criteria required by the zoning ordinance for the issuance of a Special Land Use Permit. *Mauchmar v Watson Twp. Planning Comm’n*, unpublished decision of the Michigan Court of Appeals, 2003 WL 1439799 (2003).

1. Failure to Properly Consider Disturbance to Neighbors

The Final Decision violated Section 14.05 (B) of the Zoning Ordinance, because the Planning Commission failed to make a finding that the proposed extraction operation is not hazardous or disturbing to existing or future neighborhood uses. In Section 2.d of the Final Decision, the Planning Commission stated:

Extraction Operation not Hazardous of Disturbing to Existing or Future Neighboring Uses. The Court finds that extraction operations can create a risk of disturbance to neighboring properties. This means

that appropriate conditions must be imposed to ensure that a disturbance does not occur. Such operations are appropriate as long as the requirements of the Ordinance, the Planning Commission finds that it is necessary to impose additional conditions, stated below which are designed to protect the environment, prevent disturbances of the peace, and promote harmony with surrounding uses.

In Section 2.d of the Final Decision, the Planning Commission mentions the requirement in “the Standards” that the proposed use must not be hazardous or disturbing to existing or future neighboring uses, but the Planning Commission failed to make the required findings that this standard was in fact satisfied. This was underscored by the many adjacent and nearby residents who strenuously objected in writing and at the public hearing that this proposed use would be extremely disturbing to the current and future use of their property.

As specific illustrative evidence of this point Appellant in their brief noted:

Dale Fisher, a nearby resident, operates a wedding venue business at 1916 Norvell Road, Grass Lake, Michigan (approximately 1,500 feet north of the subject property) (Adm. Record p. 0255; 0460-0462). Mr. Fisher has already encountered concerns from prospective brides and grooms that have decided to hold their weddings elsewhere due to the mere possibility that a mining operation could be occurring in such close proximity to the venue generating substantial dust and noise from rock crushing, earth-moving

equipment, and truck traffic. The proposed mining operation has already been detrimental and disturbing to Mr. Fisher's existing use of his property (adm. Record p. 0255; 0460-0462).

Further, numerous residents expressed health and safety concerns regarding the proposed mining operation in both their written comments to the Planning Commission and through their comments at the public hearings. One resident, Penny Smith, spoke at the October 12th public hearing and described how the proposed mining operation would be hazardous to her existing breathing problems. Ms. Smith lives at 12102 Harvest Drive, Grass Lake, Michigan in the Eagle Crest Subdivision. Ms. Smith and many other residents chose Grass Lake as a place to live due to its rural and agricultural character with the understanding that Grass Lake was a place that valued maintaining that character as well as protecting the Township's natural features (adm. Record 0230, audio recording of October 12, 2017 Planning Commission meeting).

The Court also finds that the Final Decision is not authorized by law for the reasons set forth in relevant portions of the Appellants brief as follows:

The Final Decision is not authorized by law since nothing in the Application or the Planning Commission's conditions addressed the air and noise pollution that will occur from the dry screening of sand, crushing of rock, and other industrial mining activities. The Final Decision merely cites to the ASTI Environmental Assessment. The Final Decision requires 6 foot high trees twenty feet apart, but does not describe how this will in fact eliminate the

disturbance to the neighbors. Further, the Planning Commission's conditions fail to address the effect these activities will have on property values (Adm. Record p. 0340-0393; 0411-0442).

Section 2.d of the Final Decision states that the additional conditions are designed to prevent "disturbances of the peace" and "promote harmony with surrounding uses"; however, the Standard in the Ordinance is stricter and requires that the operation **not** cause a hazard or **disturbance**. The ASTI Environmental Assessment addresses the air quality impact of the proposed mining operation in cursory and incomplete fashion. The ASTI Environmental Assessment states in relevant part:

During the construction phase, exposed soil could temporarily increase airborne particulate matter into the project area. The proposed project will not create any long-term air quality issues. No adverse impacts to air quality are anticipated an application for a Permit-to-Install must be submitted to the MDEQ. Open construction areas will be minimized and watered as needed to minimize particulates. (Adm. Record p. 0071)

Further, the ASTI Environmental Assessment states,

Proposed Action Impacts: Construction equipment exhaust may cause local, temporary impact during hours of operation and approximate 10-year life of mine. Potential for exposed soil and dust during construction.

Mitigation: Open construction areas will be minimized and watered as needed to minimize particulates.

(Adm. Record p. 0076)

The ASTI Environmental Assessment essentially concludes that the proposed mining operation will create a “temporary” disturbance to neighboring residential uses, but fails to recognize that this “temporary” disturbance will last the entire life of the mine (5 years, or ten years if the permit is extended). The Zoning Ordinance requires that the proposed special land use not cause a disturbance during the term of the Special Land Use Permit; not what might be the case after the permit has expired and the activities have ceased.

Moreover, the Final Decision approving the Special Use Permit for a mining/extraction operation as determined and promulgated was not supported by competent, material and substantial evidence on the **Whole Record** as required by law.

Appellant correctly cites in their brief the correct Standard of Review.

MCR 7.122(G)(2) provides that “in an appeal from a final determination under a zoning ordinance where no right of appeal to a zoning board of appeals exists, the court shall determine whether the decision was authorized by law and the findings were supported by competent, material, and substantial evidence on the whole record.”

Further, where no statute authorizes review of a local government’s administrative zoning decision, and appeal to circuit court is available under Article 6, Section 28 of the Michigan Constitution of 1963. *Carleton Sportsman’s Club*, 217 Mich App at 200-201. Article 6, §28 dictates the standard of review. *Id.* at 203.

Article 6, Section 28 provides as follows:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

“Substantial evidence” is evidence which a reasoning mind would accept as sufficient to support a conclusion. *Edw. C. Levy Co.*, 293 Mich App at 340. Our Supreme Court has held that “competent, material, and substantial” with regard to a Worker’s Compensation Appellate Commission decision is “solid, true, reliable, authoritative, capable, and can articulate this evidence from the record...” *Goff*, 454 Mich at 514, n 5.

The Court also concludes that the Planning Commission failed to base its Final Decision on the **whole record** when it failed to include or give appropriate weight and consideration to include dozens of documents submitted by citizens at a public hearing in opposition to the issuance of the special use permit. As the Court referenced earlier in its opinion, the Planning Commission violated § 14.05A when it came to the hearing where approximately 275 people expressed their concerns, exhibits, studies, and expert opinions. But the Planning Commission violated § 14.05A by having their 8 page single spaced opinion

done and ready to be issued before weighing the input of 275 citizens, property owners, and taxpayers. Substantial testimony was given by those citizens who opposed the application. And one can only reasonably conclude that the Planning Commission already had its decision made and 275 citizens interested in giving an opinion about this mining operation wasn't going to be properly weighed, or even considered at all in the decision whether to approve the application. (Adm. Record p. 0449-0457 and 0230, audio recording of October 12, 2017 Planning Commission Meeting.

Clearly, the Final Decision was not based on the "Whole Record" and violated township ordinance and Michigan law as previously cited.

The Court agrees with the Appellant that **the Planning Commission based disproportionate consideration of possible future residential development without a thorough assessment of the proposed Special Use Permit that would allow a mining operation in very close proximity to residential development, businesses, and an elementary, middle, and high school.**

As the Appellant noted in their brief:

The Final Decision includes the finding in Section 2.a that the extraction operation will eventually be converted into a residential development and therefore will not have an adverse effect on traffic. There is no requirement that the Applicant convert the extraction operation into a residential development, and in any event, the traffic patterns of a residential development that may someday be built after the expiration of the Special Land Use Permit is not

material to evaluating whether the extraction operation *itself* will have an adverse effect on traffic. Basing a finding on evidence which is not material is a violation of the Constitutional standard and requires reversal under the Constitutional standard and the Court Rule (see Article 6, Section 28 of the Michigan Constitution; MCR 7.122(G)(2)). It also violates applicable zoning ordinances.

The Final Decision makes the finding in Section 2.a that the extraction operation is “harmonious with the Ordinance,” and bases this finding on the belief that a potential residential development which may or may no occur after expiration of the Special Land Use Permit would be harmonious with the Ordinance. A hypothetical residential development has no bearing on whether the extraction operation *itself* is harmonious with the rural and residential uses that surround the land in question, and demonstrates the Commission’s finding on this point is based on evidence which is not material, hence not sufficient under (see Article 6, Section 28 of the Michigan Constitution; MCR 7.122(G)(2)); And not sufficient and determinative under Grass Lakes Zoning Ordinances.

The Final Decision makes the finding in Section 2.b that the proposed special land use is “harmonious with surrounding uses,” based on the speculative aspects of a potential future residential development that may or may not be built after the expiration of the Special Land Use Permit. There is no support in the record for finding that the extraction and mining operation *itself* is harmonious with surrounding uses. It clearly is not, as evidenced by

the voluminous public comments against this mining operation being placed in the midst of this rural residential area. The record contains 46 letters from area landowners objecting to the proposed mining and extraction operation. Public opposition to zoning issues is a relevant and proper consideration for a zoning authority. See, eg. *A&B Enterprises v Madison Twp.*, 197 Mich App 160, 164 (1992); see also *Davenport v City of Grosse Pointe Farms bd of Zoning Appeals*, 210 Mich App 400, 407-408 (1995) (neighbor opposition to proposed zoning is relevant to the issue whether the project proposed is “harmonious” with existing land use.)

The Court also finds in the Planning Commission’s Final Decision many conclusory findings unsupported by record evidence. Many of these are highlighted in Appellants Brief. **A conclusory recitation of a required standard can not be satisfied by conclusory recitation.** They must be supported by evidence, studies, expert opinions, environmental impact studies. While some were referenced many required findings were supported by nothing more than unsupported conclusions. The competent, material, and substantial evidence requires knowledge of the facts justifying the boards conclusion. The Zoning board may not merely repeat the conclusory language of a zoning ordinance without specifying the factual findings underlying the determination. *Renders*, 217 Mich App 378-379. This violates the applicable zoning ordinance and Michigan law.

Appellant also argues that the Final Decision is in conflict with the statutory Master Plan. Appellant argues that the issuance of the Special Land

Use Permit in the location requested, directly adjacent to residential and agricultural uses, violates the provisions in the Master Plan which provide that “new development will generally reflect existing rural character,” that “the encroachment of commercial and industrial uses into residential areas will be discouraged”, and that “development will be encouraged which reflects, and preserves, the community values and character of Grass Lake Township by supporting existing developed areas.” See pages 26-27 of the Master Plan.

In analyzing this issue the central problem is the proposed **location** of the mining operation. As proposed it is very close to residential developments, homesteads, schools, the city of Grass Lake, and all of the homes around and in close proximity to the Village of Grass Lake.

At the hearing for the Temporary Restraining Order the Court asked Appellants Attorney Andrew Sugarman if the proposed mining operation was per se unlawful under township ordinance, or was it just a problem with the proposed location. He agreed that it was not per se unlawful, it was the location.

The Court concludes the proposed location creates extraordinary concerns and even significant risks to the healthy, safety and welfare of many Grass Lake Township residents. This project would likely fit in the Master Plan if it was proposed in a far more rural location.

In the case of *France Stone Co. v Charter Township of Monroe*, 802 F Supp 90 (E.D. Michigan 1992). The Court dealt with the issue of a proposed mine and its compatibility to a township zoning ordinance. The interesting

issue of this case is when you look at zoning ordinances and Master Plans the Court held that a mining operation could be legally in conformity with Agricultural zoning, but first the developer of the mine needed to get a zoning change of heavy industrial and with that change a special approved use permit was required.

Monroe Township did not want to approve the mine which was in a **largely agricultural area**. The mine developer sued the township when the Special Use Permit was denied.

The Michigan Supreme Court decisively opined and ruled that a zoning regulation which would prevent the extraction of valuable natural resources is invalid unless **“very serious consequences”** will result from the proposed extraction. The holding of the case also made it crystal clear a township could not make a Master Plan or a zoning ordinance that per se made it impossible to have a mining operation approved.

Unique in this case was the fact that the mine involved a rich deposit of Dolomite which was in short supply and heavily needed in construction and manufacturing. Moreover, the proposed location of the mine was in a largely agricultural area that did not pose “very serious consequences” in the decision of the Michigan Supreme Court in a controlling precedent.

The Lester Extraction site does not involve Dolomite. It involves sand and gravel. The proposed mine site while in an agricultural and residential area, is very close to subdivisions, schools, and the Village of Grass Lake.

The Court finds that the current proposed location of the Mining Operation does pose “very serious consequences” many which have been detailed and discussed in this opinion.

Those “very serious consequences” include, but are not limited to:

1. Noise from the extraction and mining process in close proximity less than a mile from residences, subdivisions. A little over a mile to elementary school, middle school, and high school. Under 2 miles to concentrated lake development and the Village of Grass Lake. L&L says they will minimize noise. The grinding of stone is very loud. Back up beepers on this heavy equipment can be heard for hundreds of yards.
2. Dust particulate from the proposed mining operation and how much additional dust particulate will arise from the already existing Bohne Mining Operation. The Court is attaching a study submitted as part of the review and argument process to the Planning Commission. The Court believes that a comprehensive study of the proposed mine and the existing mine should be the subject of further expert testimony, if this Special Use Permit is further pursued. The Court finds this dust particulate a very serious health consideration, especially with the High School less than a mile away from the proposed Mine. And the homes, businesses, other schools, and the nearby residents. While the Court appreciates that L&L would water the site to reduce particulate, it is impossible with most mining operations to contain particulate. The health consequences are potentially very serious, especially with

another mining operation underway, although more remotely placed than the proposed site.

On this issue Appellant drove home this point as follows:

Roy Margenau lives at 12130 Harvest Drive, Grass Lake, Michigan in the Eagle Crest Subdivision and provided written comments to the Planning Commission and comments at the public hearings. Mr. Margenau is a graduate Mining Engineer with experience in underground and open pit mining. Mr. Margenau has a Master's Degree in Geology with experience in mineral and earth excavations, in particular unconsolidated sedimentary excavations. Based on his substantial experience, Mr. Margenau concluded,

It is not possible economically or with the scope of operational means to control the dust in the air that is created by both the excavation operations and the trucking of materials from the property. These consequences include respiratory problems for many humans and animals. The contamination also covers the ground with layers of mineral matter which both stifles growth and suffocates plant life. In addition, the dust from these operations brings the sediments that are excavated on top of the natural features and vegetation that exists on the adjacent lands. This can both stifle crop grown and cause human ingestion of food crops that have been contaminated. (Adm. Record p. 0403)

Further, Susan Stewart, who lives at 2660 Norvell Road, Grass Lake, Michigan provided both written comments to the Planning Commission (Adm. Record p. 0237) and comments at the October 12th, 2017 public hearing describing her concerns regarding the air pollution that would result from the proposed mining operation. As a biology professor who teaches Environmental Sciences courses, Ms. Stewart attempted to inform the Planning Commission regarding the pollution of the air with carcinogenic silica dust that results from open pit gravel and sand extraction. As part of her written comments, Ms. Stewart was not refuted by any competent, material or substantial evidence by the applicant, L&L Development. That study is attached as part of the Court's opinion.

3. Diminution In Property Values would be a serious factor. This would be especially true of many private homes and even some businesses. This diminution in property values would also add up to a significant drop in revenue for the Township. There would also be an opportunity cost of other new residential development that won't occur in the eyesight or close driving distance to an unsightly mining operation. Grass Lake has one of the most vibrant home economies in Jackson County, because of it's proximity to a much more expensive housing market in Washtenaw County. This mine would have a negative impact on that. L&L offered a limited sample of homes it claims were

not negatively affected by mine development. The Court did not find this evidence credible.

4. Disturbance of water flows and well levels from mining activity, and eventually creating a lake. These are well founded concerns that can't or shouldn't be dismissed by conclusory findings. Dewatering of the quarry or pit could cause or decrease the quality and quantity of contiguous property owners wells. Filling of the quarry to form a lake in the future so close to residential developments could dewater the aquafier according to expressed citizen concerns.
5. Dangerous Traffic Congestion Large Haul Truck, some with tandem trailers pulling out of a mine site on Norvell Road. This is less than a mile from the High School. Large gravel trucks loaded with tons of dirt and stone driving from the mine site right past the High School and private homes. Imagine distracted teens and inexperienced drivers trying to navigate around these dangerous trucks.

In 2017, in *People v Mark Feuss*, File No. 15-4654-FH this Court presided over a Manslaughter Case jury trial, where a fully loaded gravel truck had left an open pit mine and was heading north of US 127 on a two lane portion of the highway. Two Young Child Protective Service workers were in a car on the way to a home visit. They were legally stopped making a left hand turn, the Gravel Hauler semi truck slammed into the back of the car killing both of them instantly. Sand, gravel, and carnage was all over both lanes of US 127. The highway

was closed for hours. The truck driver wasn't seriously injured. He was going too fast. He had taken some medications and looked at a text shortly before impact. Two beautiful young girls, barely out of college were dead. He went to prison, but those girls families grieve everyday.

If these accidents can occur on 2 lane portion of US 127, they are even more likely to occur on a narrower Norvell Road, less than a mile from the High School. Accidents with gravel trains in a residential area close to multiple schools is a very serious consequence that shouldn't be minimized.

These trucks fully loaded also cause more damage to the road than most other vehicles combined. Who bears the cost for these repairs?

6. Necessary Mineral Extraction There has been no showing that the sand and gravel to be extracted is in short supply, or not readily obtainable from other mines or pits. This is not like the Michigan Supreme Courts decision to approve a mine in a largely agricultural area that had rare, and valuable Dolomite deposits. On a related finding, there is no evidence as Appellant asserts and the Court agrees that Applicant's extraction operation is consistent with the purposes of the Ordinance, Section 2a as it will provide the Township with natural mineral resources. Nothing in the Record indicates that the material to be mined would in fact be used in Grass Lake Township. Yet another deficiency in the Final Decision of the Planning

Commission.

In oral argument on the record we discussed the Crandall extraction mines that ultimately led to the creation of the largest lake in Eaton County. The unique thing about the mining pits is that they were a long distance away from any significant residential development. They were in a rural agricultural setting.

At the conclusion of the mining Crandall Brothers excavated the property and created a large lake that would have been a prime location for high end residential development. In the end the Crandall Brothers sold the lake and the surrounding property to Eaton County to be used as a park.

I bring this point up for comparative analysis, but also indicate L&L's idea of a mining operation, and eventually creating a lake and a high end residential development deserves consideration. As currently proposed it is in the wrong proposed location. Its proposed location and close proximity to subdivisions, private homes, schools, the Village of Grass Lake, businesses, create very serious consequences as already analyzed by the Court. In *Kropf v Sterling Heights* 391 Mich 139 (1974) the Michigan Supreme Court stated "Considerable weight will be given to the findings of the trial Judge" in legal issues raised in these types of cases.

I understand that L&L Development took out an option to purchase the property if there mine operation was approved. They can

still build a residential neighborhood on the property. Those houses could command very good prices because of the high values of home prices in Washtenaw County.

They can also consider a mining operation on vacant land in a far more rural location that would not involve the complicated legal issues raised in this case.

The Court has spent a great deal of time in addressing the issues and studying the fine legal arguments presented by all sides. In this detailed opinion the Court is endeavoring to be thorough and predictable, and give all the parties legal guidance on how to proceed forward.

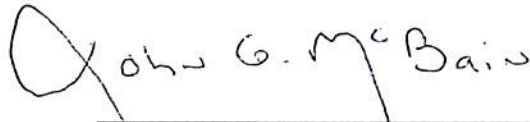
The Planning Commission and the Township Board were in a difficult spot. Complicated legal issues quickly arose. Many years ago I served on the Columbia Township Board. I also served on the Planning Commission. It probably helped having an attorney on the Planning Commission. I also served for several years as the Springport Township Attorney. I drew a lot on these experiences and my 17 years on the bench in detailing my legal analysis in this case.

I hope this opinion gives guidance to all the parties on how to proceed on this matter. A lot of money and resources have already been expended. And I hope the parties can reach a resolution that truly serves the interests of the parties and the citizens of Grass Lake Township.

For all the reasons set forth in this opinion the Court finds the Planning Commissions action in granting the Special Use Permit violated Michigan law and the zoning ordinances of Grass Lake Township and their decision is vacated.

THIS IS A FINAL ORDER CLOSING THIS CASE.

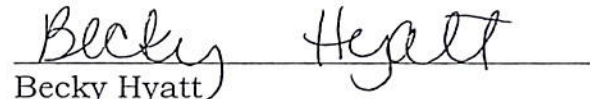
IT IS SO ORDERED this 1st day of April, 2019.



Hon. John G. McBain (P47476)
Circuit Court Judge

Proof of Service

I hereby certify that a copy of this Opinion on Appeal was sent to all counsel for the parties by email or ordinary mail this 1st day of April, 2019.


Becky Hyatt
Judicial Secretary

SEPTEMBER 25, 2014

DANGER IN THE AIR: HEALTH CONCERNS FOR SILICA IN OUTDOOR AIR <http://www.ewg.org/research/sandstorm/health-concerns-silica-outdoor-air#.WcpP-FK-Lq0>

“How Silica Damages Health

By itself, silica is not toxic. The health risk arises when silica particles are small enough to get into the deepest parts of the lungs, especially the alveoli where inhaled air passes into the bloodstream (US EPA 1996). AK

In addition to the severe damage silica dust does to the lungs and respiratory system, studies of miners have linked it to diseases such as rheumatoid arthritis, systemic lupus erythematosus, scleroderma and kidney damage (Makol 2011; Parks 1999). Exposure to high levels has also been linked to heart problems, since the heart must work harder when pulmonary tissues are injured. Workers exposed to silica in other industries have a higher risk of lung cancer, which has prompted government and international health agencies to declare silica a known human carcinogen (IARC 2012; NTP 2011; Steenland 2014).

Silica dust is one of the most harmful components of “particulate matter,” a mixture of small airborne particles of organic chemicals, metals, minerals and soil (Reff 2009). *

Smaller particles pose the greatest danger because they can get deeper into the respiratory system. Fine particles smaller than 2.5 micrometers in diameter – less than 1/30th the width of an average human hair – are more harmful than larger particles. (The shorthand designation for particulate matter of a given size is “PM” followed by the diameter, as in PM2.5, PM4, PM10 etc.) Epidemiological studies have shown that breathing air polluted with PM2.5 particles causes heart and lung problems and increases the death rate from heart disease and lung cancer (Lepeule 2012). Particles larger than 2.5 micrometers in diameter do not get as deep into the

lungs, but PM10-size pollutants do exacerbate respiratory diseases, particularly asthma, and cause heart failure (Shah 2013; Weinmayr 2010). The concentration of silica in the air is often estimated based on the percentage of crystalline silica in a given sample of PM10, PM4 or PM2.5 particles (ACGIH 2001; Davis 1984; EPA 1996). Depending on the source, the level of silica in inhalable particulates collected at quarries and sand pits can be as low as 1-2 percent or as high as 95 percent of total particulate matter (Environment Canada 2013).

When tiny silica particles lodge in the alveoli, they cause an ongoing inflammation that damages lung tissue and causes scarring and fibrosis, a precursor of silicosis and lung cancer (IARC 2012). Freshly crushed silica is more damaging to the respiratory system and produces a more severe inflammatory response than “aged” silica particles of the same size (Shoemaker 1995; Vallyathan 1995). Breathing sharp, freshly-cut sand dust, such as silica at sand mining and processing sites, carries a greater risk of pulmonary disease than breathing older, smoother particles weathered by heat, wind, and moisture – such as silica dust blown from cropland.

There is no federal standard for ambient air exposure to silica outside the workplace. Based on occupational data, the EPA came up with a health-protective benchmark for crystalline silica in PM10 particles of 3 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) (Gift 1997; US EPA 1996). Crucially, however, EPA’s benchmark did not consider the risks of exposure to vulnerable populations such as children or people with respiratory disease. The federal air quality standard for long-term exposure to PM2.5 for the general population is 12 $\mu\text{g}/\text{m}^3$ a year, and the 24-hour, or acute, PM10 standard is 150 $\mu\text{g}/\text{m}^3$ (US EPA 2014).”

Respiratory and Allergic Immune Response Impacts of
Gravel Pit / Quarry Operations on Adjacent Land / Properties

Calculations for 10 µm Particles:

Dust of this size is the median inhalable diameter specified by the EPA. "The EPA describes inhalable dust as that size fraction of dust which enters the body, but is trapped in the nose, throat, and upper respiratory tract." The terminal velocity of this size of particle is calculated to be 7.53E-03 m/s using Stokes Law for Fluid-Particle Forces, in the conditions specified previously.

It will therefore take 664 seconds for these particles to fall from a height of 5 meters (16.4 feet).

<u>Wind Speed</u>	<u>Travel Distance</u>
5 km/h (3.1 mph)	0.9 km (.55 mile)
10 (6.2 mph)	1.8 (1.1 miles)
20 (12.4 mph)	3.7 (2.3 miles)
40 (24.8 mph)	7.4 (4.6 miles)
60 (37.3 mph)	11.1 (6.9 miles)
80 (49.7 mph)	14.8 (9.2 miles)

Calculations for 5 µm Particles:

Dust of this size falls within the respirable dust range as specified by the EPA. Respirable dust refers to those dust particles that are small enough to penetrate the nose and upper respiratory system and deep into the lungs. Particles that penetrate deep into the respiratory system are generally beyond the body's natural clearance mechanisms of cilia and mucous and are more likely to be retained

The terminal velocity of this size of particle is calculated to be 1.91E-03 m/s using Stokes Law for Fluid-Particle Forces, in the conditions specified previously.

It will therefore take 2,612 seconds for these particles to fall from a height of 5 meters (16.4 feet).

<u>Wind Speed</u>	<u>Travel Distance</u>
5 km/h (3.1 mph)	3.6 km (2.2 miles)
10 (6.2 mph)	7.3 (4.5 miles)
20 (12.4 mph)	14.5 (9 miles)
40 (24.8 mph)	29.0 (18 miles)
60 (37.3 mph)	43.5 (27 miles)
80 (49.7 mph)	58.1 (36.1 miles)

*Immune -
SERIOUS -
health to
all*

Conclusion:

Using EPA inhalable dust and Stokes Law for Fluid Particle Forces definitions and calculations, by varying the dust particulate particle size, wind speed, and release height, respirable dust can, and will, impact areas just about anywhere directionally downwind from a gravel pit's operational activities, unquestionably posing health risks and bearing an impact on adjacent properties, including to residential and school facilities areas and occupants, and particularly on sensitive and vulnerable adults, seniors, and children.

Respiratory and Allergic Immune Response Impacts of Gravel Pit / Quarry Operations on Adjacent Land / Properties

The Effect of Particles on Allergic Immune Responses

<http://toxsci.oxfordjournals.org/content/65/1/7.full> (including impacts/effects of airborne sulfur (SO₂) and silica particulates/particles)

<http://oehha.ca.gov/air/pdf/oehhaso2.pdf> (sulfur specific)

Prior to 1980, controlled exposures of human subjects to SO₂ had involved only healthy subjects. In general these studies did not find adverse respiratory effects even at concentrations of 13 ppm (Frank et al, 1962).

In 1980 and 1981, Koenig et al (1980; 1981) and Sheppard et al (1980; 1981) published the results of controlled SO₂ exposures in both adolescent and adult subjects with asthma. *The studies by Koenig and Sheppard found that people with asthma were extremely sensitive to inhaled SO₂ and therefore may be at increased risk for adverse respiratory effects in communities where SO₂ concentrations are elevated even for short periods of time.*

Small particles are the most dangerous

[2768]

Because of the size of the particle, they can penetrate the deepest part of the lungs. Larger particles are generally filtered in the nose and throat and do not cause problems, but particulate matter smaller than about 10 micrometers can settle in the bronchi and lungs and cause health problems. Similarly, particles smaller than 2.5 micrometers tend to penetrate into the gas-exchange regions of the lung, and very small particles (< 100 nanometers) may pass through the lungs to affect other organs. Particles smaller than 100 nanometers can pass through cell membranes and migrate into other organs, including the brain. It has been suggested that particulate matter can cause similar brain damage as that found in Alzheimer patients. Particles emitted from modern diesel engines are typically in the size range of 100 nanometers. In addition, these soot particles also carry carcinogenic components like benzopyrenes adsorbed on their surface.

Long-term exposure to fine particulate

[2769]

Pope and colleagues 2002 found that particles smaller than 2.5 micrometers leads to high plaque deposits in arteries, causing vascular inflammation and atherosclerosis. Fine particulate and sulfur oxide-related pollution were associated with all-cause, lung cancer, and cardiopulmonary mortality. The authors concluded that long-term exposure to combustion-related fine particulate air pollution is an important environmental risk factor for cardiopulmonary and lung cancer mortality. The authors stress that the legislative limits for engines are unsuitable to protect against particulate matter.

GRASS LAKE

Grass Lake Village

Grass Lake Middle School

George Long Elementary

Grass Lake HS

Warrior Trail

Clark Farm

N

home of Dale Fisher Galleries 93 Acres

Eyry of the Eagle Farm Wedding Venue

Eagle Crest Subdivision

All Visuals generated by As the Crow Flies Source: Jackson County GIS <http://gis.co.jackson.mn.us>

Grass Lake HS is 9.8 Mile from Proposed Pit (As the crow flies)

Proposed Pit Property Line Touches Calkins 1.4 Mile from Eyry of Eagles (As the crow flies)

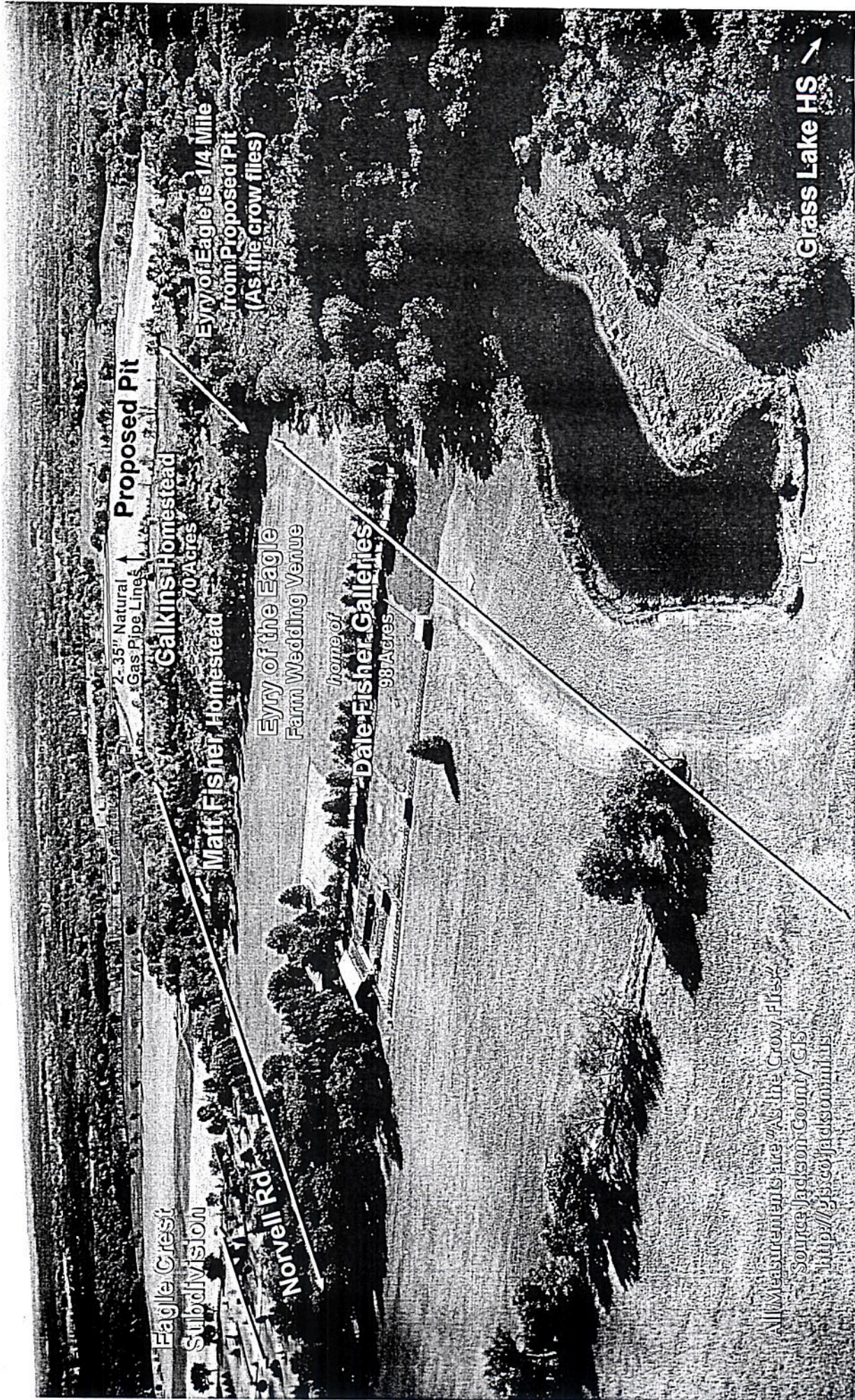
Matt Fisher Homestead

Norvell Rd

Calkins Homestead 70 Acres

DISTANCES As the Crow Flies

- 95 Miles Warrior Trail
- 98 Miles Grass Lake High School
- 1.18 Miles George Long Elementary School
- 1.33 Miles Grass Lake Middle School
- 1.69 Miles Grass Lake Village
- 1.95 Miles Grass Lake



Proposed Pit

2-35" Natural Gas Pipe Lines

Galkins Homestead
70 Acres

Matt Fisher Homestead

Eyry of the Eagle
Farm Wedding Venue

home of
Dale Fisher Galleries
98 Acres

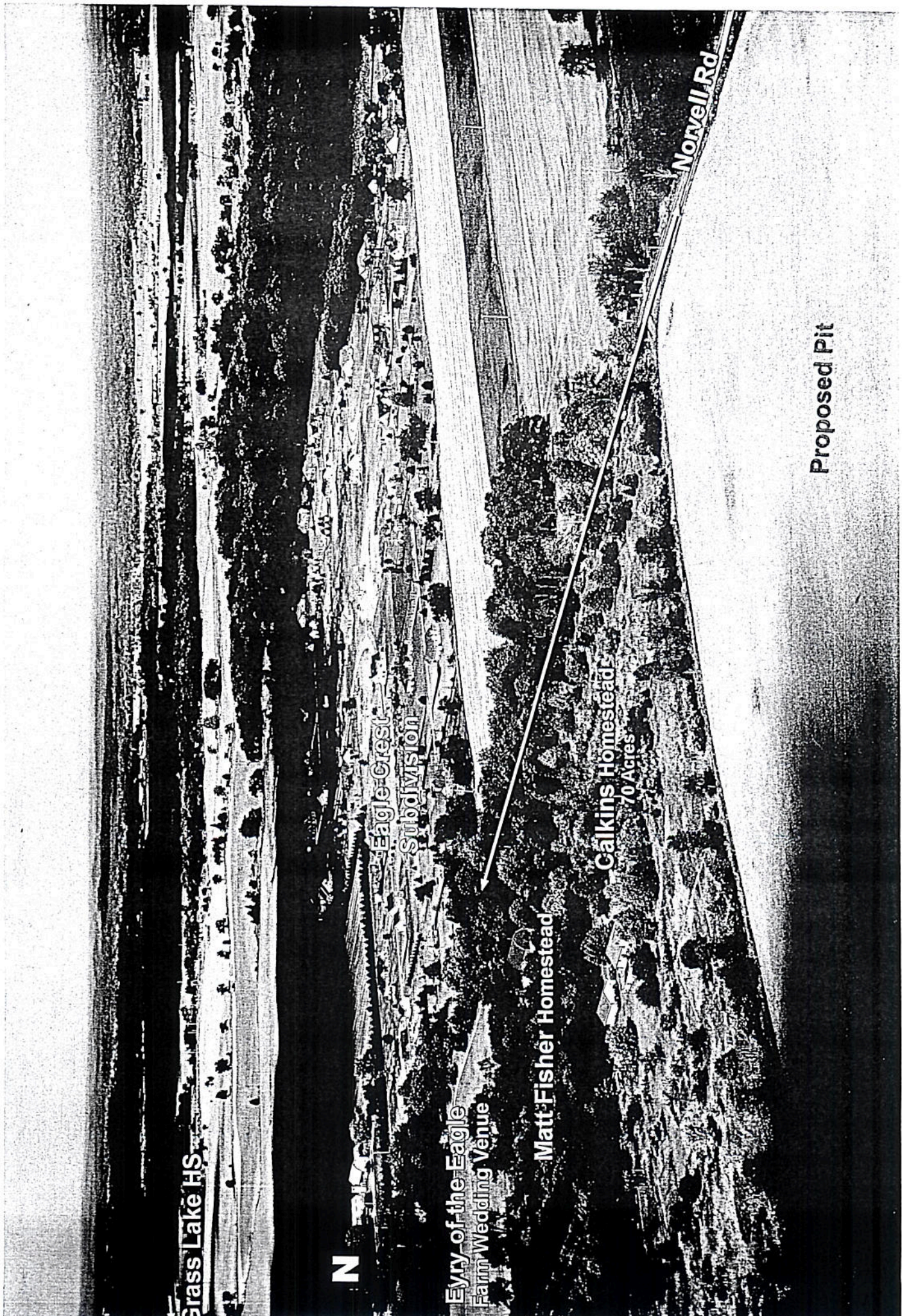
Eyry of Eagle is 1/4 Mile
from Proposed Pit
(As the crow flies)

Eagle Crest
Subdivision

Novell Rd

Glass Lake HS

All Measurements are "As the Crow Flies"
Source: Jackson County GIS
<http://gis.co.jackson.mn.us>



Grass Lake HS

N

Eagle-Crest
Subdivision

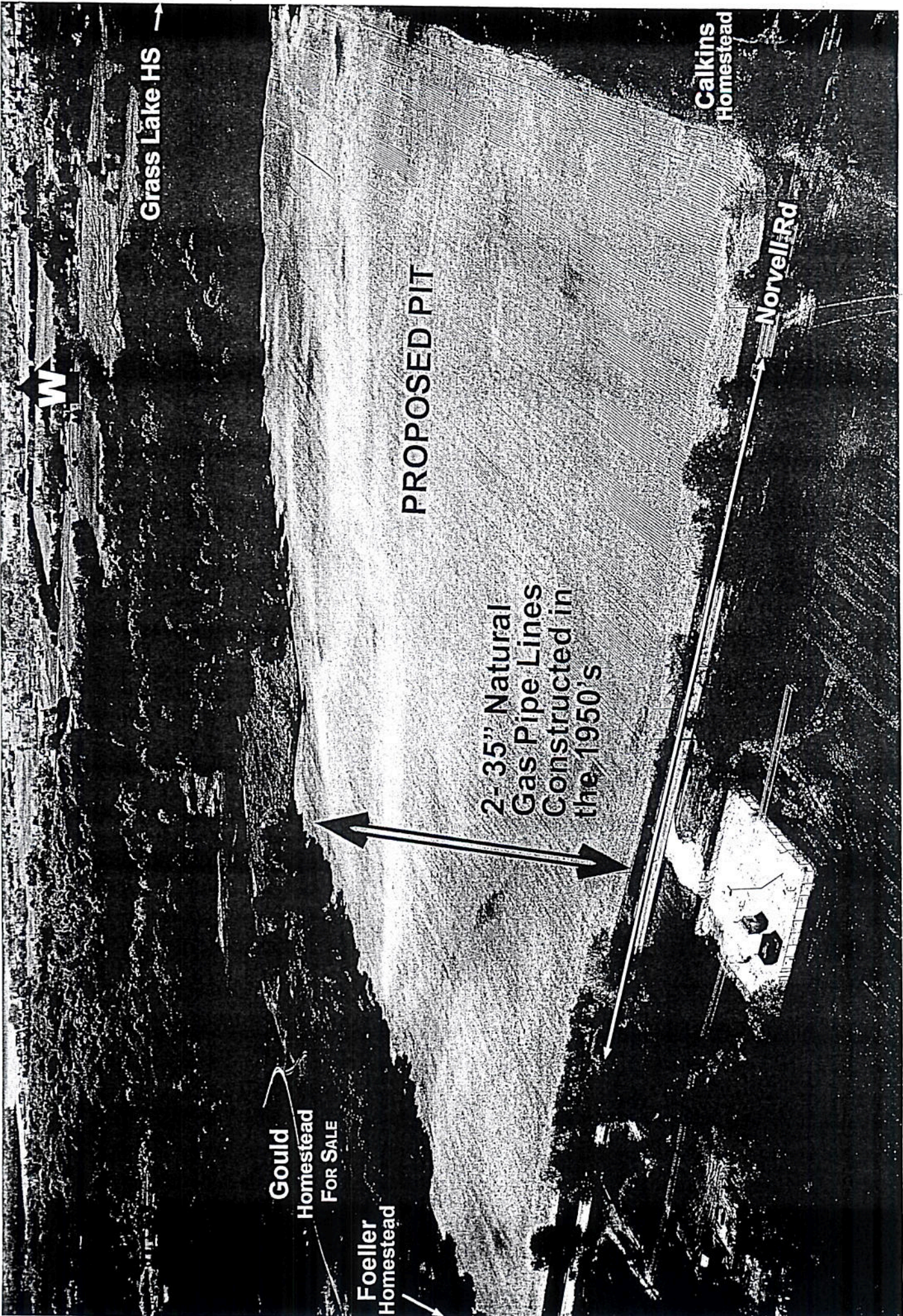
Evy of the Eagle
Farm Wedding Venue

Matt Fisher Homestead

Calkins Homestead
70 Acres

Norvell Rd

Proposed Pit



Grass Lake HS

W

PROPOSED PIT

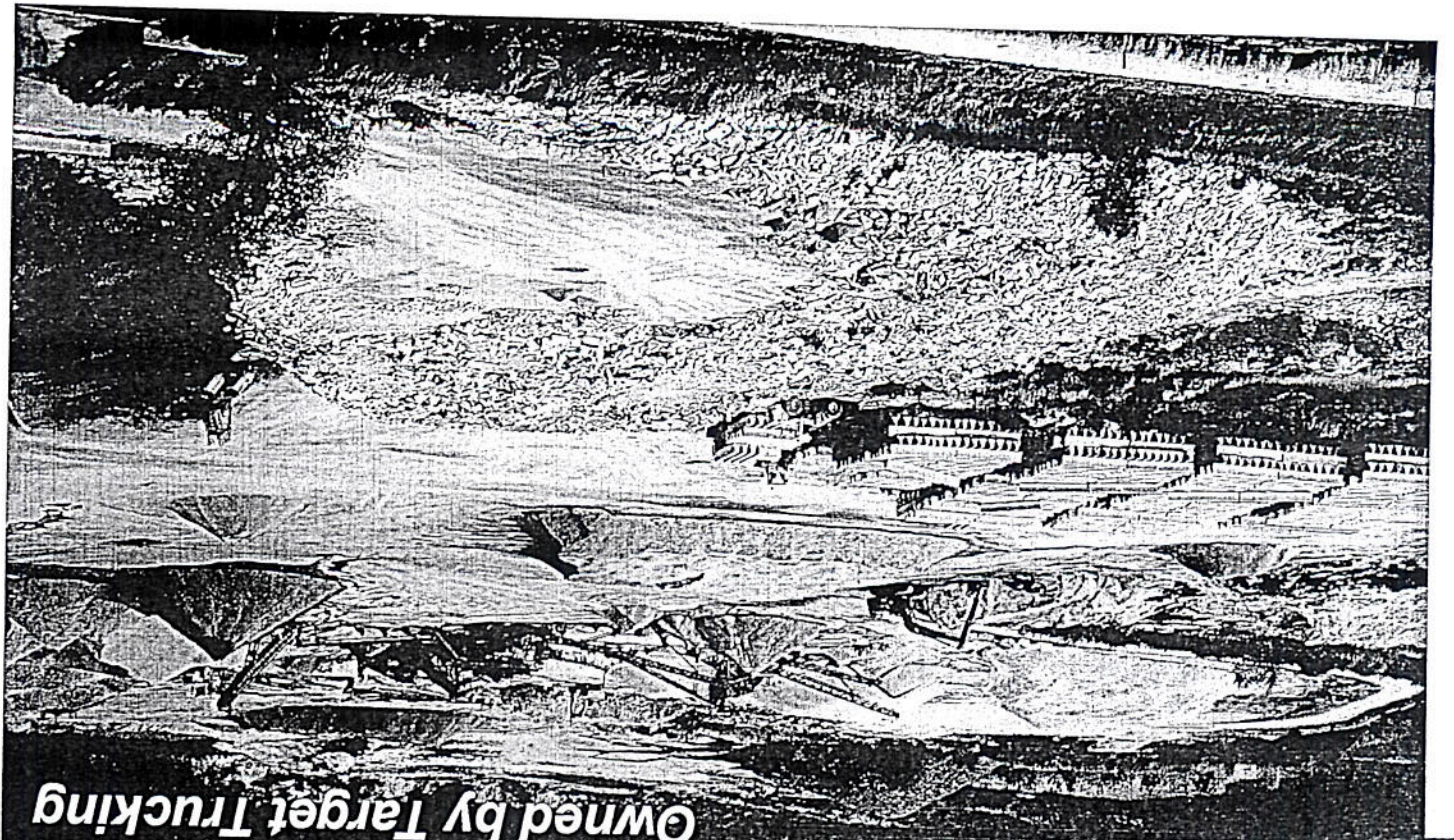
Calkins Homestead

Norvell Rd

2-35" Natural Gas Pipe Lines Constructed in the 1950's

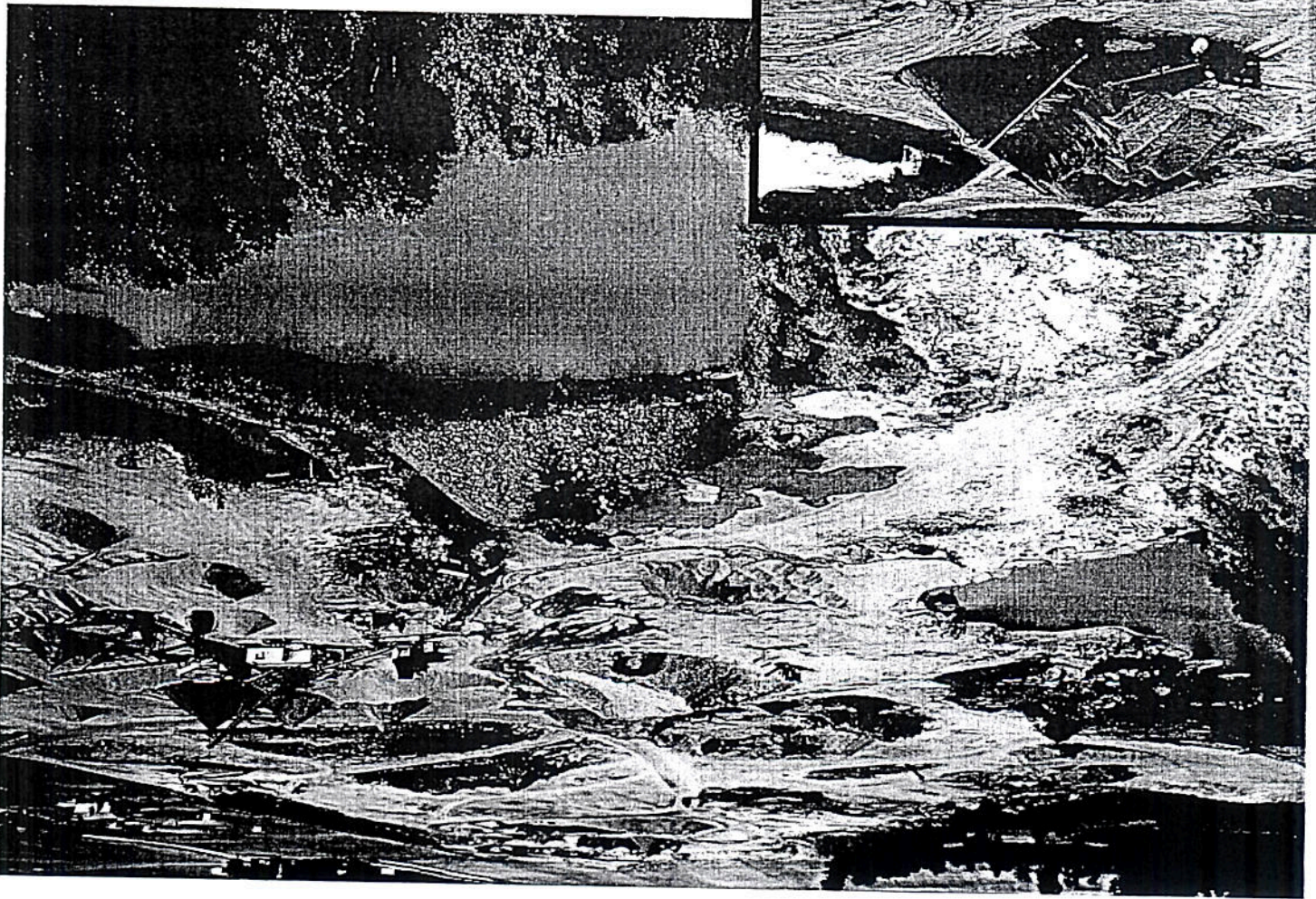
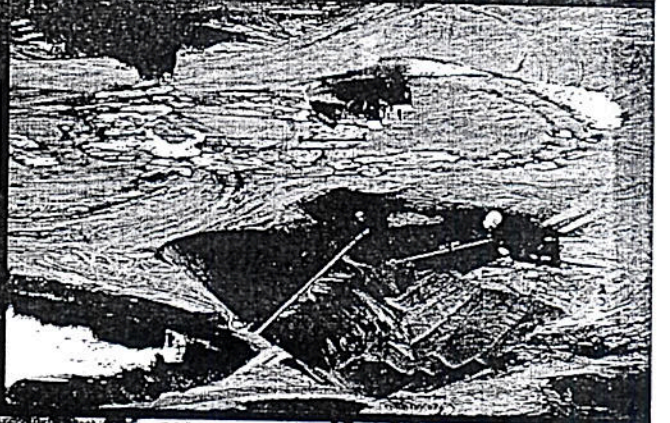
Gould Homestead FOR SALE

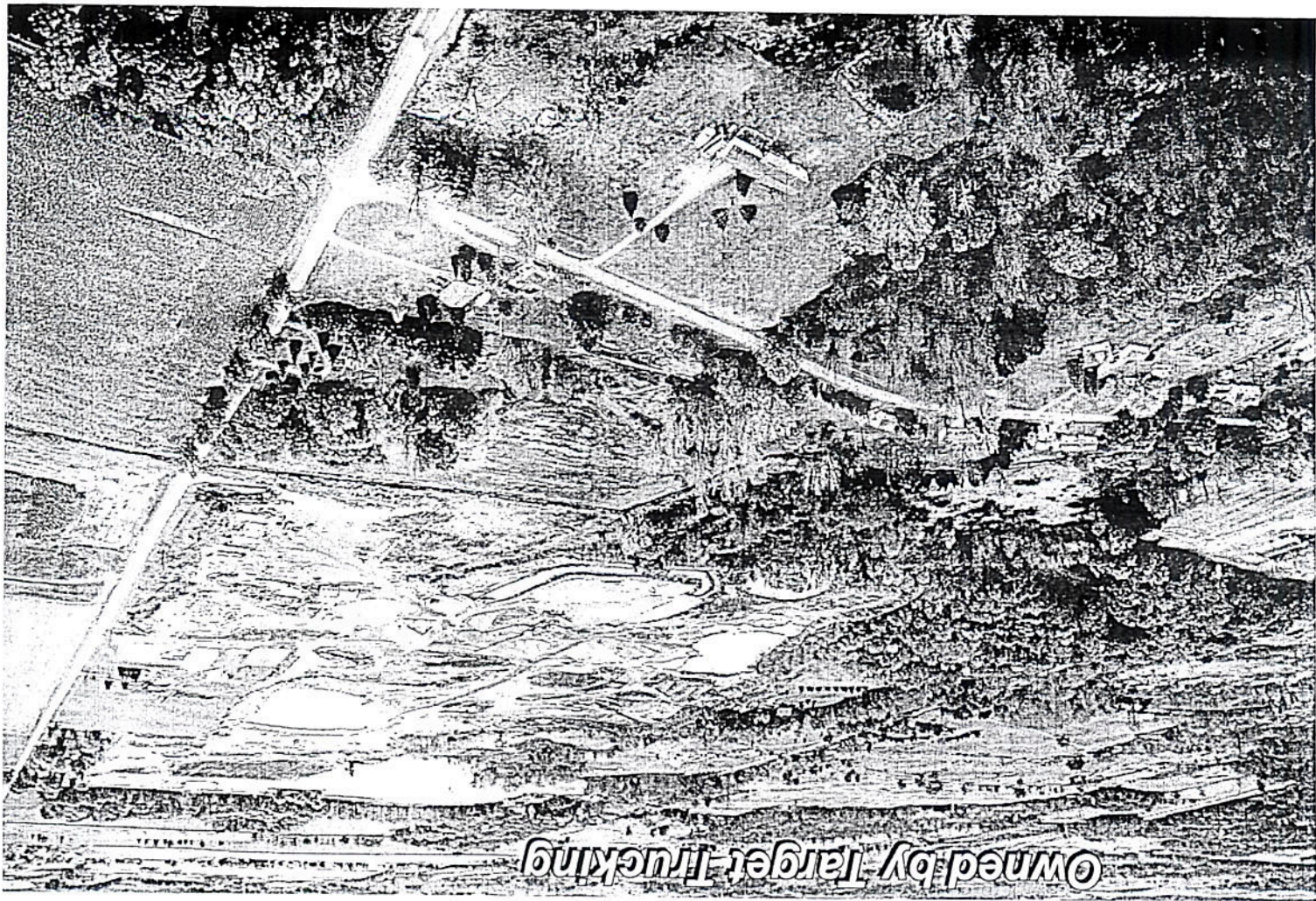
Foeller Homestead



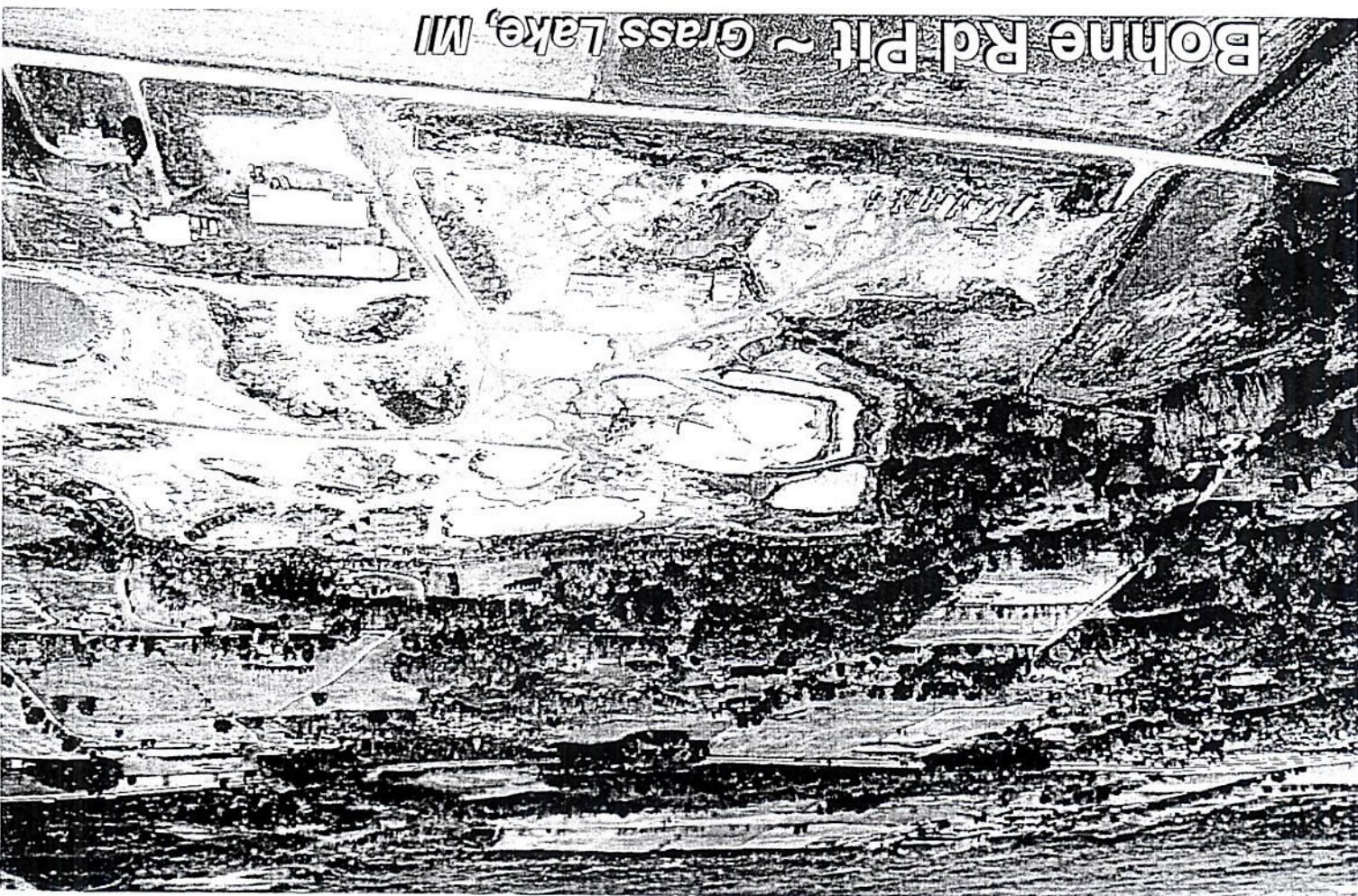
*Owned by Target Trucking
Grass Lake, MI*

Bohne Rd Pit





Owned by Target Trucking



Bohne Rd Pit ~ Grass Lake, MI



*Owned by Target Trucking
Grass Lake, MI*

Bohne Rd Pit

