COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

NOTICE

No. 96-0149

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JAMES HANLON,

Plaintiff-Respondent,

v.

TOWN BOARD OF MILTON, TOWN OF MILTON PLANNING & ZONING, TOWN OF MILTON BOARD OF ADJUSTMENT, and TOWN OF MILTON,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Rock County: PATRICK J. RUDE, Judge. *Reversed*.

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM.[1] The Town of Milton and its town board, board of adjustment, and planning and zoning committee appeal from a judgment

[1] This is an expedited appeal under RULE 809.17, STATS.

reversing the Town's decision to deny James Hanlon a conditional use permit. On certiorari review of a town zoning decision, review is limited to whether the Town kept within its jurisdiction; whether it acted accordingly to law; whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and whether the evidence was such that it might reasonably make the order or determination in question. ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment***, 131 Wis.2d 101, 119-20, 388 N.W.2d 593, 600 (1986). We apply those standards *de novo* and without deference to the trial court's decision. *See* ***Steenberg v. Town of Oakfield***, 167 Wis.2d 566, 571, 482 N.W.2d 326, 327 (1992). Applying the standards to this case, we conclude that the independent decisionmaker acted properly. We therefore reverse the trial court's judgment.

Hanlon applied to the Town for a conditional use permit to open and operate a gravel pit. The Town denied his request and, after proceedings in the trial court, the matter was remanded for an administrative appeal before an impartial decisionmaker, pursuant to § 68.11, STATS. After an evidentiary hearing, the hearing examiner issued extensive findings of fact and conclusions of law upholding the Town's decision to deny Hanlon a permit. On review of that decision, the trial court reversed and entered judgment ordering the Town to issue a permit.

The trial court reversed because it concluded that the hearing examiner failed to follow the criteria set forth in § 5.3 of the Town's ordinances. When reviewing conditional use applications, § 5.3 requires the board to consider: (1) the location, nature and size of the proposed use; (2) the size of the site in relation to the use; (3) the location of the site with respect to existing or future roads giving access to it; (4) the compatibility of the use with existing uses on adjacent land; (5) harmony of the use with future development in the area; (6) existing topography, drainage, soil type and vegetative cover; and (7) the relationship of the use to the public interest, the purpose and intent of this ordinance and substantial justice to all.

The hearing examiner made no express reference to § 5.3 in his decision. He did, however, rely on a different portion of the Town's ordinances, entitled "Standards for Evaluating Conditional Uses, Changing Zoning Districts and Granting Variances." That section requires examination of (1) site design and physical characteristics; (2) site location relative to the public road network;

(3) land use, including compatibility with existing or proposed uses in the area, relation to an existing land use plan, and relation to nearby existing or proposed development; (4) traffic concerns; (5) community effect, including "relation to the public interest, the purpose and intent of this ordinance, and substantial justice to all"; and (6) other relevant factors.

By any reasonable view, the hearing examiner used a set of standards virtually identical to the standards set forth in § 5.3 in deciding this case. His findings of fact based on those standards included: (1) that dust from the mine would negatively affect nearby commercial apple orchards; (2) that within one mile of the mine, there were twenty-one households in which a family member had a respiratory condition; (3) that noise levels from the mine would exceed the Town's standards; (4) that water from the mine may run off into a wildlife area and that the mine owner had not sought permits necessary to reroute surface waters; (4) that there was no plan for disposing of waste water or evidence of the effect on the water table of extensive water use; (6) that traffic from the mine would conflict with and pose a danger to families living nearby; (7) that the area of the mine was primarily residential, with further residential development planned; (8) that the DNR considered the mine a threat to its nearby wildlife area; and (9) that nearby residents oppose the mine because of concern with traffic, noise, dust and lowered property values.

Based on these findings, the hearing examiner concluded that the proposed use of the property was incompatible with existing and proposed uses in the area and with the existing land-use plan and that it would have a substantial detrimental impact on the tax base. He also concluded that the operation was incompatible with surrounding scenic and recreational values, that the proposed mine would create a substantial injustice to a large majority of the residential property owners in the immediate area, and that the proposal was therefore contrary to the public interest.

The evidence in the record was such that the hearing examiner could reasonably make the findings and conclusions in question. He kept within his jurisdiction, acted accordingly to law, and the evidence in support of the decision demonstrates that it was not arbitrary, oppressive or unreasonable. The hearing examiner's only omission, insofar as § 5.3 is concerned, was his failure to note the size of the proposed use and the size of the site in relation to

the use. Those were questions that had little bearing on the dispute. We must therefore reverse the trial court, reinstating the decision to deny a permit.

By the Court.—Judgment reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.