

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

September 4, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1597

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**THOMAS KONKEL, DONNA KONKEL, HAROLD R.,
ANDREW C., DAVID A., KENNETH E., ARTHUR W.,
AND JEAN R. BRISKY, AND SKYCOM, INC.,**

PLAINTIFFS-APPELLANTS,

V.

TOWN OF ELBA TOWN BOARD,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Skycom, Inc., and several Town of Elba landowners (appellants), appeal a judgment affirming a zoning decision of the Elba Town Board. The appellants petitioned the board to rezone two hundred

acres of farmland from exclusive agriculture (A-1) to extended commercial (EC). The board referred the petition to the Town of Elba Plan Commission, which recommended denial. The board adopted the commission's recommendation and findings, and the appellants commenced this review proceeding. They contend that the Elba Town Board: abused its discretion; exceeded its jurisdiction; denied the petition arbitrarily, oppressively and capriciously; and failed to act according to law. We reject those contentions and affirm.

The landowners sought rezoning as the first step in Skycom's plan to lease two hundred acres from them to build a 1706-foot television tower on the land. Under the applicable town ordinance, the board referred the petition to the plan commission. After hearings, the plan commission recommended denial, based on the following findings:

A. The proposed zoning district change and use will not promote the safety and health of the community because of increased risk of personal injury and property damage from falling ice and debris, aircraft collisions and car accidents caused by distracted drivers.

B. The proposed zoning district change and use will have no effect on population concentration.

C. The proposed zoning district change and use would require increased public services in [the] form of fire protection and road maintenance but would not require additional public facilities.

D. The proposed zoning district change and use will not stabilize and protect property values. The proposed change and use could have an adverse effect on property values.

E. The proposed zoning district change and use could adversely impact natural resources, especially migratory birds.

F. The proposed zoning district change and use will not preserve and promote the beauty of the town. The proposed use would be an “eyesore” and “visual pollution.”

G. The proposed zoning district change and use will not further or encourage appropriate use of land. The present A-1 zoning classification encourages the preservation of land used exclusively for agricultural purposes. The proposed zoning district change will jeopardize the use of the land for exclusively agricultural purposes.

H. The proposed zoning district change and use are not consistent with the comprehensive plan of the Town of Elba or Dodge County. Petitioners’ land is not an appropriate place for an EC zoning district.

I. The proposed zoning district change and use will not promote or benefit the general welfare of the town. The proposed use would increase the tax base but may or may not decrease the real property tax levy. Construction of the proposed tower would benefit local contractors little, if any. One more television channel is not a benefit to the community; there are enough television channels now. The only parties who will certainly benefit are the petitioners.

The town board allowed interested persons to submit oral and written evidence at a subsequent public hearing. Several days later, the board met publicly to decide the matter. The only speaker, other than board members, was the town attorney, who criticized much of the appellants’ written evidence. The board then voted to accept the plan commission’s report and recommendation to deny the petition without further explanation of their decision.

We limit review of a zoning board decision to: “(1) whether the board kept within its jurisdiction; (2) whether it proceeded on correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.” *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis.2d 468, 475, 247 N.W.2d

98, 102 (1976) (citations omitted). We examine the record *de novo* and do not defer to the trial court's decision. *Boynton Cab Co. v. DILHR*, 96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980). We do, however, grant substantial deference to the town board's zoning decision. In *Buhler v. Racine County*, 33 Wis.2d 137, 146 N.W.2d 403 (1966), the court stated:

[S]ince zoning is a legislative function, judicial review is limited and judicial interference restricted to cases of abuse of discretion, excess of power, or error of law. Consequently, although a court may differ with the wisdom, or lack thereof, or the desirability of the zoning, the court, because of the fundamental nature of its power, cannot substitute its judgment for that of the zoning authority in the absence of statutory authorization. This rule applies not only to the necessity and extent of zoning but also to rezoning

Id. at 146-47, 146 N.W.2d at 408 (citations omitted).

The purpose of A-1 zoning, as defined by Elba town ordinances, is “to promote an area for uses of a generally exclusive agricultural nature on lands of the best agricultural quality.” TOWN OF ELBA, WIS. ZONING ORDINANCE § 3.71 (1992). The purpose of EC zoning is “to promote an area for uses of a commercial nature which are generally found in association with major traffic arteries.” *See id.*, § 3.43. The ordinances allow the town board to change a zoning classification “[w]henever the public necessity, convenience, health, safety or general welfare require” it. *See id.*, § 12.1.

The board properly exercised its discretion. The appellants contend that the board erroneously exercised its discretion by failing to articulate the reasons for its decision. However, by approving the plan commission recommendation, the board, in effect, adopted and incorporated the commission

findings into its decision. Those findings present a fully articulated rationale for disapproving the petition.¹

The town board did not exceed its jurisdiction. The appellants contend that the plan commission's adopted findings address matters outside the town's jurisdiction. Those matters included, according to the appellants, air safety, wildlife protection, and television program content. In each case, according to the appellants, the applicable state or federal regulations would allow the tower, and the town's authority to deny rezoning is therefore preempted. We disagree. State legislation preempts a municipal ordinance if: "(1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation." *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis.2d 642, 651-52, 547 N.W.2d 770, 773 (1996) (footnotes omitted).

The issue here is not preemption of an existing ordinance, but whether state and federal approval of a project compels the town to rezone agricultural land. The appellants advance no authority for the proposition that the preemption doctrine would extend that far. We therefore conclude that the Elba Town Board properly considered air safety, wildlife protection and television program content, despite state and federal regulation of those matters, under its authority to consider "the public necessity, convenience, health, safety, or general welfare," before rezoning farmland. TOWN OF ELBA, WIS. ZONING ORDINANCE § 12.1.

¹ This court is required by statute to explain its decisions. Section 752.41(1), STATS. We have determined that an appropriate way of doing so is to adopt and incorporate a fully and properly articulated trial court decision, and affirm on the basis of that decision. *See* WIS. CT. APP. IOP VI(5)(a) (July 15, 1991).

The appellants also contend that the town board's consideration of the program content to be disseminated by the proposed tower somehow implicated Skycom's First Amendment rights. Again, the appellants have confused the issue. Skycom and the other appellants do not have a First Amendment right that compels rezoning of agricultural land.

The board did not act arbitrarily and capriciously by denying the rezoning petition. The appellant contends that the evidence did not support three plan commission findings, those being:

1. The proposed zoning district change and use will not stabilize and protect property values. The proposed change and use could have an adverse effect on property values.

2. The proposed zoning district change and use will not further or encourage appropriate use of land. The present A-1 zoning classification encourages the preservation of land used exclusively for agricultural purposes. The proposed zoning district change will jeopardize the use of the land for exclusively agricultural purposes.

3. The proposed zoning district change and use are not consistent with the comprehensive plan of the Town of Elba or Dodge County. Petitioners' land is not an appropriate place for an EC zoning district.

As to the first finding, the Dodge County Director of Planning testified to the potentially adverse effect on the nearby property values. The plan commission, and the board, could have reasonably considered this witness an expert and reasonably relied on his opinion to resolve that issue, even if the greater weight of the evidence favored the appellants. See *Petersen v. Dane County*, 136 Wis.2d 501, 511, 402 N.W.2d 376, 381 (Ct. App. 1987) (disapproval of a rezoning

petition is not arbitrary and capricious simply because it is contrary to the preponderance of the evidence).

Evidence in the nature of undisputed facts also supported the second of the three challenged findings. A television tower is radically different from and inconsistent with agricultural use. The fact that the tower would only remove one acre from agricultural use and that the town board had rezoned agricultural land in the past is of no consequence. Neither the limited amount of land taken nor the board's action on previous, unrelated petitions deprives it of the right to preserve exclusive agricultural zoning in this case.

As to whether the proposed rezoning was inconsistent with the town's comprehensive plan, the appellants contend that no comprehensive plan actually existed. As the board was advised, however, a comprehensive land use plan can exist within a planning ordinance. *Bell v. City of Elkhorn*, 122 Wis.2d 558, 565-66, 364 N.W.2d 144, 148 (1985). The board could reasonably treat its A-1 zoning as part of a comprehensive town plan to retain certain areas as exclusively agricultural.

The Elba Town Board acted according to law. Appellants contend that it did not because it provided insufficient notice for the series of hearings on the petition, and because the town's attorney advocated against the tower at the board's final hearing in the matter. However, the appellants themselves had adequate notice of all proceedings, as did residents affected by the rezoning. They fail to identify those other persons who did not receive notice, what their interest might have been, and how their attendance at the proceedings would have affected the outcome. As for the town attorney's advocacy, the appellants claim this affected their right to impartial decision-makers. However, the attorney was not

one of the board members ruling on the petition, and the appellants do not explain how his advocacy prejudiced those decision-makers. The record indicates that the appellants were given sufficient opportunity to present their evidence and arguments. The board therefore complied with the necessary ““common law concepts of due process and fair play,”” demanded of administrative proceedings. *See State v. Goulette*, 65 Wis.2d 207, 215, 222 N.W.2d 622, 627 (1974) (quoted source omitted).

By the Court.—Judgment affirmed.

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

