

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP1368

Cir. Ct. No. 2002CV1770

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TOWN OF LA PRAIRIE,

PLAINTIFF-APPELLANT,

V.

MULE HILL MATERIALS & NURSERY, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County:
JOHN H. LUSSOW, Judge. *Reversed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. The Town of La Prairie appeals the circuit court's decision dismissing its action. The issue is whether there are genuine issues of material fact in this case that preclude summary judgment. We conclude that there are and reverse.

¶2 The Town of La Prairie brought this action to seek compliance with its zoning ordinance regarding mineral extraction activity on land formerly owned by Whilden Hughes. Mule Hill Materials & Nursery, Inc., which now owns the land, brought a motion for summary judgment seeking dismissal. Mule Hill contended that it was permitted to operate a gravel extraction pit on the property because its non-conforming land use was grandfathered in when the new zoning ordinance took effect in 1977. The circuit court agreed and granted summary judgment dismissing the case.

¶3 We review a decision granting summary judgment de novo, benefiting from the circuit court's analysis. *Lambrecht v. Kaczmarczyk*, 2001 WI 25, ¶¶21, 241 Wis. 2d 804, 623 N.W.2d 751. Summary judgment is appropriate where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*, ¶¶24.

¶4 We conclude that summary judgment should not have been granted because there is a genuine factual dispute about whether there was a commercial extraction operation on Hughes' farm before the zoning law came into effect in 1977. We base this conclusion on the affidavits of Gordon Hill and William Kennedy and on photographs submitted by the parties.

¶5 Gordon Hill averred that he was very familiar with Hughes' land because he was a town board member from 1951 to 1995 and chairperson of the town board from 1963 to 1998. Hill averred that "there was no operating gravel extraction operation or pit located on Hughes' property in the [Town of La Prairie]" in 1977. Referring to a period in 1988 or thereabout, Hill stated that Hughes had called him, but he told Hughes "that he could not open a gravel pit for commercial sale there, because it was not zoned right." Hill stated that "[t]he pit

had just been opened.” He also stated that “Hughes indicated that he would haul from [his] Janesville property,” rather than his property in the Town of La Prairie, and that Hughes did in fact cease operating the pit. Finally, Hill stated that “[o]nly recently has Hughes hauled material from the property in ... the Town of La Prairie.”

¶6 William Kennedy stated in his affidavit that his family has owned and operated gravel-extracting facilities in the area, that he “has maintained a familiarity with all other competing extraction facility pits, and that neither Mr. Hughes or Mule Hill were operating a gravel extraction facility prior to 1988 in the Town of La Prairie.” Kennedy also stated that the Hughes operation “did not start until approximately 1988 to 1990.” Kennedy’s averment that he was in the gravel extracting business, made it his business to be aware of his competition, and had not heard that Hughes was operating a gravel extraction facility prior to 1988 is sufficient, when read with the Hill affidavit, to raise a factual issue about whether Hughes has had a gravel extraction operation open continuously since before 1977.

¶7 Finally, the aerial photographs also raise an issue of fact with regard to when extraction began, or at least when it began in a scale large enough to appear from the air. Aerial photos from 1975 and 1985 are similar and do not show much activity. A 1990 photo shows disruption to the land and a small road. The 2000 photograph shows major disruption and a larger road going to the area. The photos support Hill’s assertion that there was no active gravel extraction until relatively recently.

¶8 In sum, we conclude that summary judgment should not have been granted because the Town of La Prairie has submitted sufficient evidence by

affidavits and photos to contradict Hughes' testimony that there has been a commercial extraction operation on his farm since before the zoning law came into effect in 1977. Because there are genuine issues of material fact, summary judgment should not have been granted.

By the Court.—Judgment reversed.

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

