

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 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. 2004AP1318

Cir. Ct. No. 2004CV132

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**WILLIAM GILL, LUCY GILL, THOMAS GENGLER, RUSS PETERSEN,
WAYNE HOLT, RONALD DEABLER, AS TRUSTEE OF THE JOHN W.
DEABLER RESIDENTIAL TRUST, D. RODNEY BLUHM, MARY R. BLUHM,
PAUL ERDMANN, KATHY ERDMANN, DONALD COUNSELL, AND
SUE COUNSELL,**

PLAINTIFFS-APPELLANTS,

OTHER NEIGHBORS OF PABST FARMS,

PLAINTIFF,

V.

**CITY AND COMMON COUNCIL OF OCONOMOWOC, PLAN COMMISSION OF
OCONOMOWOC, CITY PLANNER OF OCONOMOWOC ROLAND TONN, PABST
FARMS DEVELOPMENT, LLC, OPUS NORTH CORPORATION, AND
ROUNDY'S, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Higginbotham, JJ.

¶1 PER CURIAM. The appellants appeal from an order of the circuit court that granted the respondents’ motion for summary judgment and dismissed the appellants’ action. The appellants argue that the circuit court erred when it concluded that the appellants lacked standing to challenge the action of the Common Council of Oconomowoc in granting a conditional use permit. Because we conclude that the circuit court properly determined that the appellants lacked standing under WIS. STAT. § 62.23(7)(f)2. (2003-04),¹ and granted summary judgment to the respondents, we affirm.

¶2 This matter involves the proposal of Opus North Corporation to build a food and grocery distribution facility to be operated by Roundy’s Inc., on property owned by Pabst Farms Development, LLC. Roland Tonn, the Oconomowoc City Planner, reviewed the application and determined that it was complete. The Plan Commission of Oconomowoc held public hearings and voted to recommend approval of the conditional use permit to the Common Council of Oconomowoc. The Common Council approved the conditional use permit for the project. (The respondents shall collectively be referred to as “the City.”)

¶3 The appellants are property owners in the Town of Summit, (hereinafter “the property owners”) who brought this action on their own behalf

¹ All references are to the 2003-04 version of the Wisconsin Statutes unless otherwise noted.

and on behalf of other neighbors of Pabst Farms, alleging that each of them has been or will be injured by the actions of the City. The City moved for summary judgment arguing that the property owners lacked standing to pursue their claims under WIS. STAT. § 62.23(7)(f)2. The circuit court held a hearing on the motions. The circuit court found that some of the plaintiffs were neighboring property owners as defined by the statute, and some were not. The court further found that none of the plaintiffs had shown that they were specially damaged as required by the statute. The court concluded that the property owners, therefore, lacked standing to challenge the Common Council's decision to grant a conditional use permit to the respondents. The court dismissed the action and the property owners appeal.

¶4 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins an issue of material fact or law. If we determine that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If the movant has carried his [or her] initial burden, we then look to the opposing party's affidavits to determine whether any material facts are in dispute that entitle the opposing party to a trial.

Schurmann v. Neau, 2001 WI App 4, ¶6, 240 Wis. 2d 719, 624 N.W.2d 157 (Ct. App. 2000) (citations omitted). In our review, we are limited to consideration of the pleadings and evidentiary facts submitted in support and opposition to the motion. See *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 573, 431 N.W.2d 721 (Ct. App. 1988).

¶5 The property owners first argue that the circuit court incorrectly determined that WIS. STAT. § 62.23(7)(f)2. applies to this action. The property owners argue that the case should have been decided under § 62.23(7)(e)10., which allows “[a]ny person or persons, jointly or severally aggrieved by any decision of the board of appeals” to commence a certiorari action. They argue that the City violated its own zoning ordinances during the approval procedure, and thereby deprived the property owners of the opportunity to appeal the Plan Commission’s decision to the Board of Appeals. Since they should have been allowed to appeal to the Board of Appeals, they argue, this court should allow them to satisfy the less restrictive standing requirements contained in § 62.23(7)(e)10.

¶6 The City responds that the challenged action was properly taken by the Common Council, and that the standing requirements for challenging an action taken by the Common Council are set out in WIS. STAT. § 62.23(7)(f)2. The City asserts that the property owners are arguing, in essence, that if the conditional use permit had been approved in a different manner, then a different rule would apply. We agree.

¶7 Under the controlling statute, the Common Council has the authority to appoint a plan commission or board of appeals. *See* WIS. STAT. § 62.23(1) and (7)(e). The statute also states that its provisions do not prevent the Common Council from granting special exceptions. *See* § 62.23(7)(e)1. In other words, as the City argues, the Common Council is allowed to make conditional use decisions. The statute further establishes that an aggrieved party challenges a decision by the Common Council under § 62.23(7)(f)2. Because the property owners are challenging a decision of the Common Council, the circuit court

properly concluded that the property owners must meet the standing requirements of § 62.23(7)(f)2.

¶8 In order to bring a challenge to a decision under WIS. STAT. § 62.23(7)(f)2., a property owner must establish that he or she is: (1) an adjacent or neighboring property owner, and (2) that he or she is specially damaged. The circuit court determined that some of the plaintiffs were neighboring property owners within the meaning of the statute. More importantly, however, the court determined that none of the property owners here established that they have been or will be specially damaged by the decision to grant the conditional use permit. We agree.

¶9 The Wisconsin Supreme Court has defined “specially damaged” as irreparable injury done to property “when the injury threatened is special and different from that of the general public.” *Jelinski v. Eggers*, 34 Wis. 2d 85, 91, 148 N.W.2d 750 (1967) (quoting *Holzbauer v. Ritter*, 184 Wis. 35, 39, 198 N.W. 852 (1924)). In that case, a neighboring property owner built a garage that violated a setback requirement of a zoning ordinance. *Id.* The supreme court concluded that the plaintiffs had been specially damaged because they had been denied “the full use of the light and air and view from their home ... as distinguished from general or public damage.” *Id.* at 92. In other words, the court concluded that because of their proximity to the garage built in violation of the ordinance, this injury was specific to these plaintiffs. They were, therefore, specially damaged within the meaning of the applicable statute. *Id.*

¶10 In this case, however, the property owners have neither alleged nor proved that they are facing irreparable injury as a result of the City’s actions that is different from any injury faced by the general public. At the most, they have

established that all of the homes on the northern shore of Middle Genesee Lake and the properties to the east and west of the proposed distribution center may be injured by the alleged increase in noise and traffic. Because this is a potential injury faced by the general public, and is not specific to these appellants, we agree with the circuit court's finding that they have not demonstrated that they have been specially damaged within the meaning of the statute.² Consequently, we must also agree with the circuit court's conclusion that they lack standing to challenge the Common Council's decision to grant a conditional use permit. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

² Because we conclude that none of the plaintiffs established that they were specially damaged, we need not address that part of the circuit court's decision that determined which plaintiffs were neighbors within the meaning of the statute. See WIS. STAT. § 62.23(7)(f)2.

