

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2006

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 Nos. 2005AP999
2005AP1076**

**Cir. Ct. Nos. 2003CV431
2004CV650**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 2005AP999

ROLLAND R. ROGGENSACK AND MARGARET E. ROGGENSACK,

PLAINTIFFS-APPELLANTS,

v.

GRANT COUNTY, WISCONSIN AND RULE CONSTRUCTION LTD.,

DEFENDANTS-RESPONDENTS.

No. 2005AP1076

STATE OF WISCONSIN EX REL. ROLLAND R. ROGGENSACK,

PETITIONER-RESPONDENT,

v.

PLANNING & ZONING COMMITTEE, COUNTY OF GRANT,

RESPONDENT-APPELLANT.

APPEAL from judgments of the circuit court for Grant County:
WILLIAM D. DYKE and MICHAEL KIRCHMAN, Judges. *Affirmed.*

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. These two appeals, which have been consolidated for disposition, stem from the same underlying dispute regarding land owned by Rule Construction Ltd. Rolland and Margaret Roggensack have appealed Judge Dyke’s declaratory judgment that an amendment to the Grant County Zoning Ordinance is lawful and valid. The Grant County Planning and Zoning Committee appeals Judge Kirchman’s decision setting aside the Planning and Zoning Committee’s decision to grant a conditional use permit related to the same parcel. We affirm both appeals.

¶2 The procedural history of these cases is complex, but the facts are not disputed. Rule Construction purchased a little over five acres of land near the Roggensacks’ home. Rule Construction wanted to use the parcel as a stone quarry. Rule Construction petitioned the Grant County Planning and Zoning Committee to change the zoning classification of the parcel from exclusive agricultural to industrial M2. The Planning and Zoning Committee recommended approval to the Grant County Board of Supervisors, which adopted the amendment to the zoning ordinance reclassifying the parcel.

¶3 The Roggensacks filed an action in the circuit court against Grant County and Rule Construction, seeking a declaratory judgment that the amendment was unlawful and an injunction prohibiting Rule Construction from further quarrying operations. The case was assigned to Judge Dyke. All parties moved for summary judgment. Judge Dyke denied the summary judgment motion brought by Grant County and Rule Construction. Judge Dyke also ordered that

Rule Construction “start the process over again for obtaining a conditional use permit for operating a quarry on the subject site.” Finally, Judge Dyke held in abeyance a decision on the Roggensacks’ motion for summary judgment and their request for declaratory judgment, pending compliance by Grant County and Rule Construction with its order.

¶4 Pursuant to Judge Dyke’s order, Rule Construction applied for a conditional use permit, proceeding on the basis that the property had not been rezoned and was therefore zoned for exclusive agricultural use. The Planning and Zoning Committee issued a conditional use permit to Rule Construction allowing it to operate the quarry. The Roggensacks then sought certiorari review of the decision granting the conditional use permit. This case was assigned to Judge Kirchman.

¶5 After the Roggensacks filed the petition for certiorari review in the case assigned to Judge Kirchman, Judge Dyke issued a written decision on the remaining motion for summary judgment and the motion for declaratory judgment. Judge Dyke denied the Roggensacks’ motion for summary judgment and ruled that the amendment to the Grant County zoning ordinance reclassifying the parcel from exclusive agricultural to industrial M2 was lawful and valid.

¶6 Shortly thereafter, Judge Kirchman issued a decision on the petition for certiorari review, reversing the Planning and Zoning Committee’s decision to grant a conditional use permit. Judge Kirchman concluded that the Planning and Zoning Committee did not have authority to grant a conditional use permit for an exclusive agricultural district because the amendment rezoning the parcel to industrial M2 had not been invalidated. Both Judge Dyke’s decision and Judge Kirchman’s decision have been appealed.

¶7 We first address Judge Dyke’s decision. Despite the complicated procedural history of this case, the legal issues presented are not novel. Judge Dyke concluded that the amendment to the zoning ordinance reclassifying Rule Construction’s parcel was valid. Where, as here, land “‘is granted privileges which are not granted or extended to other land in the vicinity in the same use district,’” the land has been “[s]pot zon[ed].” *Step Now Citizens Group v. Town of Utica Planning & Zoning Comm.*, 2003 WI App 109, ¶27, 264 Wis. 2d 662, 663 N.W.2d 833 (citation omitted). Spot zoning is both lauded and deplored. *See id.*, ¶28 (“Spot zoning has been characterized both as a necessary device to provide flexibility to comprehensive zoning ordinances and as ‘the very antithesis of planned zoning.’”). Spot zoning “‘should only be indulged in where it is in the public interest and not solely for the benefit of the property owner who requests rezoning.’” *Id.*, ¶31 (citation omitted). Zoning ordinances are presumed valid, and the opinion of the zoning authority controls unless it misuses its discretion, acts in excess of its authority, or makes an error of law. *Id.*, ¶26.

¶8 The Grant County Board of Supervisors did not misuse its discretion, exceed its authority or make an error of law in rezoning the land. According to John Patcle, Vice-Chairman of Grant County’s Planning and Zoning Committee, the Board’s decision to rezone the land so that it could be used as a quarry benefited not only Rule Construction, but all of the people of the county, because it increased competition in the quarry industry, lowering the price of rock. The Grant County Board of Supervisors concluded that the development would not result in undue water or air pollution, that soil erosion would not be an issue on the site, and that adequate public facilities existed to accommodate the quarry. Under the presumptively valid and broad rezoning authority accorded the County,

the rezoning was valid because it served the public interest and was not unduly burdensome in terms of public health and resources.

¶19 We next address Judge Kirchman’s decision. We believe that Judge Kirchman correctly analyzed the matter. The parcel had been rezoned to industrial M2. When Judge Dyke ordered Rule Construction to “start the process over” by applying for a conditional use permit while Judge Dyke’s decision on the validity of the rezoning was pending, Rule Construction and the County proceeded on the assumption that the parcel was still zoned for exclusive agricultural use. Because the circuit court then upheld the rezoning to industrial M2, Rule Construction and the County had proceeded based on the wrong assumption. The Planning and Zoning Committee lacked authority to grant the conditional use permit to Rule Construction because the committee issued the permit under the incorrect belief that the land was zoned as an exclusively agricultural district, when in fact the parcel had been properly rezoned as industrial M2.

By the Court.—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

