

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2007

David R. Schanker
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. 2006AP2036

Cir. Ct. No. 2005CV56

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**RICHARD WHITBECK, JACQUELINE WHITBECK, JOHN SEE, LYNNE
SEE, STEVEN NEWMAN AND SANDY D'HEILLY,**

PLAINTIFFS-APPELLANTS,

STANLEY MOE AND KATHLEEN MOE,

PLAINTIFFS,

v.

**BARRON COUNTY BOARD OF SUPERVISORS, TOWN OF MAPLE PLAIN,
PATRICIA A. OLSON AND JOHN T. OLSON,**

DEFENDANTS-RESPONDENTS,

BARRON COUNTY BOARD OF ADJUSTMENTS,

DEFENDANT.

APPEAL from a judgment of the circuit court for Barron County:
JAMES C. BABLER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Richard Whitbeck¹ appeals a summary judgment in favor of the Barron County Board of Supervisors, the Barron County Board of Adjusters, the Town of Maple Plain, and Patricia and John Olson. Whitbeck argues the spot zoning of the Olsons' property is illegal because it is for the sole benefit of the Olsons. Alternatively, Whitbeck argues the zoning authorities made an error of law by failing to apply the eight factors laid out in BARRON COUNTY, WIS. ORDINANCE § 17.81(3) (2005). We are not persuaded and affirm the judgment.

BACKGROUND

¶2 Whitbeck is a resident of Minnesota and owned real property in Barron County, Wisconsin, for twenty-nine years. The Olsons are adult residents of Wisconsin and own property near Whitbeck's in Barron County. The Board of Supervisors and the Board of Adjustments (Committee) are governing bodies of Barron County which is a municipal corporation. The Town of Maple Plain is a municipal corporation.

¶3 Initially, the Olsons filed a petition to rezone an eighty-acre parcel, from Agricultural II/Business to Recreational/Residential, so they could develop a recreational campground. Maple Plain approved the petition by resolution. The Town's resolution states:

The board feels the request will encourage economic development, in the town as there is a need for recreational

¹ There are other plaintiffs in this action. For the sake of clarity, we refer to them collectively as "Whitbeck."

Facilities. This property is now Ag.II it is not conducive to Ag. production. Best use is for recreational and commercial....

¶4 Subsequently, the Committee held its first public hearing on the petition. During this hearing, the Committee viewed a video and a slide show of the Olson property. The Committee then adjourned the hearing until it could determine the number of acres the Olsons required for the campground.

¶5 At the Committee's next hearing, Whitbeck and his attorney spoke against the rezoning. In response, the Olsons agreed to reduce the area to be rezoned from eighty acres to approximately fifteen acres. The Committee held a meeting and site visit at the Olsons' property. Whitbeck also attended this meeting.

¶6 A few weeks later, the Committee convened with Whitbeck and his counsel present. At this hearing, the Committee approved the rezoning of roughly fifteen acres of the Olsons' property by a vote of four to one. In its report, the Committee made the following findings:

- 1.) Good use for land – promotes recreation in the are[a]s.
- 2.) Allows vacationers to use north Wisconsin lakes.
- 3.) Approved by the township.
- 4.) Adjoins commercial land and close to a lake. Very good use of the land.
- 5.) Land is hidden [and] campground will not affect anyone. Meets the Land Use Plan.

¶7 After the Committee's decision, Whitbeck filed a statutory protest against the Olsons' rezoning petition. The Board of Supervisors met to consider the statutory protest and the Olsons' petition to rezone their property. Whitbeck

and his counsel were present at this hearing. The Board voted twenty to four to approve the Olsons' petition and rejected Whitbeck's statutory protest.

¶8 Whitbeck then filed this action in circuit court. The circuit court ultimately heard cross-motions for summary judgment on Whitbeck's two surviving state law claims alleging (1) the rezoning was illegal spot zoning; and (2) the rezoning violated Whitbeck's procedural and substantive due process rights because the Board failed to address standards set forth in the County Zoning Ordinance. The circuit court held the rezoning was spot zoning. However, the court held the spot zoning was not illegal because it was in the public's interest and was not solely for the Olsons' benefit. Additionally, the court concluded the rezoning did not violate any of Whitbeck's due process rights because the Board considered the necessary factors in reaching its decision. Whitbeck appeals.

DISCUSSION

¶9 This court reviews the grant of summary judgment de novo and applies the same standard as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).²

¶10 Here, neither party disputes that the rezoning constituted an act of spot zoning.³ "Spot zoning is not per se illegal[,] however. *Step Now Citizens*

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

³ Spot zoning is defined as "the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district..." *Cushman v. City of Racine*, 39 Wis. 2d 303, 306-07, 159 N.W.2d 67 (1968) (citation omitted).

Group v. Town of Utica Planning & Zoning Comm., 2003 WI App 109, ¶30, 264 Wis. 2d 662, 663 N.W.2d 833. Whitbeck argues the spot zoning is illegal because it solely benefits the Olsons. *See id.*, ¶31. Alternatively, he argues the rezoning was based on an error of law because zoning authorities did not follow the procedure laid out in ORDINANCE § 17.81(3).

¶11 WISCONSIN STAT. § 62.23(7) grants municipalities zoning power. *Cushman v. City of Racine*, 39 Wis. 2d 303, 306, 159 N.W.2d 67 (1968). Amendments of zoning ordinances are also permitted. *Id.* In challenging the rezoning, Whitbeck faces “the burden of a heavy presumption against ... [his] challenge to the rezoning.” *See Step Now*, 264 Wis. 2d 662, ¶26. Zoning is a matter of legislative discretion and, therefore, we presume it is valid. *Id.* “[A] court may differ with the wisdom and desirability of a zoning change [however,] it cannot substitute its opinion for that of the zoning authority.” *Heaney v. City of Oshkosh*, 47 Wis. 2d 303, 307, 177 N.W.2d 74 (1970). In the absence of an erroneous exercise of discretion, excess power or error of law, the zoning authority’s opinion controls. *Rodgers v. Village of Menomonee Falls*, 55 Wis. 2d 563, 572, 201 N.W.2d 29 (1972).

I. The Town, the Committee, and the Board Considered Sufficient Factors to Make Its Spot Zoning Legal.

¶12 Spot zoning is not per se illegal because it can be consistent “with the purposes for which zoning ordinances can be passed according to WIS. STAT. § 62.23(7).” *Step Now*, 264 Wis. 2d 662, ¶28. In fact, “spot zoning has been characterized as a ... necessary device to provide flexibility to comprehensive zoning ordinances....” *See Howard v. Village of Elm Grove*, 80 Wis. 2d 33, 41-42, 257 N.W.2d 850 (1977).

¶13 The standard to determine whether spot zoning is legal is as follows:

Spot zoning to be accomplished through rezoning 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, absent any showing that a refusal to rezone will in effect confiscate his property by depriving him of all beneficial use thereof....

Rodgers, 55 Wis. 2d at 573 (citation omitted). The determination of whether spot zoning is in fact legal is a case by case inquiry that must be determined on the facts. *Step Now*, 264 Wis. 2d 662, ¶30. Those factors which we have pointed to in the past as relevant to this inquiry are as follows:

whether the rezoning is consistent with long-range planning and based upon considerations which affect the whole community. The nature and character of the parcel, the use of the surrounding land and the overall scheme or zoning plan are also relevant. Finally, the interests of public health, morals and safety must also be considered, as well as the promotion of public welfare, convenience and general prosperity.

Id. (citations omitted).

¶14 Here, Whitbeck argues the spot zoning was illegal because it was simply for the benefit of the Olsons and had no broader benefits to the community. We must reiterate that zoning is a matter of legislative discretion and we cannot simply substitute our opinion for that of the zoning authority, which is in essence what Whitbeck asks us to do. *See id.*, ¶36.

¶15 The Town and the Committee met at least three times on this matter.⁴ Whitbeck and his counsel were present at most of these meetings and voiced their objections, arguing the respective authorities had to apply the aforementioned factors. Although the Board’s record is not explicit,⁵ the Board was presented with adequate findings from the Town and the Committee to support the decision to rezone. Those findings include: (1) the need for economic development and recreational facilities; (2) keeping the parcel in the Ag-II zone was not the best use, as the land was not conducive to agriculture; (3) the best use of the parcel was for recreational and commercial activities; (4) the zoning change would allow vacationers to use northern Wisconsin lakes; (5) the rezoning met the land use plan; (6) and the land was hidden and would not negatively affect anyone.

¶16 Whitbeck nevertheless contends that the rezoning was illegal because these governmental bodies, particularly the Board, did not make sufficient and specific findings. However, there is no requirement “that a legislative body has to prove that it considered certain standards or employed specific magic words.” *Id.*, ¶37. Therefore, we conclude the Town, the Committee, and the Board properly exercised their legislative discretion because the record shows the zoning authorities considered the spot zoning a benefit to more than just the Olsons.

⁴ Whitbeck asserts that one of the meetings was not properly noticed to him. However, he does not develop this argument beyond its mere assertion. We decline to address undeveloped arguments. See *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (under WIS. STAT. RULE 809.19(1)(e) proper appellate argument requires an argument containing the contention of the party with citation of authorities and statutes).

⁵ Whitbeck argues the various zoning authorities should have recorded their meetings. Whitbeck cites no authority requiring legislative bodies hearing zoning issues to make a record of their proceedings. We decline to address this unsupported argument as well. See *Shaffer*, 96 Wis. 2d at 545-46.

II. The Town and the Board Did Not Violate ORDINANCE § 17.81(3) By Rezoning the Olsons' Property.

¶17 Alternatively, Whitbeck argues the Town and the Board made an error of law by not explicitly complying with ORDINANCE § 17.81(3). The Board argues Whitbeck waived this issue on appeal. Regardless, we are satisfied the Board did comply.

¶18 Barron County enacted ORDINANCE § 17.81(3), which includes eight standards for determining when to rezone or amend a zoning plan:

(3) REZONING AND AMENDMENT STANDARD.

(a) General Rezoning Standards. The district boundaries established by this chapter and the maps designating said boundaries may be amended if upon consideration of the following general standards which address public necessity, convenience, general welfare, and good zoning practice it is determined that:

....

1. Additional property of the proposed zoning classification is needed in the area to meet public need, because existing property of the classification is being utilized, or uses that would be beneficial to the neighborhood and are authorized under [the] proposed classification are not reasonably accessible to the neighborhood.

2. The principle uses and accessory uses thereto authorized under the proposed zoning classification, are unlikely to impair the use, enjoyment, or economic value of neighboring properties due to appearance, noise, dust, odor, smoke or vibration.

3. The principle uses and accessory uses thereto authorized under the proposed zoning classification, are unlikely to endanger the public health or safety, if located in the area.

4. The principle uses and accessory uses thereto authorized under the proposed zoning classification, are unlikely to cause an unreasonable adverse impact on air quality, ground water, surface water, or natural vegetation if located in the area.

5. The principle uses and accessory uses thereto authorized under the proposed zoning classification, are unlikely to cause an unreasonable adverse impact on historically significant features if located in the area.
6. The principle uses and accessory uses thereto authorized under the proposed zoning classification, are unlikely to impair the normal development of neighboring properties if located in the area.
7. The proposed zoning classification is unlikely to cause undesirable land use patterns, including but not limited to small, isolated zoning districts or neighboring incompatible uses.
8. The proposed zoning classification is consistent with the county land use plan, or a land use plan of the affected town or neighboring municipality.

ORDINANCE § 17.81(3)(a).

¶19 Whitbeck argues WIS. STAT. § 59.69(14) required the zoning authorities to apply each of these factors in making its decision to rezone. Whitbeck relies on the following part of § 59.69(14) to support his argument:

A landowner, occupant or other person who is affected by a county zoning ordinance or amendment, who claims that the ordinance or amendment is invalid because *procedures prescribed by the statutes or the ordinance were not followed*, shall commence an action within the time provided by [WIS. STAT.] s. 893.73(1)... (Emphasis added.)

Whitbeck thus argues that because the zoning authorities did not explicitly consider the factors laid out ORDINANCE § 17.81(3), they did not follow the procedures prescribed by the ordinance and therefore made an error of law.

¶20 Whitbeck's argument fails for two reasons. First, ORDINANCE § 17.81(3) does not lay out procedures that must be followed; rather, it lays out standards for the zoning authorities to consider. This section does not require the Board's affirmative approval of each factor as a prerequisite to adoption of a

zoning amendment. By its plain language, ORDINANCE § 17.81(3)(a) provides guidelines for the Board to consider when reviewing a proposed rezoning.

¶21 Second, even assuming ORDINANCE § 17.81(3) does lay out a procedure the Board must follow, the record supports the conclusion that the Board considered these factors. We must presume legislative bodies act rationally and consider all factors required by law. See *Buhler v. Racine County*, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966). We also reiterate legislative bodies do not need to prove that they considered certain standards or employed specific magic words in the context of rezoning. *Step Now*, 264 Wis. 2d 662, ¶37.

¶22 The record demonstrates the Board considered at least six of the eight standards within the ordinance. Regarding the first standard, it concluded there is a public need for recreational zoned lands. As to the second standard, it determined the land was hidden and the rezone would not affect anyone. Regarding the third and sixth standards, it concluded the use would not adversely affect anyone. It concluded recreational use is preferred to agricultural use, satisfying the seventh standard. Regarding the eighth standard, it concluded the rezoning is consistent with an applicable land use plan. Based upon the record, we conclude the Board had the zoning ordinance factors before them when they considered the rezone decision and it made its decision consistent with them.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

