

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 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. 2005AP1220

Cir. Ct. No. 2004CV936

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**GRAND VIDERE ENTERPRISES LLC AND
GRAND VIDERE ESTATES CONDOMINIUM
ASSOCIATION, INC.,**

PLAINTIFFS-APPELLANTS,

v.

TOWN OF JANESVILLE,

DEFENDANT-RESPONDENT,

RAYMOND GEHRIG AND AUDREY GEHRIG,

INTERVENORS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: R. A. BATES, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Grand Videre Enterprises, LLC and Grand Videre Estates Condominium Association, Inc. (collectively “Grand Videre”) appeal a circuit court order upholding a decision of the Town of Janesville Town Board (“Town Board”) to rezone a parcel of land owned by Raymond and Audrey Gehrig. Grand Videre argues that the Town Board’s decision to rezone the Gehrigs’s property was an arbitrary and unreasonable exercise of discretion because the Town Board’s sole purpose in rezoning the property was to “legalize” the Gehrigs’s nonconforming use. Grand Videre also asserts that the Town Board’s rezoning of the Gehrigs’s property was arbitrary and unreasonable because it was illegal spot zoning. We reject both arguments and affirm the circuit court’s order.

BACKGROUND

¶2 Grand Videre Estates is a 265-acre condominium development in the Town of Janesville, Rock County, Wisconsin. The Gehrigs own approximately 200 acres of property, which adjoins the Grand Videre property.

¶3 The portion of Grand Videre’s property adjacent to the Gehrigs’s property is zoned A-3 (small scale agricultural district). The Gehrigs’s property was originally zoned A-1 (exclusive agricultural district) but the rezoning of their property that is the subject of this action changed the property’s classification to A-2 (general agricultural district). The Gehrigs’s property adjoins other A-2 property, as well as A-1, A-3, and C-1 property (lowland conservancy overlay district).

¶4 On October 13, 2003, the Gehrigs applied to rezone their property from A-1 to A-2, and to receive a conditional use permit (CUP) allowing them to operate a sport shooting preserve on their property. After a public hearing, the

Town Board's Planning and Zoning Committee (PZC) approved both requests. The Town Board followed the PZC's recommendation and unanimously voted to rezone the Gehrigs's property from A-1 to A-2. In a separate vote, the Town Board also approved the issuance of the CUP allowing sport shooting on the property, subject to certain conditions and restrictions.

¶5 After the Gehrigs's property was rezoned, Grand Videre commenced this action, seeking a declaratory judgment that the Town Board's decision to rezone the Gehrigs's property and its granting of the CUP to the Gehrigs were unlawful. After receiving permission to intervene in the lawsuit, the Gehrigs moved to dismiss the action. On January 3, 2005, the circuit court granted the Gehrigs's motion to dismiss Grand Videre's challenge to the issuance of the CUP; the court also dismissed paragraph 37 and a portion of paragraph 40 of Grand Videre's complaint, which specifically challenged the issuance of the CUP. However, the court denied the Gehrigs's motion to dismiss Grand Videre's challenge to the rezoning. Grand Videre did not timely appeal the dismissal of its CUP-related claims.

¶6 The Town subsequently moved for summary judgment on the rezoning issue. The circuit court granted the summary judgment motion dismissing all remaining claims, concluding that the Town had a reasonable legislative basis for changing the property's zoning from A-1 to A-2 and that the Town Board did not act in an arbitrary or unconstitutional manner. Grand Videre appeals.

DISCUSSION

¶7 Grand Videre appeals the circuit court's summary judgment order upholding the Town Board's decision granting the Gehrigs's petition to rezone

their property. Summary judgment is appropriate when there is no material factual dispute and a party is entitled to judgment as a matter of law. *See Germanotta v. National Indem. Co.*, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Summary judgment methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. We review decisions to grant or deny summary judgment de novo, applying the same standard as the circuit court. *Step Now Citizens Group v. Town of Utica Planning and Zoning Comm'n*, 2003 WI App 109, ¶24, 264 Wis. 2d 662, 663 N.W.2d 833.

¶8 WISCONSIN STAT. § 60.61(2) (2003-04)¹ authorizes a town board to

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. WISCONSIN STAT. § 60.61(2) provides in relevant part:

(2) EXTENT OF AUTHORITY. Subject to subs. (3) and (3m), if a town is located in a county which has not enacted a county zoning ordinance under s. 59.69, the town board, by ordinance, may:

(a) Regulate, restrict and determine all of the following: the areas within which agriculture, forestry, mining and recreation may be conducted; the location of roads, schools, trades and industries. the location, height, bulk, number of stories and size of buildings and other structures; the percentage of a lot which may be occupied; the size of yards, courts and other open spaces; the density and distribution of population; the location of buildings designed for specified uses; the trades, industries or purposes that may be engaged in or subject to regulation; and the uses for which buildings may not be erected or altered.

(b) Establish districts of such number, shape and area necessary to carry out the purposes under par. (a).

(c) Establish building setback lines.

(d) Regulate, restrict and determine the areas in or along natural watercourses, channels, streams and creeks in which

(continued)

adopt zoning ordinances if the town is located in a county that has not adopted a zoning ordinance under WIS. STAT. § 59.69. See *Magnolia Twp. v. Town of Magnolia*, 2005 WI App 119, ¶12, 284 Wis. 2d 361, 701 N.W.2d 60. Wis. 2d Zoning is a matter of legislative discretion, and those challenging the zoning decisions of a municipality bear a heavy burden. *Step Now*, 264 Wis. 2d 662, ¶26.² When we review such challenges to zoning decisions, we begin with the

trades and industries, filling or dumping, erection of structures and the location of buildings may be prohibited or restricted.

(e) Adopt an official map showing areas, outside the limits of villages and cities, suited to carry out the purposes of this section. Any map adopted under this paragraph shall show the location of any part of an airport, as defined in s. 62.23(6)(am)1.a, located in the town and of any part of an airport affected area, as defined in s. 62.23(6)(am)1.b, located in the town.

(f) Regulate, restrict and determine the location, height, bulk, number of stories and size of buildings and other structures and objects of natural growth in any area of the town in the vicinity of an airport owned by the town or privately owned, divide the territory into several areas and impose different restrictions for each area. In exercising its power under this paragraph, the town board may, by eminent domain, remove or alter any buildings, structures or objects of natural growth which are contrary to the restrictions imposed in the area in which they are located, except railroad buildings, bridges or facilities other than telegraph, telephone and overhead signal system poles and wires.

(g) Encourage the protection of groundwater resources.

(h) Provide for the preservation of burial sites, as defined in s. 157.70(1)(b).

(i) Provide adequate access to sunlight for solar collectors and to wind for wind energy systems.

² Although *Step Now Citizens Group v. Town of Utica Planning and Zoning Comm'n*, 2003 WI App 109, ¶¶25-26, 264 Wis. 2d 662, 663 N.W.2d 833, addressed a municipality's zoning authority under WIS. STAT. § 62.23(7), deferential principles applicable to municipalities under § 62.23(7) apply with equal force to a town board's authority to adopt zoning ordinances under WIS. STAT. § 60.61(2).

presumption that zoning ordinances and decisions made pursuant to WIS. STAT. § 60.61(2) are valid. *See id.* “While a court may differ with the wisdom and desirability of a zoning change, it cannot substitute its opinion for that of the zoning authority.” *Id.* The zoning authority’s decision controls unless the challenging party demonstrates an erroneous exercise of discretion, excess of power or error of law. *Id.*

¶9 Grand Videre first asserts that the Town Board’s decision granting the Gehrigs’s petition to rezone their property was an arbitrary and unreasonable exercise of discretion. Specifically, Grand Videre contends that the Town Board’s sole purpose for granting the Gehrigs’s rezoning petition was to “legalize” the Gehrigs’s sport shooting business, which, in Grand Videre’s view, was an illegal nonconforming use under the Town’s zoning ordinance. According to Grand Videre, the “weight of authority holds that a municipality abuses its zoning discretion and acts in an arbitrary and unreasonable manner when it rezones property for the sole purpose of legalizing an illegal nonconforming use.” Grand Videre further argues that the Town Board’s abuse of discretion in rezoning the Gehrigs’s property to legalize the sport shooting business was aggravated because the Town Board knew or should have known that the Gehrigs’s business was an illegal nonconforming use.

¶10 The Town³ counters that its rezoning decision was proper under Wisconsin statutes, the Town of Janesville zoning ordinance and the Rock County

³ The Gehrigs’s arguments generally mirror those of the Town. Thus, any reference to the Town’s arguments also includes arguments raised by the Gehrigs, except where indicated otherwise.

development plan for the Town of Janesville.⁴ Specifically, the Town argues that its decision to rezone the Gehrigs's property was consistent with the development plan and that it applied the proper criteria in granting the Gehrigs's rezoning petition. The Town also refutes Grand Videre's contention that the Town Board illegally rezoned the property in order to legalize a nonconforming use. According to the Town, the Gehrigs's nonconforming use of their property was legal. The Gehrigs argue that the rezoning "merely changed the zoning from A-1 to A-2." As the argument goes, the rezoning itself did not allow the Gehrigs to operate a sport shooting business; rather, approval of the CUP authorized the use of their property in this way. As to Grand Videre's "nonconforming use" arguments, the Town argues that Grand Videre's "claims regarding use are nothing more than a veiled attempt to appeal the conditional use permit, which they failed to appeal in a timely manner." Finally, the Town asserts that the decision to rezone was in the public's interest.

¶11 We conclude, applying the presumption that the zoning ordinance is valid and giving controlling deference to the Town Board's zoning authority, that the Town Board properly exercised its discretion in granting the Gehrigs's petition to rezone their property. *See Step Now*, 264 Wis. 2d 662, ¶26.

¶12 At a regular meeting held on November 3, 2003, the Town Board voted to approve the Gehrigs's rezoning petition. The only record of these proceedings is the minutes of the meeting. None of the parties provided a

⁴ One of the specific arguments made by the Town in support of its contention that the Town Board properly followed the law in granting the Gehrigs's rezoning petition is that the Town Board followed the proper rezoning procedure. Grand Videre does not argue that the Town Board failed to follow established rezoning procedures. Consequently, we do not address this issue.

transcript of the meeting; thus, we cannot determine from the record of the proceedings the factors each member of the Board considered to approve the petition to rezone.

¶13 However, the PZC held a public hearing earlier in the evening of November 3. A transcript and the minutes of that hearing are in the record before us. A report of the hearing was provided to the Town Board to assist the Board in reaching its decision to rezone the Gehrigs's property. Thus, it is helpful to consider the testimony provided at the hearing and the discussion by the members of the PZC.

¶14 We begin by examining the legal standards Town Board members may consider as they decide whether to grant a petition to rezone property. Section 7.0, Town of Janesville Zoning Ordinance establishes guideline⁵ standards for evaluating changing zoning districts.⁶ Those standards include: (1) the consideration of site design and physical characteristics such as topography, drainage patterns, water, and circulation systems; (2) site location relative to the public road network; (3) land use, such as compatibility with existing or proposed uses in the area, and how the use relates to any existing land use plan and existing or proposed development at nearby interchanges; (4) traffic generation;

⁵ The text of section 7.0, Town of Janesville Zoning Ordinance suggests that the guideline standards are just that: guidelines. In other words, section 7.0 provides standards the PZC and Town Board may, in the proper exercise of their discretion, consider in deciding whether to rezone a district. We also observe that the text of section 7.0 provides that the guidelines are non-exclusive, again suggesting that the PZC and the Town Board may consider other relevant and appropriate standards in deciding whether to rezone a district.

⁶ Section 7.0, Town of Janesville Zoning Ordinance also provides the standards for evaluating conditional uses and granting variances. As we explained, in this case our sole consideration relates to the standards the Town Board considered in evaluating changing the zoning for the Gehrigs's property from A-1 to A-2.

(5) community effects, including impact on the tax base, how the use relates to scenic and recreation values, and the relation of the use to the public interest, the purpose and intent of the zoning ordinance, and substantial justice to all parties concerned; and (6) any other relevant factors.

¶15 Based on our examination of the public hearing transcript and the minutes of the PZC and Town Board meetings held on November 3, 2003, we conclude that the Town Board's decision to rezone the Gehrigs's property from A-1 to A-2 rested on a rational basis and was therefore made in the proper exercise of its discretion. A number of people testified at the public hearing, both for and against the petition to change the zoning ordinance. In addition, the committee members received letters and telephone calls from interested citizens, expressing support for and against the ordinance change. Counsel for Grand Videre, counsel for its owners, Dr. and Mrs. Bruce Golden, counsel for the Gehrigs, and a number of local citizens representing themselves presented statements and arguments to the committee. The primary reason expressed by local citizens in support of the zoning change was that the Gehrigs generously open their land to the public for outdoor enjoyment, which includes providing an opportunity for kids to "sight" their rifles; a facility where youth and adults can learn about hunter safety and participate in sport shooting; and a place where the public can fish, hunt, hike, cross-country ski, gather wild mushrooms and train their dogs. The public's interest is one of the standards committee members and Town Board members may consider in deciding whether to change a zoning district. As one adjoining property owner stated, "Ray [Gehrig's] property is ... an asset to our community."

¶16 We acknowledge that other local citizens expressed strong safety, environmental, and noise concerns, and concerns about the negative impact the use of the property had on their property values.⁷ We observe, however, that the committee considered and factored these issues in constructing the conditions under which the Gehrigs could use their property as a sport shooting facility. Some concern was also expressed about whether the Gehrigs were operating a commercial business in an area zoned as exclusive agriculture. Grand Videre's attorney also asserted that the Gehrigs's use of the property was not permitted under A-2 zoning because it was then a non-conforming legal use and would not be permitted in any event under A-2 zoning.

¶17 The record shows that the PZC heard the various points of view and, after discussing the issues, exercised its judgment in agreeing to recommend that the Town Board approve the zoning petition. Assuming that the Town Board was well informed of the proceedings before the committee,⁸ we cannot say, based on the record before us, that the Town Board erroneously approved the Gehrigs's rezoning petition. Although, based on the present record, we may not have granted the Gehrigs's petition to rezone their property, we cannot substitute our opinion for that of the Town Board. *See Step Now*, 264 Wis. 2d 662, ¶26.

¶18 As we noted, Grand Videre contends that the Town Board rezoned the Gehrigs's property solely to legalize the Gehrigs's nonconforming use. Grand

⁷ We observe that, aside from the complaints expressed at the hearing and through affidavits regarding the negative impact the Gehrigs's use of their property as a sport shooting facility has on the values of the Gehrigs's neighbors' properties, the record is devoid of any documentary evidence supporting these claims.

⁸ Grand Videre does not argue that the Town Board was not sufficiently informed about what transpired at the PZC public hearing.

Videre, relying on *Cushman v. City of Racine*, 39 Wis. 2d 303, 309, 159 N.W.2d 67 (1968), asserts that the rule in Wisconsin is that rezoning for the sole purpose of legalizing a nonconforming use is impermissible. Consequently, in Grand Videre's view, because the Town Board's sole motivation in rezoning the Gehrigs's property was to legalize their nonconforming sport shooting business, the Town Board acted arbitrarily and unreasonably in granting the Gehrigs's petition to rezone their property. We disagree.

¶19 We first note that Grand Videre initially ignores, but then eventually concedes, that in June 1999, the Town Board determined that the Gehrigs's use of their property as a sport shooting preserve was a lawful nonconforming use.⁹ The Town Board rested its determination on an opinion letter issued by the Town's attorney. The Town's attorney opined that the Gehrigs's sport shooting facility did not violate the Town's noise ordinance, and that the facility was a lawful use of their property, "either [as] a lawful nonconforming use or [as] a permitted use" Thus, because the Town Board had determined that the Gehrigs's use of their property was lawful under either scenario, Grand Videre's argument that the Town Board rezoned the Gehrigs's property solely to legalize a nonconforming use fails. More importantly, this argument, as well as other arguments made by Grand Videre relating to the use of the Gehrigs's property, is not at issue in this appeal. Grand Videre lost its right to raise objections to how the Gehrigs use or plan to use their property by failing to file a timely appeal of the court's order dismissing its challenge to the CUP. We therefore do not consider these arguments any further.

⁹ Grand Videre urges us to review the Town Board's June 1999 determination that the Gehrigs's use of their property was either a legal nonconforming use or a permitted use. We have no jurisdiction to review that determination. Grand Videre did not timely seek judicial review of the 1999 determination.

¶20 In addition, as we discussed, the record contains substantial evidence that rezoning the property would benefit the public by providing a place where the public can fish, hunt, hike, train dogs, and sight their rifles. The record belies the notion that the Town Board based its decision to rezone the Gehrigs's property solely on one factor. In other words, the evidence plainly demonstrates that a number of factors informed the Town Board's decision to approve the rezoning petition. The record is devoid of any evidence that the Town Board's sole purpose for rezoning the Gehrigs's property was to legalize a nonconforming use; thus, *Cushman* does not apply under these facts.

¶21 Grand Videre points to statements made by the Gehrigs's attorney at the public hearing as support for its argument that the Town Board agreed to rezone the Gehrigs's property solely to legalize its nonconforming use. However, Grand Videre confuses what the Gehrigs's lawyer said at the hearing with what motivated the Town Board members to vote in favor of the zoning petition. Grand Videre points to nothing in the record demonstrating what each Town Board member thought or considered in deciding how to vote on the rezoning petition. The only evidence Grand Videre reluctantly acknowledges as indicative of what Town Board members considered in reaching their decisions are affidavits submitted by three of the members in support of the Town's motion for summary judgment before the circuit court. A review of those affidavits shows that at least three Board members considered a number of factors in deciding how to vote on the Gehrigs's petition, including those factors listed under section 7.0 of the Town of Janesville's Zoning Ordinance.¹⁰ At bottom, there is no support in the record

¹⁰ Three Town Board members submitted affidavits in support of the Town Board's motion for summary judgment. In these affidavits the three Town Board members averred that the standards set forth in section 7.0 of the Town of Janesville Zoning Ordinance were applied in
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for Grand Videre’s assertion that the Town Board’s decision in favor of the Gehrigs was motivated solely by an interest in legalizing the Gehrigs’s nonconforming use of the property.

¶22 We next address Grand Videre’s argument that the Town Board’s rezoning of the Gehrigs’s property amounts to illegal spot zoning. 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.” *Step Now*, 264 Wis. 2d 662, ¶27 (quoting *Cushman*, 39 Wis. 2d at 306-07). The size of the property at issue, although not dispositive, is one factor to consider in determining whether zoning is spot zoning. *Id.*, ¶29.

¶23 Grand Videre argues, without elaboration, that the Town Board engaged in spot zoning when it rezoned the Gehrigs’s property from A-1 to A-2, because the Town Board rezoned only the Gehrigs’s property and because the

their consideration of the Gehrigs’s rezoning petition. Specifically, the Town Board members all averred that they were familiar with the standards they must apply in evaluating a request to rezone under section 7.0, and applied those standards, where applicable, in voting to grant the Gehrigs’s petition to rezone. Each Town Board member also averred that the proposed zoning changes did not affect existing topography, drainage patterns, vegetative cover or the area’s water or utilities; did not involve an internal circulation system resulting in any safety concerns; did not affect the appearance of the subject property and the convenience of access to public roads or involve the construction of a public road; did not result in incompatibility with existing or proposed uses; did not significantly change traffic patterns or significantly affect the Town’s tax base or scenic or recreation values.

The Town Board members also averred that they believed the change was in the public interest, and not solely for the Gehrigs’s benefit, that the rezoning was “consistent with the Town’s overall zoning plan for the area,” and that there is other A-2 property adjacent to the Gehrigs’s property. Another Town Board member testified in deposition that she voted to deny the CUP due to safety concerns, but voted in favor of the rezoning because she believed that the rezoning was consistent with the Town’s plan, and that the two issues were separate. Grand Videre presents no evidence refuting the averments of the three Town Board members.

Town Board granted privileges to the Gehrigs not extended to anyone else through the rezoning. We conclude that the Town Board did not engage in spot zoning.¹¹

¶24 The Gehrigs’s property was originally zoned A-1, which, as we have explained, is zoned as an exclusive agricultural district. The Town Board rezoned the property from A-1 to A-2, a general agricultural district. This area is located in an area of mixed zoning. According to the record, land adjacent to the Gehrigs’s is zoned A-1, A-2, A-3 and C-1. All of the Gehrigs’s property is designated “small scale agricultural” on the Rock County Development Plan for the Town of Janesville. This evidence supports the Town’s view that the Gehrigs’s property was not spot zoned.

¶25 In addition, although we recognize that the size of the property rezoned is not dispositive as to whether the rezone is spot zoning, *see Step Now Citizens*, 264 Wis. 2d 662, ¶29, size is a significant factor. *See id.; Rodgers v. Village of Menomonee Falls*, 55 Wis. 2d 563, 572-74, 201 N.W.2d 29 (1972). The size of the Gehrigs’s property is nearly 200 acres, which is much larger than other properties generally found to be subjects of spot zoning.¹² *See Rodgers*, 55 Wis. 2d at 574. In *Rodgers*, the supreme court explained that “[t]he classic definitions refer to spot zoning as an amendment which affects a ‘small parcel of

¹¹ Because our conclusion that the Town Board did not engage in spot zoning is dispositive on this topic, we do not address Grand Videre’s arguments relating to whether the spot zoning was legal. We also do not address Grand Videre’s argument that material facts are in dispute. To the extent such a dispute exists, the facts Grand Videre points to relate only to whether the spot zoning was lawful.

¹² Grand Videre, without specific citation to authority, argues that the size of the Gehrigs’s property must be considered relative to the overall area in determining whether spot zoning has occurred. This argument is undeveloped; we therefore do not consider it any further. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review an issue inadequately briefed).

land,’ and the bulk of cases in which amendments have been disapproved as spot zoning involve reclassifications of relatively small parcels.” *Id.* at 573 (citation omitted). In that case, the court observed that “[n]o authority can be found where rezoning of a tract of land as large as the 42-acre tract involved here was called ‘spot’ zoning.” *Id.* at 574. Similarly, we can find no cases in which the rezoning of a 200-acre piece of property has been considered to be spot zoning.

CONCLUSION

¶26 We conclude that the Town Board properly exercised its discretion in approving the Gehrigs’s petition to rezone their property. We also conclude that the Town Board did not engage in spot zoning by approving the rezoning petition. We therefore affirm the circuit court’s order granting summary judgment against Grand Videre.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

