COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2564

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

THE KRAEMER COMPANY, LLC,

PLAINTIFF-RESPONDENT,

V.

SAUK COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: RICHARD O. WRIGHT, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. This appeal concerns the interpretation of a Sauk County Zoning Ordinance prohibiting mineral extraction activities on agricultural land absent a special exception permit. The Kraemer Company, LLC, owner of a quarry in Sauk County, complains that the Sauk County Board of Adjustment incorrectly concluded that Kraemer Company was not entitled to operate its quarry

without a special exception permit. In the alternative, Kraemer Company asserts that the Board of Adjustment improperly denied Kraemer Company's request for a special exception permit. The circuit court held that Kraemer Company was entitled to operate the quarry without a special exception permit and reversed the Board of Adjustment. Consequently, the circuit court did not reach the question of whether the Board improperly denied the special exception permit. For the reasons that follow, we reverse the circuit court's decision concluding that no special exception permit was needed for Kraemer Company to operate the quarry. We also affirm the Board of Adjustment's decision denying a special exception permit.

I. Background

¶2 In July of 1986, § 7.04(2)(r)19 of the Sauk County Zoning Ordinance was enacted. Section 7.04(2)(r)19 prohibits mineral extraction activities on property situated in an agricultural district without a special exception permit. At the time § 7.04(2)(r)19 was enacted, the quarry which is the subject of this appeal was owned by Baraboo Quartzite Company. Baraboo Quartzite operated the quarry as a nonmetallic mineral extraction site prior to the ordinance's enactment in July of 1986 and continued to do so after that date.

¶3 The quarry was subsequently sold by Baraboo Quartzite to Edward Kraemer & Sons on October 6, 1989. On September 11, 1989, the Board of Adjustment granted a five-year special exception permit to Edward Kraemer & Sons to operate the quarry as a nonmetallic mineral extraction site. The permit was extended an additional two years in 1994.

¶4 Kraemer Company purchased the site from Edward Kraemer & Sons in August of 1996 and submitted an application for the renewal of the special

exception permit in that same year. After a public hearing, the Board denied Kraemer Company's request because it determined that the general intent of the ordinance "to protect the public's health, safety and welfare and provide for the wise use of the county's resources would not be met" if the mineral extraction activities at the site were allowed to continue.

¶5 Kraemer Company filed an action for certiorari review in the circuit court, alleging that the Board of Adjustment's decision to deny the special exception permit was arbitrary, oppressive, and unreasonable. Kraemer Company subsequently filed an amended complaint and a second amended complaint, additionally alleging that mineral extraction activities on the property predated the enactment of § 7.04(2)(r)19 of the Zoning Ordinance and, therefore, those activities constituted a "non-conforming use" which was exempt from the special exception permit requirement. After a hearing, the circuit court remanded the case to the Board to hear additional evidence and to decide whether operation of the property for mineral extraction constituted a legal nonconforming use.

¶6 The Board convened January 21, 1999. The parties submitted a stipulation of facts, in which they agreed that the property was operated as a mineral extraction site until July 1, 1987, and that the property was operated as a mineral extraction site from January 3, 1990, to the present. As the Board acknowledged, it was required to determine whether the property lost its legal nonconforming use status pursuant to § 7.12(1)(f)3 of the Sauk County Zoning Ordinance by its non-operation as a mineral extraction site for any consecutive twelve-month period between the dates of July 1, 1987, and January 3, 1990. As noted, the property was owned by Baraboo Quartzite and subsequently transferred to Edward Kraemer & Sons during that time period.

¶7 After examining several exhibits, and hearing testimony presented by both parties, the Board determined that the mineral extraction activities ceased for a period in excess of twelve months and, therefore, the operation lost its status as a nonconforming use. In a written decision dated February 12, 1999, the Board stated its conclusion that "there was a period of time greater than twelve months in which there were no nonmetallic mineral [extraction] activities at the site from at least July 1, 1988 to October 6, 1989."

¶8 The circuit court reversed the Board, finding that Baraboo Quartzite's "commercial activity satisfie[d] the Sauk County Zoning Ordinance as use of the Property without discontinuance." The court's order incorporated by reference its bench decision, where the court stated that Baraboo Quartzite's "continued use revolved around the evidence to sell the very product that was extracted." The Board filed this appeal.

II. Discussion

A. Standard Of Review

¶9 On certiorari review, this court reviews the decision of the Board of Adjustment, not the decision of the circuit court. ***Bd. of Regents of Univ. of Wisconsin v. Dane County Bd. of Adjustment***, 2000 WI App 211, ¶10, 238 Wis. 2d 810, 618 N.W.2d 537. Our certiorari review is limited to one or more of the following: (1) whether the Board kept within its jurisdiction; (2) whether the Board proceeded on a correct theory of law; (3) whether the Board's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the Board might make the decision it did. ***Id.***

B. Need For A Special Exception Permit

¶10 The first issue we consider is whether the Board of Adjustment properly construed and applied § 7.04(2)(r)19 of the Sauk County Zoning Ordinance. There is no dispute in this case regarding the general scheme created by the relevant county ordinances. Section 7.04(2)(r), enacted in 1986, prohibits specified uses of land without a "special exception permit." These specified uses are labeled "non-conforming." If a nonconforming use predated the effective date of the 1986 ordinance, that use may continue without a special exception permit, so long as there has been no continuous twelve-month period since 1986 during which the nonconforming use was discontinued. *See* § 7.12(1)(f)3 of the Zoning Ordinance.

¶11 The dispute here centers on the meaning of a particular nonconforming use, "mineral extraction activities." Section 7.04(2)(r)19 of the Sauk County Zoning Ordinance identifies this nonconforming use as follows:

> Mineral extraction activities that include the commercial excavation, mining, or removal of non-metallic minerals, clay, ceramic or refractory minerals, quarrying of sand, gravel, crushed or broken stone, but not the removal of top soil, when such activities are undertaken or proposed to be undertaken as a distinct land use.

¶12 On appeal, the Board of Adjustment argues that if the words "excavation," "mining," "removal," and "quarrying" are given their ordinary meanings, then the phrase "mineral extraction activities" is limited to the actual separation of minerals from the earth.[1] The Board asserts that because it is agreed

[1] We note that the Board has not always taken quite so narrow a view. In its February 12, 1999, written decision, the Board concluded that mineral extraction activities at the property included "drilling, blasting, crushing, screening and *selling of product*" (emphasis added).

that no separation activity occurred during the time period in question, the relevant "non-conforming" use ceased for the requisite twelve-month period.

¶13 Kraemer Company argues that the phrase "mineral extraction activities" includes not only the physical separation of minerals from the earth, but also maintaining stockpiles, marketing and selling the product, and efforts to sell the quarry itself as an ongoing operating quarry. At the hearing before the Board, Kraemer Company presented evidence that the process of "quarrying" is cyclical in that minerals are first separated from the earth and then stockpiled, marketed, and sold. On appeal, Kraemer Company argues that it is absurd to construe the ordinance as excluding marketing and sales activities because an active quarry might mine and stockpile rock and then continuously and actively market the rock for a twelve-month period or more without resuming mining activities if stockpiles prove adequate to meet demand.

¶14 After carefully reviewing the proceedings and exhibits before the Board of Adjustment, we conclude that we need not fully resolve the debate regarding the precise meaning of "mineral extraction activities" in order to affirm the decision of the Board. Even if we were to agree with Kraemer Company that "quarrying" includes the marketing and selling of the extracted rock, the record does not show that appreciable marketing or selling occurred during the twelve-month period between October 3, 1988, and October 6, 1989.

¶15 At the Board of Adjustment proceedings, it was Kraemer Company's burden to prove by a preponderance of the credible evidence that any legal nonconforming use of the property was not discontinued for a twelve-month period. *See* ***Gabe v. City of Cudahy***, 52 Wis. 2d 13, 17, 187 N.W.2d 874 (1971).

A review of the evidence presented by Kraemer Company to the Board reveals the following.

¶16 The last sale of processed granite from the quarry by Baraboo Quartzite took place on June 16, 1988. Edward Kraemer & Sons purchased the property on October 6, 1989. There is no evidence of any other sales of stockpiled material between those two dates. The last time Baraboo Quartzite made any affirmative attempt to market the rock for sale was via a letter to a prospective purchaser on October 3, 1988. There is no evidence of any other activity of any type signifying an attempt to market the quarry product between that date and October 6, 1989, when Edward Kraemer & Sons purchased the land.[2]

¶17 Additionally, a statement by Ruth Netzband, president of Baraboo Quartzite from September of 1988 until the sale to Edward Kraemer & Sons, was read into the record at the hearing. Within that statement, Ruth indicated that all operations at the quarry stopped prior to her husband's death in September of 1988. Ruth also indicated that no customer orders were placed or filled after her husband's passing.

¶18 At least seven nearby landowners testified, in varying degrees of detail, that there was no "quarrying" or blasting during the time period at issue, the

[2] Kraemer Company points this court's attention to two copies of a trade magazine in which the name "Baraboo Quartzite Company" appears as a product source for abrasive grain and mass-finishing media as evidence of marketing efforts by Baraboo Quartzite. The magazines were published in October of 1988 and October of 1989. Kraemer Company does not, however, point to any evidence that Baraboo Quartzite took some affirmative action during the time period in question to maintain its status as a product source in the trade directory. The appearance of Baraboo Quartzite's name in the directory, with no indication that any affirmative steps were taken by Kraemer Company or its predecessors to maintain the listing, is not significant enough to constitute "mineral extraction activities," even if that term encompasses marketing efforts.

gates to the quarry were always closed and locked, the driveway was overgrown with weeds and grass from nonuse, and the equipment on the property was rusty and in a state of disrepair. Contrarily, Kraemer Company offered the testimony of just one landowner that the property was being utilized as a quarry between July 1, 1987, and January 3, 1990.

¶19 The record does show that Ruth Netzband engaged in activities to sell the quarry as an ongoing concern during the time period in question.

¶20 Finally, the record reveals that an unspecified quantity of mined granite was stockpiled at the quarry. We have not located, nor has Kraemer Company directed our attention to, any evidence in the record showing that affirmative steps were taken to maintain the stockpiled granite during the twelve months leading up to the sale to Edward Kraemer & Sons.

¶21 Accordingly, so far as the record discloses, the only significant activity that occurred during the twelve months between October 3, 1988, and October 6, 1989, was that Ruth Netzband took steps to sell Baraboo Quartzite as a business and that unspecified quantities of mined granite remained on the premises. It follows that the question this court must resolve is whether attempts to sell Baraboo Quartzite, or the stockpiling of granite, constitute "mineral extraction activities" within the meaning of the ordinance. While the Board of Adjustment's order did not plainly articulate an interpretation of "mineral extraction activities," we infer from its decision that it found neither of these activities fell within the ordinance. With this factual background in mind, we now construe the applicable ordinance language.

¶22 The supreme court has identified three distinct levels of deference granted to agency interpretations of legislation: (1) great weight deference;

(2) due weight deference; and (3) *de novo* review. ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). Great weight deference is applied when the agency has employed its expertise or specialized knowledge in forming the interpretation and the interpretation is one of long-standing. ***Id.*** at 284. Due weight deference is accorded when "the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." ***Id.*** at 286. Finally, a *de novo* review is applicable when the issue before the agency is one of first impression or when an agency's position on an issue has been so inconsistent so as to provide no real guidance. ***Id.*** at 285.

¶23 It is well settled that these levels of deference are applied to Board of Adjustment decisions. *See* ***Univ. of Wisconsin***, 2000 WI App 211 at ¶11; ***Schroeder v. Dane County Bd. of Adjustment***, 228 Wis. 2d 324, 333, 596 N.W.2d 472 (Ct. App. 1999).

¶24 In this case, the Board was required to interpret § 7.04(2)(r)19 of the Sauk County Zoning Ordinance and, more specifically, to determine what constitutes "mineral extraction activities." We find no evidence in the record or in existing case law to suggest that the Sauk County Board of Adjustment has any experience in interpreting the section of the ordinance at issue here. Accordingly, we will review the Board's interpretation of § 7.04(2)(r)19 *de novo*.

¶25 When interpreting an ordinance, the rules of statutory construction apply. ***Schroeder***, 228 Wis. 2d at 333. The purpose of statutory construction is to discern legislative intent. ***Id.*** If the language of the statute is clear on its face, this court applies that language to the facts without looking beyond the statute to ascertain its meaning. ***Id.;*** *see also* ***UFE Inc.***, 201 Wis. 2d at 281. At the same

time, the plain language of a statute should not be construed in a manner that results in absurd or unreasonable consequences. ***State v. Yellow Freight Sys., Inc.***, 101 Wis. 2d 142, 153, 303 N.W.2d 834 (1981).

¶26 We conclude that construing the phrase "mineral extraction activities" in § 7.04(2)(r)19 of the Zoning Ordinance to include selling the quarry itself, or the mere stockpiling of product, would lead to absurd results. *See* ***Tesker v. Town of Saukville***, 208 Wis. 2d 600, 611, 561 N.W.2d 338 (Ct. App. 1997).

¶27 First, Kraemer Company's argument that holding out the business as a quarry and selling it as an ongoing concern constitute "mineral extraction activities" is unpersuasive. This activity fails to satisfy even Kraemer Company's own analysis of "mineral extraction activities" as covering "a cycle of blasting, crushing and processing the rock to produce a saleable material and then a cycle of marketing, bidding and selling the material while maintaining it as stockpiled inventory."

¶28 Second, stockpiling of the blasted rock alone cannot reasonably constitute "mineral extraction activities." If "mineral extraction activities" included the mere stockpiling of rock with nothing more, then a quarry owner could maintain property as a legal nonconforming use for an indefinite period of years by simply leaving some unsold rock on the property. Such an interpretation would be directly contrary to the obvious goal of the ordinance to limit the duration of nonconforming uses. *See* ***Village of Menomonee Falls v. Veierstahler***, 183 Wis. 2d 96, 103-04, 515 N.W.2d 290 (Ct. App. 1994). We do not believe that the ordinance drafters intended to create a loophole so easy to fulfill that it renders the ordinance all but non-enforceable.

¶29 Accordingly, we affirm the Board of Adjustment's decision that the nonconforming use in question ceased for a twelve-month period beginning in 1988 and ending in 1989, and, therefore, reverse the circuit court on this issue.

C. Denial Of Special Exception Permit

¶30 We turn now to the issue of whether the Board properly denied Kraemer Company's request for a special exception permit to operate the quarry.

¶31 The Board denied Kraemer Company's request to renew a special exception permit because it determined that continued use of the property for mineral extraction would not meet the intent and purpose of the ordinance to protect the "public's health, safety and welfare and provide for the wise use of the county's resources." Additionally, the Board determined that the specific location of the operation was inappropriate for extraction activities because "the Lower Narrows and the Baraboo Hills [are] significant historical and natural landmarks in the county and the region" and because the operation "would significantly impair the aesthetic values of the Lower Narrows and Baraboo Hills." Finally, the Board stated that Kraemer Company's plan to use Man Mound Road to transport its products to and from the site would "cause an undue burden on the Township and would pose a threat to the public's health and safety."

¶32 Because the circuit court concluded that Kraemer Company's operations on the land constituted a legal nonconforming use, the court never addressed the propriety of the Board's decision to deny Kraemer Company's request to renew the special exception permit. On appeal, Kraemer Company asserts that the Board's decision was based upon an incorrect application of the law. Specifically, Kraemer Company argues that in 1989, when Edward Kraemer & Sons obtained its first special exception permit to conduct mineral extraction on

the property, the ordinance did not direct the Board to consider "aesthetics" as one criterion in granting the permit. Rather, that criterion was added later. Because the property has always looked the same, it is nonconforming as to the aesthetics. This is independent from its nonconforming use as a mineral extraction site.

¶33 We disagree. Section 7.12(1)(f) of the Zoning Ordinance specifically relates to nonconforming "uses," not nonconforming "conditions." Subsection 3 of § 7.12(1)(f) provides that if the nonconforming "use" of any premises is discontinued for a twelve-month period, then any future "use" of the premises must conform to the regulations of the district in which it is located. We cannot conceive how the aesthetics of a property qualifies as a "use" of that property, and Kraemer Company's arguments on appeal shed no light on the matter.

¶34 The Board's decision to deny Kraemer Company's request for a special exception permit was based upon its concern for the public's health, safety, and welfare, as well as the aesthetics of the property. These are valid considerations under § 7.04(2)(r)19.d.1 of the Zoning Ordinance.

¶35 More specifically, the Board found that Kraemer Company's plan for utilizing Man Mound Road to transport products to and from the site would "cause an undue burden on the Township and would pose a threat to the public's health and safety." The Board also determined that the Lower Narrows and the Baraboo Hills are significant historical and natural landmarks that would be aesthetically impaired by Kraemer Company's extraction activities.

¶36 The ordinance specifically contemplates consideration of "aesthetics," but even if it did not, the supreme court has determined that the "public health, safety and welfare standard" is "broad enough" to allow the Board

to consider "harm to the public that would result from partial destruction of a natural area ... of great geological importance." *See* ***Edward Kraemer & Sons, Inc., v. Sauk County Bd. of Adjustment***, 183 Wis. 2d 1, 11, 515 N.W.2d 256 (1994).

¶37 After reviewing the ordinance at issue, as well as the transcripts from the hearing on Kraemer Company's request for the special exception permit wherein there was significant evidence presented as to the strain on Man Mound Road that would result from the transportation of the rock, the historical and geological importance of preserving the Lower Narrows and the Baraboo Hills, and the substantial widening of the quarry since its purchase by Kraemer Company, we cannot say that the Board's decision to deny the permit was either contrary to law or arbitrary and unreasonable. See ***Univ. of Wisconsin***, 2000 WI App 211 at ¶10. Accordingly, we uphold the Board's decision to deny Kraemer Company's request for a renewal of the special exception permit and remand with directions that the circuit court affirm this decision of the Board of Adjustment.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.