

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 2003

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. 02-3210
STATE OF WISCONSIN

Cir. Ct. No. 02-CV-73

**IN COURT OF APPEALS
DISTRICT IV**

BRYAN MEYER,

PETITIONER-RESPONDENT,

v.

TOWN OF MILTON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
JAMES WELKER, Judge. *Reversed.*

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

¶1 PER CURIAM. Bryan Meyer appeals from the circuit court's order affirming in part and reversing in part a decision of the Milton Town Board. The dispositive issue is whether the town board properly denied Meyer's application for a conditional use permit on October 8, 2001. We conclude that the town board properly denied Meyer's application. Therefore, we reverse.

¶2 Meyer owns land in an area designated by the Town of Milton as an A-1 district for zoning purposes. In an A-1 district, permitted uses include general farming and forestry. Certain “conditional uses” are also allowed, after approval of the town board. The conditional uses include, in relevant part, “parks and recreational areas” and “[s]upportive agri-business activities to include grain elevators; seed, fertilizer, and farm chemical sales; commercial feedlots; feed mills; and similar agricultural activities.” TOWN OF MILTON, WIS., ORDINANCES, § 4.3(3)(A) and (H).

¶3 On August 14, 2001, Meyer applied for a conditional use permit to allow him to operate a farm market and greenhouse, at which he planned to sell various items, including produce from the farm and “value-added” goods like jams, honey, and Christmas wreaths. He also sought permission to use his farm for income-producing activities like hayrides and a corn maze. On October 8, 2001, the town board denied the conditional use permit, concluding that Meyer’s proposed uses were not permitted by the zoning ordinance.

¶4 Meyer appealed the town board’s decision to the Town of Milton Board of Adjustment (BOA). The BOA affirmed the denial of the permit. Meyer then petitioned the circuit court for certiorari review. The circuit court reversed the BOA and remanded to the town board to reconsider its decision and provide a

more detailed explanation of the reasons for its decision.¹ On remand, the town board issued Meyer a conditional use permit, allowing him some of the uses he requested, but not all of them. Meyer informed the circuit court about the Town's decision and requested that the circuit court review the Town's actions. The circuit court affirmed in part and reversed in part the Town's decision.² We review the decision of the town board, not that of the circuit court. *State ex rel. Spinner v. Kenosha County Bd. of Adjustment*, 223 Wis. 2d 99, 103, 588 N.W.2d 662 (Ct. App. 1998).

¶5 Our review of the town board's decision is limited to: (1) whether the board acted within its jurisdiction; (2) whether it acted in accordance with the law; (3) whether its action was arbitrary, oppressive or unreasonable, representing its will and not its judgment; and (4) whether the evidence was such that the board might reasonably have made the determination in question. *See State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 410-11, 577 N.W.2d 813 (1998).

¹ The circuit court's order issued May 23, 2002, provided that the BOA's decision "is reversed and this matter remanded to the Milton Town Board for further proceedings." In the order, the circuit court found that "[s]everal, if not all, of the items listed in Meyer's application for a conditional use permit are permitted as conditional uses," and that "[t]he Town of Milton Zoning Code requires the Town Board to grant at least a portion of Meyer's conditional use permit application." On July 16, 2002, the circuit court issued an order "replacing" the May order. The July order clarified that the prior order was not intended to be a final order. The circuit court "remanded to the Town Board with directives to the Town Board to make a determination ... as to what parts of the application it will grant, which parts of the application it will deny, and what conditions it will impose for the granting of any portions of that application." The circuit also ordered the town board to make its decision "with sufficient specificity to allow this Court to review its rationale." Because the May 23 order was vacated, no appeal could be taken from that order.

² The town board initially issued Meyer a conditional use permit (CUP) on July 19, 2002, but revised it on August 12, 2002. The circuit court reviewed the CUP issued in August.

¶6 The Town argues that the town board’s original decision denying the conditional use permit was valid, and the BOA properly affirmed it. Because there is no dispute that the board acted within its jurisdiction and in accordance with the law, the controversy focuses on the third and fourth criteria. Given the wide latitude accorded the town board’s decision, we conclude that the town board’s decision was not “arbitrary, oppressive or unreasonable,” and that it might reasonably have been made given the information before the board. The “parks and recreational areas” clause does not encompass for-profit entertainment like a corn maze. Both a common sense reading of the clause in its context and its use elsewhere in the ordinances show that it is intended to allow only non-profit recreational activities. As for the agri-business exception, it allows the sale of agricultural inputs, not retail sales of all items that have a connection to agriculture. Therefore, the board acted reasonably in concluding that Meyer’s intended uses do not come within the agri-business exception.

¶7 We do not reach the other issues raised because it is not necessary to do so. We affirm the town board’s first decision denying Meyer’s conditional use permit. Because we affirm the town board’s first decision, its subsequent decision, made pursuant to the circuit court’s remand, granting the conditional use permit in part is void.

By the Court.—Order reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

