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DISTRICT II

April 3, 2024

To:

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Clerk of Circuit Court
Calumet County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1068

Halquist Stone Company, Inc. v. Town of Brothertown
(L.C. #2022CV71)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Halquist Stone Company, Inc. (Halquist) appeals from an order of the circuit court in favor of the Town of Brothertown (Town). The court affirmed the Town's decision to alter a conditional use permit (CUP) previously granted to Halquist by accelerating a condition in the permit. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ Because the

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

alteration of the condition in Halquist's CUP is not supported by substantial evidence, we reverse the order and remand this case with directions to order the Town to grant Halquist's 2022 CUP under the same 2019 CUP conditions as requested by Halquist.

Background

In 1998, the Town granted Halquist a CUP to operate its non-metallic mining (i.e., quarrying) and mining-related activities on its property in Brothertown. The Town has renewed Halquist's CUP every three years as required by the CUP. Halquist's CUP sets forth three phases—0, 1, and 2. Phase 0, the initial phase in the 1998 permit, includes quarrying operations as well as a commercial building that supports Halquist's quarry business located on the north side of Paradise Road. Phase 1 is located on the south side of Paradise Road. Thus, vehicles traveling from Phase 1 to the building on Phase 0 must traverse the road. Pursuant to the 2019 renewal of the CUP, Halquist had until December 31, 2027 to cease quarrying operations on Phase 0, and until January 1, 2030 to remove the building.

Halquist requested that its CUP be renewed in 2022 under the same conditions as in 2019. The Town renewed the CUP but accelerated the January 1, 2030 deadline, requiring Halquist to replace the commercial building located on Phase 0 with a new building on Phase 1 by December 31, 2027, when the quarrying operations on Phase 0 must cease. This would end the vehicular travel across Paradise Road from Phase 1 to Phase 0 sooner.

Halquist sought certiorari review of the Town's decision to alter the CUP. The circuit court affirmed the Town's decision. Halquist appeals.

Discussion

On certiorari appeal, we review the municipal body’s decision, not that of the circuit court. See *Klinger v. Oneida County*, 149 Wis. 2d 838, 845 n.6, 440 N.W.2d 348 (1989). “The purpose of certiorari judicial review of municipal ... decisions is to ensure procedural due process.” *Hartland Sportsmen’s Club, Inc. v. City of Delafield*, 2020 WI App 44, ¶12, 393 Wis. 2d 496, 947 N.W.2d 214. Our certiorari review is limited to whether: (1) the Town “kept within its jurisdiction”; (2) the Town acted according to law; (3) the Town’s actions were “arbitrary, oppressive, or unreasonable and represented its will and not its judgment”; and (4) “the evidence was such that [the Town] might reasonably” have made the determination under review. See *Ottman v. Town of Primrose*, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411.² The Town’s decision enjoys “a presumption of validity and correctness.” See *Miswald v. Waukesha Cnty. Bd. of Adjustment*, 202 Wis. 2d 401, 411, 550 N.W.2d 434 (Ct. App. 1996). Halquist, the party challenging the Town’s decision, has the burden of overcoming the presumption. See *id.*

This case involves the alteration of a conditional use permit. A conditional use is a use not permitted of right by zoning regulations, but which may be authorized by a zoning authority. See *Town of Rhine v. Bizzell*, 2008 WI 76, ¶20, 311 Wis. 2d 1, 751 N.W.2d 780. “Conditional uses are for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner.” *Id.*

² Though both statutory and common-law certiorari are pleaded here, the scope of review is the same. See *Ottman v. Town of Primrose*, 2011 WI 18, ¶¶35–36, 332 Wis. 2d 3, 796 N.W.2d 411.

Neither party identifies any ordinance applicable to the Town’s imposition of the deadline for closing the Phase 0 building by 2030 in the 2019 CUP, or for the accelerated deadline in the 2022 CUP renewal. The Town appears to base the accelerated deadline condition on concerns relating to public safety and welfare.³ The Town does not contend that Halquist endangered public safety or welfare when it set forth the 2030 deadline in the 2019 CUP. Moreover, there is no contention that Halquist failed to follow any condition upon which the 2019 permit was issued. *See* WIS. STAT. § 62.23(7)(de)4. (“Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed.....”). Instead, both parties focus on the Town’s authority to impose conditions on “the permit’s duration, transfer, or renewal.” *See* Sec. 62.23(7)(de)2.a. and 4. The parties agree that a condition “must be reasonable and, to the extent practicable, measurable,” as well as “supported by substantial evidence.” *See* Sec. 62.23(7)(de)2.b. “‘Substantial evidence’ means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.” Sec. 62.23(7)(de)1.b.

While Halquist contends that the Town erred in multiple respects, we agree that the acceleration of the condition in Halquist’s CUP is not supported by substantial evidence.⁴ Again,

³ Section 15.7(A) of the Town’s zoning code provides “[t]hat the establishment, maintenance or operation of the Conditional use will not be detrimental to or endanger the public health, safety, morals, comfort or general welfare.” TOWN OF BROTHERTOWN, WIS., ZONING ORDINANCES § 15.7(A) (2017), *available at* <https://townofbrothertown.com/wp-content/uploads/2019/08/Zoning-Ordinance-Town-of-Brothertown-Revised-03-27-2017.pdf>.

⁴ Because we conclude the evidence does not support the Town’s decision, we need not consider Halquist’s additional arguments. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on narrowest possible grounds).

without identifying any ordinance supporting the duration condition, the Town argues on appeal that it is “obvious” that driving quarrying equipment back and forth across a public road is more dangerous and disruptive than not driving the equipment across the road. However, the Town has not identified any *facts* provided to, or considered by, the Town Board to show that driving the equipment across the road is dangerous or disruptive. The record considered by the Town Board regarding the 2022 renewal contains no facts regarding the number of Halquist vehicles crossing the road or the number of vehicles using the road, or any other information regarding the road for that matter.

The Town identifies the following comments made at the public hearing before the Planning Commission to support its contention: (1) a public comment about mud slicks; and (2) an observation that there is “a lot of movement and noise.” Neither provides substantial evidence to support the Town’s decision to accelerate the building replacement condition.

First, an individual at the Planning Commission meeting stated: “[y]ou go faster now in a heavier rainstorm and have a[] 100 ft mud slick, it is probably only a matter of time before something does happen there.” Despite Halquist having operated at the site since 1998, the record does not include any facts to show that mud slicks have occurred, much less that they have, or will, pose a risk to the safety of drivers on the road.

With regard to the “movement and noise” observation, there are no facts in the record considered by the Town Board regarding the movement and noise associated with the location of the building on the north side of Paradise Road. There are no facts to show what movement and noise is at issue, much less how that would be decreased with the relocation of the building to the south side of the road.

In sum, the record contains no facts or information addressing the road-crossing impacts supporting the accelerated three-year condition. The record lacks facts or information to show dangerous conditions or unreasonable movement or noise levels related to Halquist's Phase 0 commercial building.

While the Town points to comments made during earlier renewal meetings that contemplated the end of Halquist operations on the north side by 2021, the deadline established in the 2019 CUP was 2030, not years earlier. In any event, the Town does not identify any facts from prior meetings regarding noise, movement, or public safety concerns associated with the location of the building on the north side of Paradise Road, much less that such information was carried forward and presented at the public hearing to the decision makers considering the 2022 CUP renewal.

The Town's decision to accelerate the demolition of Halquist's Phase 0 building as a condition of its 2022 CUP is not supported by substantial evidence. The Town's decision is thus reversed and, on remand, Halquist's 2022 CUP must be granted under the same 2019 CUP conditions as originally requested. *See Hartland Sportsmen's Club*, 393 Wis.2d 496, ¶20 (stating that reversal is appropriate "where the factual evidence failed to support the municipality's ... decision. Because the decision maker cannot supplement the record with new evidence or new grounds, the defect cannot be cured.").

Therefore,

IT IS ORDERED that the order of the circuit court is summarily reversed and the cause remanded with directions to order the Town to grant Halquist's 2022 CUP under the same 2019 CUP conditions as requested by Halquist. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals