

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2159-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DALE VERCAUTEREN AND JEAN VERCAUTEREN,

PLAINTIFFS-APPELLANTS,

v.

COUNTY OF OCONTO AND EDWARD WOJKIEWICZ, JR.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Oconto County:
RICHARD DELFORGE, Judge. *Affirmed.*

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

¶1 HOOVER, P.J. Dale and Jean Vercauteren appeal an order that affirmed the Oconto County Board of Supervisors' vote to amend a zoning

ordinance.¹ The ordinance amendment changed the zoning of the Vercauterens' neighbor's property from agricultural/forest/residential to rural residential/light industrial. The Vercauterens argue that the board's decision solely benefits the property owner, Edward Wojkiewicz, and disregards the public interest. They further argue that the board erroneously exercised its discretion when it failed to follow the required zoning standards. We disagree and affirm the circuit court's order.

BACKGROUND

¶2 The parties do not dispute the facts. Wojkiewicz filed a petition for a zoning amendment to rezone a portion of his property. His plan was to build a residence and operate a custom cabinetry business. Wojkiewicz's property is surrounded by land zoned as agricultural/forest/residential that would not permit the cabinetry business.

¶3 The Oconto County Planning and Zoning Committee held a public meeting regarding the petition. Neighbors were given the opportunity to voice their opinions for and against the petition. The zoning administrator submitted a staff report for the committee's consideration. After amending the petition with Wojkiewicz's permission, the committee unanimously recommended that Wojkiewicz's petition be approved.

¶4 The board of supervisors, by a vote of twenty-four in favor and six against, adopted the committee's recommendation to rezone the property. The rezoning was conditioned upon (1) the town must regrade the road; (2) no

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000).

hazardous waste may be disposed on the property; (3) no more than five employees can work for Wojkiewicz's business; and (4) the property reverts back to the original zoning classification if sold.

¶5 The Vercauterens filed a notice of claim for damages in Oconto County. Upon rejection of their claim, they requested judicial review of the board's decision. The parties filed cross-motions for summary judgment. The circuit court granted summary judgment in favor of the County and Wojkiewicz. It concluded that the board properly reviewed all the evidence presented and determined that rezoning was in the public interest because it promoted economic development and supported a strong local economy. The Vercauterens appealed.

STANDARD OF REVIEW

¶6 Judicial review of the legislative function of amending zoning ordinances is limited to cases exhibiting abuse of discretion, excess of power, or error of law. *Buhler v. Racine County*, 33 Wis. 2d 137, 146, 146 N.W.2d 403 (1966). Whether a parcel should be zoned commercial or residential is within the legislative discretion of the county board. *Id.* A zoning authority's legislative discretion may not be disturbed on judicial review if any "reasonable basis" supports the action. *Schmeling v. Phelps*, 212 Wis. 2d 898, 917, 569 N.W.2d 784 (Ct. App. 1997) (citing *Jefferson County v. Timmel*, 261 Wis. 39, 62-63, 51 N.W.2d 518 (1952)). A zoning ordinance is presumed valid, and we must liberally construe it in favor of the County. *See Heaney v. City of Oshkosh*, 47 Wis. 2d 303, 307, 177 N.W.2d 74 (1970).

¶7 Thus, a court may not substitute its judgment for that of the zoning authority in the absence of statutory authorization, even if the court disagrees with

the "wisdom, or lack thereof, or the desirability of the zoning" *Buhler*, 33 Wis. 2d at 146-47.

DISCUSSION

¶8 The Vercauterens claim the board has spot zoned. They contend that the "issues are whether Mr. Wojkiewicz would be deprived of all beneficial use of his property or whether the spot zoning would be justified in the public interest." They claim that Wojkiewicz is still able to use his property for residential purposes under the pre-petition zoning. Further, they claim the rezoning does not serve the public interest. The Vercauterens contend the zoning must be consistent with long-range planning and based upon considerations affecting the whole community. See *Ballenger v. Door County*, 131 Wis. 2d 422, 427, 388 N.W.2d 624 (Ct. App. 1986). They assert that Wojkiewicz's property and surrounding properties are not designated industrial property in the long-range plan.

¶9 The Vercauterens also argue that the zoning administrator's staff report indicates that rezoning is contrary to the public interest because it states that the change would be detrimental to the ecology, scenic beauty of the area or the wildlife and may create noise, parking, traffic and air quality problems. The Vercauterens insist that especially pertinent to their appeal is the zoning administrator's conclusion that rezoning would decrease adjacent property values. Finally, the Vercauterens claim that because the rezoning reverts to agricultural/forest/residential if Wojkiewicz sells the property, this demonstrates that the rezoning was "solely for the benefit of Mr. Wojkiewicz."

¶10 The County disputes the Vercauterens' claim that the board has spot zoned. Because the facts are undisputed, whether the board's act constituted spot zoning is a question of law. *Ballenger*, 131 Wis. 2d at 426. 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." *Heaney v. City of Oshkosh*, 47 Wis. 2d 303, 307, 177 N.W.2d 74 (1970) (citing 1 Rathkopf, *The Law of Zoning & Planning*, ch. 26-1, Spot Zoning (3^d ed.)). The parties do not dispute that the surrounding properties are all used for residential purposes. They have not identified any other light industrial zone in the vicinity of Wojkiewicz's property. We therefore conclude that the board spot zoned.

¶11 In some cases, spot zoning is grounds for reversal. *Id.* at 308. However, spot zoning is not per se illegal. *Id.* It is reviewed under the following standard:

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.

Id. (citation omitted).

¶12 Spot zoning is allowed where the board determines that the public interest, and not just the preference of the property owner, supports rezoning. *Id.* at 310. The decision to rezone should be based on the County's long-range plan and the purposes of the whole community. *See id.* The Vercauterens misinterpret *Heaney* when they argue that Wojkiewicz is required to show that refusal to rezone deprives him of all beneficial use of his property in order to prove acceptable spot zoning. Courts have found that an ordinance that deprives an owner of all beneficial use constitutes a regulatory taking and requires compensation. *See Zealy v. City of Waukesha*, 201 Wis. 2d 365, 374, 548 N.W.2d 528 (1996). However, classifying this zoning amendment as a regulatory

taking begs a different remedy from that sought by Wojkiewicz. Such discussion is not relevant to this case.

¶13 The zoning administrator's staff report stated that rezoning would not create problems with garbage or sewage disposal, road access, police or fire protection, lighting or water supply. The staff report also indicated that rezoning would not affect the adjoining properties in terms of run-off or drainage, water or air pollution, wind erosion, or wind-blown particles. The report only stated that the rezoning would "possibly" create a noise, parking or traffic problem, not that rezoning would cause these problems. The zoning administrator did not evaluate whether the proposed zoning was compatible with the Town Comprehensive Land Use Plan, explaining that the question was "N/A."

¶14 Neighbors testified at the public hearing both for and against rezoning. Wojkiewicz's petition included conditions that addressed his neighbors' concerns. He agreed to keep the operation small by not having more than five employees. Further, the rezoning was contingent upon the town upgrading the roads. Additionally, the rezoning could not be transferred to another owner. If he sold the property, it would revert back to the original zoning classification. The board had the discretion to consider both the neighbors' concerns along with the zoning administrator's staff report. The Vercauterens have presented no authority that dictates weighing some evidence greater than other evidence.

¶15 The ordinances define Oconto County's zoning goals. OCONTO COUNTY, WIS., ORDINANCE § 14.1801 states: "It is the policy of Oconto County to promote economic development and a strong local economy." Although recognizing that "most commercial and industrial uses should be located in the

urban communities where the full range of needed services can be afforded to such uses," it does not rule out light industrial zoning in rural areas. *Id.*

¶16 The board balanced the interests of the adjacent property owners and Wojkiewicz to determine the public interest. The restrictions placed upon the rezoning protect the adjoining property owners' interests, and the rezoning permits economic development and a strong local economy. The board determined that a cabinet making business under the County ordinances is consistent with public interests. Because the board considered the public interests, we cannot say as a matter of law that it erroneously exercised its discretion.

¶17 Next, the Vercauterens argue that the board failed to follow rezoning standards imposed by the zoning ordinance. Citing OCONTO COUNTY, WIS., ORDINANCE § 14.1806,² they advance three standards that the rezoning petitioner must meet: (1) the showing of a need for a rural location for the proposed use; (2) the relationship of the proposed use to other adjacent commercial uses; and (3) the suitability of the land for the installation of a sanitary system to serve the proposed use. They contend that none of these standards has been met.

¶18 The Vercauterens reason that the need for a rural location is not satisfied because Wojkiewicz currently operates his cabinetry business from another location, and this business does not need to be in a rural setting. They assert that adjacent properties are not used commercially, and no evidence shows that the current sanitary system will serve the proposed use. Because the standards

² The Vercauterens actually cited OCONTO COUNTY, WIS., ORDINANCE § 14.1706. However, the quoted language appears in their appendix at § 14.1806. Because § 14.1706 is not provided and § 14.1806 appears to apply to the case, we will refer to the applicable ordinance as § 14.1806.

outlined in OCONTO COUNTY, WIS., ORDINANCE § 14.1806 have not been met, the Vercauterens contend the board violated the ordinances.

¶19 The County responds that these standards are not intended as threshold requirements that remove the board's discretion to rezone a property light industrial. Furthermore, the County asserts that no evidence shows that the board did not consider these standards. We agree.

¶20 As stated above, the County favors promoting "economic development and a strong local economy." OCONTO COUNTY, WIS., ORDINANCE § 14.1801. As argued by the Vercauterens, the ordinances guide the County for evaluating petitions for rezoning at § 14.1806.

¶21 The standards were implicitly considered. The Vercauterens have not provided any authority that a legislative body has to prove that it considered certain standards or employed specific "magic words." The Vercauterens agree that no adjacent commercial uses exist for comparison. Further, the record reveals that Wojkiewicz's proposed use does not require any additional sanitary system to be installed. As a condition of the rezoning, Wojkiewicz testified that he disposes of his waste in Brown County and agreed that he would be prohibited from depositing hazardous waste at the rezoned property. Finally, Wojkiewicz testified why this location was ideal for his proposed use, explaining that he could use part of the property as his residence and the other for his small cabinet making business.

¶22 The board approved the petition, which incorporated conditions that resolved many of the neighbors' concerns.³ The board did not erroneously exercise its discretion, exceed its power or legally err when it granted Wojkiewicz's petition to rezone his property.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

³ The statutes recognize the importance of neighbors' concerns in the board's decision-making process. WIS. STAT. § 59.69(5)(e)2 and 5g (1997-98). Neighbors are notified of the public hearing and, if 50% or more of the adjoining landowners oppose the rezoning, they may file a protest. *Id.* Upon filing such protest, the board must pass the rezoning decision by three-fourths of the members for the amendment to be effective. WIS. STAT. § 59.69(5)(e)5g. Without analyzing whether a protest was filed and whether it complied with the statutory requirements, we conclude that this provision provides no bar to this case. The Vercauterens do not challenge notice to the public hearing. Further, the parties agree that the board approved the rezoning by a vote of 24 to 6. Thus, three-fourths or more of the voting board members approved the rezoning. WIS. STAT. § 59.69(5)(e)5g (1997-98).

