Case No. 22-124,998-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

AMERICAN WARRIOR, INC. and BRIAN F. PRICE,
Plaintiffs / Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF FINNEY COUNTY, KANSAS and HUBER SAND, INC.,
Defendants / Appellees,

Appeal from the District Court of Finney County, Kansas
Honorable District Court Judge Wendel W. Wurst
District Court Case No. 2021-CV-0095

REPLY BRIEF OF APPELLANTS

Patrick A. Edwards, KS # 24553
STINSON LLP
1625 N. Waterfront Parkway, Suite 300
Telephone: (316) 268-7938
Facsimile: (316) 268-9792
patrick.edwards@stinson.com

Attorneys for Plaintiffs/Appellants
American Warrior, Inc. and Brian F. Price

Oral Argument 15 minutes

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs/Appellants American Warrior, Inc. ("AWI") and Brian F. Price ("Price") (AWI and Price are collectively "Plaintiffs") respectfully submit this Reply Brief of Appellants to the Joint Brief of Appellees (the "Response Brief") filed by Defendants/Appellees Huber Sand, Inc. ("Huber Sand") and Board of County Commissioners of Finney County, Kansas ("County Commission") (Huber Sand and the County Commission are collectively "Defendants"). Much of the Response Brief is copied nearly directly from the Brief of Appellants (the Statement of the Facts and Standard of Review sections) or the District Court's Memorandum Decision on Motions for Summary Judgment, dated December 8, 2021 ("Memorandum Decision"). Plaintiffs do not respond herein to those duplicative arguments, as they are addressed in the Brief of Appellants.

Defendants rely on two primary arguments on appeal: First, they argue that K.S.A. § 12-757 does not apply to or govern CUPs or SUPs because they are not referenced in the statute. Second, they argue that K.S.A. § 12-755 allows the County Commission to enact processes and procedures of its choosing for the issuance of CUPs and SUPs, regardless of K.S.A. § 12-757. As explained below, the first argument is rebutted by the ten Kansas cases (*see* summaries on pages 10 to 23 of the Brief of Appellants) – including two opinions issued by this Court only two weeks ago – applying K.S.A. § 12-757 to CUPs and SUPs. If the statute did not govern CUPs or SUPs as the Defendants argue, then these cases would not analyze the statute as applied to CUPs or SUPs. The second argument is directly rebutted by (i) the language of the planning and zoning enabling statute, K.S.A. § 12-

741(a), (ii) the analysis of the statutes in *Moore* and *Crumbaker*, and (iii) the reasoning behind the *Manly*, *Ternes*, and *Vickers* cases. *See* Brief of Appellants, pp. 29-34.

ARGUMENT AND AUTHORITIES

I. The *Kaw Valley Companies* and *Pretty Prairie Wind* Opinions Issued by this Court Only Two Weeks Ago Conclusively Establish that K.S.A. § 12-757 Applies to Conditional Use Permits and Is Mandatory.

On August 26, 2022, this Court issued two separate opinions that resolve the issues in this appeal – *Kaw Valley Companies* (unpublished) and *Pretty Prairie Wind* (published). Both cases are attached in the Supplemental Appendix of Cases to this Reply Brief.

In *Pretty Prairie Wind*, a wind company applied for a conditional use permit to build a wind farm near Haven, Kansas. *Pretty Prairie Wind LLC v. Reno County*, No. 123,277, 2022 WL 3693052, --- P.3d ----, at *1 (Kan. Ct. App. Aug. 26, 2022). The CUP went before the Reno County Planning and Zoning Commission, which held several public hearings on the matter, and ultimately voted to recommend that the CUP application be denied. *Id.* After this vote, 114 neighboring property owners (owners of 46% of the property within 1,000 feet) filed protest petitions in opposition to the CUP. *Id.* at *2. The County Commissioners voted 2 to 1 to approve the CUP, which fell short of the increased 3/4ths vote required to approve it in light of the protest petitions, so the CUP was denied. *Id.* The wind company filed suit, arguing that (i) the protest petitions were invalid for failing to comply with K.S.A. § 25-3602(b)(4) – dealing with protest petitions submitted for elections – because the circulator of each protest petition did not sign it before a notary and (ii) the decision to deny the CUP application was unreasonable. *Id.* The district court denied the wind company's summary judgment motion regarding the protest petitions,

finding that K.S.A. § 25-3602(b)(4) did apply but the circulator's declaration substantially complied with the statute. *Id.* The wind company dismissed its other argument about the unreasonableness of the denial and appealed the district court's ruling to this Court. *Id.*

This Court repeatedly cited to and analyzed K.S.A. § 12-757(b), (d), and (f) in evaluating the protest petitions submitted in opposition to the wind company's CUP application. *See id.* at *1, 3, and 6-8. This Court held that "K.S.A. § 12-757 governs zoning decisions" (*id.* at *6) and summarized the two-part process where the application first goes to the planning commission and only later goes to the county commission for a final vote (*id.* at *7). Ultimately, this Court held that "[t]he requirements of K.S.A. 25-3601 through K.S.A. 25-3608 do not apply to zoning protest petitions [in response to a CUP application]. Those petitions are governed by K.S.A. 2021 Supp. 12-757(f)(1)." *Id.* at *1, Syl. ¶ 3. After finding that the protest petitions satisfied the requirements of K.S.A. § 12-757(f)(1), the Court affirmed the district court's ruling, albeit for a different reason. *Id.* at *8.

In *Kaw Valley Companies*, a sand company submitted an application for an SUP for an open surface sand mine in rural Leavenworth County. *Kaw Valley Companies, Inc. v. Board of Leavenworth County Commissioners*, No. 124,525, 2022 WL 3693619, at *1 (Kan. Ct. App. Aug 26, 2022) (unpublished decision) The Leavenworth County Planning and Zoning Commission held a public hearing on the SUP application with public comment and voted to recommend denial of the application. *Id.* at *2. After this meeting, both the applicant and the county exchanged several additional reports and studies regarding truck traffic for the operation. *Id.* at *2-5. The County Commissioners then held a public hearing on the SUP application, which included additional presentations by the applicant and the

Department of Planning and Zoning (that recommended the SUP be granted with certain conditions, including repaving the truck route), as well as public comment. *Id.* at *5. The County Commission continued its consideration of the SUP application, later received a letter from the County Engineer summarizing his position, and ultimately approved the SUP application subject to several conditions recommended by the County Engineer. *Id.* at *6. The sand company appealed the SUP to the district court, which affirmed the County Commission's decision, so the sand company appealed to this Court. Id. at *7.

On appeal, the sand company argued the SUP conditions imposed were unreasonable and one condition was an unconstitutional taking. *Id.* Before analyzing these issues, this Court summarized Kansas zoning procedure for special use permits as follows:

> K.S.A. 12-741 et seq. grants cities and counties the authority to enact planning and zoning regulations for the protection of the public health, safety, and welfare. Specifically, K.S.A. 12-755(a)(5) grants a city or county's governing body to issue "special use or conditional use permits" to allow a particular land use that is not allowed under existing zoning regulations. The procedure to be used by a city or county in considering a SUP application is set forth in K.S.A. 2021 Supp. 12-757. See *Manley v. City of Shawnee*, 287 Kan. 63, 67, 194 P.3d 1 (2008). We pause to note that there is no allegation in the present case that the Board of County Commissioners failed to follow the statutory procedure.

Id. at *8 (emphasis added). After summarizing certain county zoning regulations, the standard of review, and factors used in evaluating the reasonableness of conditions in an SUP and in determining whether to grant or deny an SUP, the Court did not find the SUP conditions to be unlawful or improper, but determined those conditions were not specific enough to allow the Court to determine their reasonableness. *Id.* at *1, 8-13. The Court remanded the matter back to the County Commission for further proceedings. *Id.* at *13.

Thus, within the last two weeks, this Court has applied K.S.A. § 12-757 to CUPs or SUPs on two different occasions. Additionally, the underlined language above from the *Kaw Valley Companies* case indicates that the procedure from K.S.A. § 12-757 is mandatory, not optional ("procedure to be used"). As a result, these two recent cases are entirely determinative in this appeal.

II. Defendants' Attempts to Distinguish the Kansas Cases Relied Upon By Plaintiffs Based on Different Language of the Underlying Zoning Regulations Enacted By the County Commission Are Without Merit.

Throughout the Response Brief, Defendants repeatedly attempt to distinguish cases relied upon by Plaintiffs by arguing those cases are irrelevant because they did not address the current factual scenario where the County Commission enacted zoning regulations that provided the BZA with the sole authority to process and approve on CUPs and the BZA complied with the processes and procedures in those zoning regulations. *See* Response Brief, pp. 17-18 (analyzing *WD No. 1*), at 22-23 (analyzing *Blessant*), at 23-24 (analyzing *Manly*), at 24-25 (analyzing *RWD #2*), at 27 (analyzing *Vickers*), at 27-28 (analyzing *Ternes*), at 29-30 (analyzing rulings from the Memorandum Decision that no binding precedent exists), at 35 (analyzing K.S.A. §§ 12-755 and 12-757), and at 39-40 (analyzing K.S.A. § 12-755). Defendants argue the zoning regulations in the cases cited by Plaintiffs instead followed the processes and procedures set forth in K.S.A. § 12-757, which is why those cases analyzed that statute. *See id.* As part of this argument, Defendants repeatedly mention how the Finney County Zoning Regulations still provide notice and public hearing on a CUP application before the BZA. *See id.*, pp. 17-18, 21, 23, 25-26, 35, and 40.

Defendants' arguments ignore the rulings from several cases that the procedures in K.S.A. § 12-757 are mandatory and must be applied to CUPs and SUPs. For example, the *Vickers* case invalidated an SUP because it followed the process set forth in the Franklin County Zoning Regulations that "did not comply with the mandatory statutory procedures set forth in K.S.A. 12-757." *Vickers v. Franklin Cty. Bd. of Commissioners*, No. 118,649, 444 P.3d 380, at *4 (Kan. Ct. App. July 19, 2019) (unpublished opinion); *see also* Brief of Appellants, p. 28. Moreover, the *Ternes* case held that an arguably ambiguous Sumner County zoning regulation could not be interpreted as requiring planning commission approval as a condition precedent to the county board approving the CUP, as doing so would violate the mandatory two-part process in K.S.A. § 12-757(b) and (d) and the separation of powers between the planning commission and county commission. *Ternes v. Bd. of Cty. Commissioners of Sumner Cty.*, No. 119,073, 464 P.3d 395, at *7-8 (Kan. Ct. App. June 12, 2020) (unpublished opinion), review denied (Nov. 24, 2020); *see also* Brief of Appellants, pp. 28-29. The *Manly* case analyzed the separation of powers for SUP decisions under K.S.A. § 12-757 between (i) the advisory appointed planning commission and (ii) the elected county commission, which would make no sense if the county could enact whatever procedures it wanted for SUPs and CUPs. *Manly v. City of Shawnee*, 287 Kan. 63, 70-71, 194 P.3d 1, 7-8 (2008); *see also* Brief of Appellants, pp. 25-26.

Defendants also conveniently overlook the express language of the planning and zoning enabling statute, K.S.A. § 12-741(a), which provides that a county may enact and enforce other planning and zoning regulations as long as they "are not in conflict with the provisions of this act." Thus, the grant of authority in K.S.A. § 12-755(a) that allows a

county commission to adopt zoning regulations to provide for the issuance of CUPs and SUPs is restricted by K.S.A. § 12-741(a) to only allow regulations that do not conflict with the other planning and zoning statutes. Because K.S.A. § 12-757 governs the two-part process required for the consideration and issuance of CUPs and SUPs (*see generally* Response Brief, pp. 10-23), then K.S.A. § 12-741(a) prevents a county commission from enacting zoning regulations with a different procedure for CUPs or SUPs.

Additionally, Defendants fail to address the *Moore* case or the applicable part of *Crumbaker*, holding that a county is not required to create a planning commission and BZA, but once it does, it is required to follow the Kansas statutes that govern the rights, duties, and obligations assigned to the planning commission and BZA under K.S.A. § 12-741, *et seq.* *See Moore v. City of Lawrence*, 232 Kan. 353, 356-57, 654 P.2d 445, 449 (1982); *Crumbaker*, 275 Kan. at 884-86, 69 P.3d at 610-11; *see also* Brief of Appellants, pp. 30-32. That includes implementing the two-part process under K.S.A. § 12-757 where CUPs go to the Planning Commission first for a recommendation and then to the County Commission second for a final vote.

Finally, as to Defendants references to the notice and public hearing, if a county can enact its own regulations with a different procedure for CUPs than the specific two-step process in K.S.A. § 12-757 as Defendants claim, then whether that different procedure provides for public notice or a public hearing is entirely irrelevant. If Kansas law allowed a county to deviate from the requirements of K.S.A. § 12-757 under the language of K.S.A. § 12-755, then the county would be able to do whatever it wants with respect to CUPs. Taking this position to the extreme, Defendants' argument would allow a county to enact a

zoning regulation where CUP applications are decided by a game of rock-paper-scissor or by a coin flip, with or without notice or a public hearing. If K.S.A. § 12-757 does not apply to CUPs, then there is no requirement under Kansas law as to what is required except that the procedure must be set out in the county zoning regulations. There is no way Kansas law would provide for such an absurd result.

III. The *M.S.W., Inc.* Case Does Not Analyze K.S.A. § 12-757 and Is Distinguishable from the Facts in This Case.

Defendants argue that the Court in *M.S.W., Inc. v. Board of Zoning Appeals of Marion County, Kansas*, 29 Kan.App.2d 139, 24 P.3d 175 (2001) analyzed an analogous, "if not exactly the same", procedure and process to the one at issue here and did not find it to be invalid or otherwise make any findings that it was required to conform with K.S.A. § 12-757. Defendants' summary of *M.S.W.* is wrong and its application to this lawsuit is misplaced. The *M.S.W.* case never even cited K.S.A. § 12-757, as it was a non-conforming use case that analyzed narrow issues (discussed below) inapplicable here. Additionally, it appears that Marion County followed the two-step process from K.S.A. § 12-757 for the issuance of the CUP, except it automatically included the CUP in the proposed initial zoning instead of separately requiring the owner to submit a CUP application to start the CUP process.

The *M.S.W.* case involved a quarter-section tract of rural land in Marion County that was un-zoned in 1974 when its owner entered into a 20-year contract with the county to operate a landfill and subsequently received the necessary landfill permit from the KDHE. *M.S.W., Inc.*, 29 Kan.App.2d at 141, 24 P.3d at 179. In 1992, the County

Commission voted to adopt zoning regulations for all unincorporated portions of the county. *Id.* The adoption of the zoning regulations zoned the subject property as agricultural with a simultaneous conditional use permit (without any application submitted) to operate a landfill on the property. *Id.* These zoning regulations also included 115 unrelated CUPs for other uses on other properties. *Id.* In 1996, the landfill ceased operations and closed. *Id.*, 29 Kan.App.2d at 141-142, 24 P.3d at 179.

In 1998, a new company ("MSW") purchased the landfill property and requested a certification from the local planning and zoning authority that the proposed landfill footprint was consistent with local land use restrictions. *Id.*, 29 Kan.App.2d at 142, 24 P.3d at 180. The County Zoning Administrator ruled that the landfill use was non-conforming and the conditional use permit granted in 1992 had lapsed. *Id.* MSW appealed that decision to the Marion County BZA, which upheld the Zoning Administrator's decision, finding that no non-conforming use previously existed because the landfill operated under a proper CUP from 1992 to 1996 but the CUP was forfeited after a lengthy period of non-use. *Id.*, 29 Kan.App.2d at 142-143, 24 P.3d at 180. MSW appealed the BZA's rulings to the district court, which affirmed the BZA's rulings, and then appealed the district court's rulings to this Court. *Id.*, 29 Kan. App. 2d at 143, 24 P.3d at 180.

On appeal, MSW argued that the County Commissioners acted illegally in 1992 by granting the CUP without following its zoning regulations – the owner never submitted a CUP application, the County Commission never voted on a CUP application, a development plan was never prepared, and a separate written CUP was never issued – and that the BZA's decision in 1998 was arbitrary and capricious for the same reasons. *Id.*, 29

Kan. App. 2d at 147, 24 P.3d at 182. MSW argued that neither Kansas statutes nor the county zoning regulations allow for CUPs to be issued simultaneously as part of the initial zoning in 1992. *Id.*, 29 Kan. App. 2d at 149, 24 P.3d at 183-184. MSW argued that the County Commissioners' actions in 1992 converted its vested right of a non-conforming use landfill into a non-vested right of a conditional use of property as a landfill without any due process, resulting in an unconstitutional taking of private property without compensation. *Id.*, 29 Kan. App. 2d at 152, 24 P.3d at 185.

As part of its analysis, the Court stated:

> A municipality has no inherent power to enact zoning laws, and the power of a local government to accomplish zoning exists only by virtue of authority delegated by the state. The planning and zoning powers of Kansas municipalities are derived from the grant contained in K.S.A. 12–741 *et seq.* Pursuant to K.S.A. 12–741(a), the municipalities can enact or enforce any zoning laws and regulations <u>as long as they are not in conflict with Kansas statutes</u>.

Id., 29 Kan. App. 2d at 148-149, 24 P.3d at 183 (internal citations omitted and <u>emphasis added</u>). The Court quoted K.S.A. § 12-755(a)(5) about how the county commission can enact zoning regulations for the issuance of CUPs and how this statute is a "nonexhaustive list". *Id.*, 29 Kan. App. 2d at 149, 24 P.3d at 183. The Court noted how there is no authority expressly prohibiting a county from adopting CUPs at the same time initial zoning regulations are enacted under K.S.A. § 12-753. *Id.*, 29 Kan. App. 2d at 150, 24 P.3d at 184.

The Court noted how the issuance of a CUP for a landfill use has the same practical effect as the County Commissioners zoning the property as "Landfill" if such a zoning classification existed, as both would allow the property to be used legally as a landfill. *Id.*, 29 Kan. App. 2d at 150, 24 P.3d at 184. The Court then addressed K.S.A. § 12-758(a),

which provides that "regulations adopted under authority of this act shall not apply to the existing use of any building or land." *Id.*, 29 Kan. App. 2d at 150-151, 24 P.3d at 184. The Court held that the County Commissioners' action in 1992 prevented the creation of a non-conforming use, but did not violate any non-conforming use existing at the time, and further held that the owner's use of the property was not impacted in any way by the 1992 CUP. *Id.*, 29 Kan. App. 2d at 153, 24 P.3d at 185-186. The Court held that no landfill use of the property was ever non-conforming, as the CUP issued by the County Commissioners provided a protective status for the recognized use, which is consistent with the disfavored status of non-conforming uses. *Id.*, 29 Kan. App. 2d at 154, 24 P.3d at 186.

After determining that the BZA correctly determined that the property was properly zoned in 1992 as agricultural with the CUP issued for landfill use, the Court then evaluated whether the CUP lapsed between 1996 and 1998, concluding it did lapse when the landfill was closed and was forfeited under the express language of the zoning regulations as a result. *Id.*, 29 Kan. App. 2d at 155-156, 24 P.3d at 187. Finally, the Court analyzed and rejected MSW's argument about estoppel involving a report from the Marion County Planning Commission in 1996 regarding non-conforming use. *Id.*, 29 Kan. App. 2d at 156-157, 24 P.3d at 187-188. Ultimately, the *M.S.W.* Court affirmed the district court's rulings.

Notably, <u>not once</u> did the *M.S.W.* case cite to, much less analyze, K.S.A. § 12-757. *See generally id.*, 29 Kan. App. 2d at 139-157, 24 P.3d at 178-188. This makes sense because the *M.S.W.* case analyzed the very narrow issues of (i) whether the issuance of a CUP at the same time the initial zoning was enacted violated Kansas law governing non-

conforming uses and was an unconstitutional taking without compensation, and (ii) whether a previously-issued CUP had lapsed and was forfeited.

Additionally, Appellees either are incorrect in their claim that the process used in the *M.S.W.* case is analogous to the one used by the BZA here or the record from the *M.S.W.* case is unclear on this issue. The *M.S.W.* case only referenced a small portion of the county's zoning regulations dealing with the issuance of CUPs and did not set out in-depth analysis of these regulations. *See id.*, 29 Kan. App. 2d at 147-148, 151, and 155, 24 P.3d at 182-183, 184-185, and 187 (excerpts of portions of § 21-103, an uncited section, § 24-102, and § 21-104). But based on the excerpt of the published notice, it appears the proposed initial zoning with the proposed CUPs first went before the Planning Commission for public hearing before going before the County Commissioners for a final vote in 1992. *See id.*, 29 Kan. App. 2d at 141 and 156-157, 24 P.3d at 179 and 188 (quoting the Planning Commission's meeting minutes and published notice, and describing the final vote by the County Commission on the resolution). Thus, it appears that Marion County followed the two-step process set forth in K.S.A. § 12-757 for the issuance of the CUP, except it automatically included the CUPs in the proposed initial zoning instead of separately requiring each of the 116 landowners to submit CUP applications to start the CUP process.

IV. Defendants Attempts to Invalidate the *Crumbaker* Ruling Fail and this Court Is Required to Follow the *Crumbaker* Ruling Under the Principle of *Stare Decisis*.

On pages 19 to 22 of the Response Brief, Defendants attempt to undercut the ultimate rulings from *Crumbaker v. Hunt Midwest Min., Inc.*, 275 Kan. 872, 69 P.3d 601 (2003) by arguing that the Supreme Court simply got wrong. Defendants argue that the

cases cited in *Crumbaker* for the proposition that the procedures from K.S.A. § 12-757 apply to SUPs (*Ford v. City of Hutchinson*, 140 Kan. 307, 37 P.2d 39 (1934) and *Carson v. McDowell*, 203 Kan. 40, 452 P.2d 828 (1969), as well as *Armordale State Bank v. Kansas City*, 131 Kan. 419, 292 P. 745 (1930) cited in the *Ford* case) were not CUP or SUP cases, so *Crumbaker* incorrectly held that K.S.A. § 12-757 applies to SUPs.

Crumbaker was summarized in detail on pages 10 to 12 of the Brief of Appellants, including a direct quote of relevant portion of the ruling, so that summary is not repeated here. But even if Defendants are correct that no case prior to or cited in *Crumbaker* applied K.S.A. § 12-757 to SUPs, then it is clear that *Crumbaker* extended the application of K.S.A. § 12-757 to include SUPs. *See Crumbaker*, 275 Kan. at 886, 69 P.3d at 611 ("As a result, we have long held that the power of a city government to change the zoning of property—which includes issuing special use permits—can only be exercised in conformity with the statute which authorizes the zoning."); *see also id.*, 275 Kan. at 887, 69 P.3d at 611 ("the City's failure to follow the zoning procedures in state law [referring to citations in the three preceding paragraphs to K.S.A. § 12-757] and in city ordinances and regulations renders its actions invalid"). As a ruling by the Kansas Supreme Court, the District Court and this Court are bound to follow *Crumbaker* pursuant to the doctrine of *stare decisis*. *See Tillman v. Goodpasture*, 56 Kan. App. 2d 65, 77, 424 P.3d 540, 549 (2018), aff'd, 313 Kan. 278, 485 P.3d 656 (2021); *Majors v. Hillebrand*, 51 Kan. App. 2d 625, 629-30, 349 P.3d 1283, 1286-87 (2015); *see also* Brief of Appellants, pp. 23-26. Although Defendants might disagree with the *Crumbaker* ruling, this Court is bound by it.

For this very same reason, Defendants' analysis on pages 12 to 17, 29, and 31 to 40 of the Response Brief to rules of statutory interpretation and construction as applied to K.S.A. § 12-741(a), K.S.A. § 12-755(a), K.S.A. § 12-757, and K.S.A. § 12-759 has no bearing on the issue before this Court. Statutory interpretation and construction are irrelevant because the *Crumbaker* case clearly held that the procedures and processes in K.S.A. § 12-757 apply to and govern SUPs.

V. Defendants' Attempts to Otherwise Distinguish the *Crumbaker*, *Manly*, *Rural Water District #2*, *Vickers*, and *Ternes* Cases Fail.

In addition to the arguments addressed in Section II above, Defendants attempt to distinguish the cases relied upon by Plaintiffs on other grounds, including by arguing that (i) *Crumbaker* was just a notice case that involved annexation of property and changing zoning and land use (*see* Response Brief, p. 21); (ii) *Manly* dealt with whether a City could grant an SUP with a simple majority vote (*see id.*, p. 23); (iii) *Rural Water District #2* involved a landowner protest petition (*see id.*, p. 24); (iv) *Vickers* only addressed whether notice and a public hearing is required for procedural fairness (*see id.*, p. 25); and (v) *Ternes* simply analyzed whether a county commission could approve a zoning change and CUP over the planning commission's recommendation of denial (*see id.*, p. 28). Plaintiffs refer the Court to their detailed summaries of these cases on pages 10 to 23 of their Brief of Appellants. Additionally, Plaintiffs addressed most of these very same arguments from the District Court's Memorandum Decision in the Brief of Appellant at page 26 (addressing *Manly*); pages 27-28 (addressing *RWD #2*); page 28 (addressing *Vickers*); pages 28-30 (addressing *Ternes*); and pages 33-34 (addressing *Crumbaker*).

At best, Defendants' arguments show a distinction without a difference, but they do not effectively distinguish the cases cited by Plaintiffs in their Brief of Appellants. These cases all apply K.S.A. § 12-757 to different aspects of the two-part process required to be applied to applications for CUPs and SUPs. If this statute did not apply to or govern CUPs or SUPs, then these cases would have no reason to cite the statute in the first place, as they could simply cite to and analyze the underlying county zoning regulations. The fact that ten appellate decisions have applied K.S.A. § 12-757 to CUPs and SUPs, and no cases have even suggested that the statute does not apply to CUPs or SUPs, is clear evidence that K.S.A. § 12-757 applies to and governs CUPs and SUPs in Kansas. In the CUP that is the subject of this appeal, the Finney County Commission neither reviewed nor voted on the CUP prior to, or after, its approval by the BZA. This absence of County Commission involvement stands in direct contrast to all of the appellate decisions cited herein.

CONCLUSION

For the reasons above and in the Brief of Appellants, Plaintiffs respectfully request that this Court (i) reverse the legal conclusions of the District Court in the Memorandum Decision, (ii) find that the CUP issued to Huber Sand is invalid, void, and unenforceable because the processes and procedures under which it was issued violate Kansas law, and (iii) remand this case to the District Court to enter an order consistent with these findings.

SUPPLEMENTAL APPENDIX OF CASES

E. *Kaw Valley Companies, Inc. v. Board of Leavenworth County Commissioners*, No. 124,525, 2022 WL 3693619 (Kan. Ct. App. Aug 26, 2022) (unpublished decision).

F. *Pretty Prairie Wind LLC v. Reno County*, No. 123,277, 2022 WL 3693052, --- P.3d ---- (Kan. Ct. App. Aug. 26, 2022).

Date: September 9, 2022

Respectfully Submitted by:

/s/ Patrick A. Edwards

Benjamin C. Jackson (KS #26922)
JACKSON LEGAL GROUP, LLC
325 S. Main St.
Scott City, Kansas 67871
Phone: 620-874-9844; Fax: 307-369-1781
ben@jacksonlegalgroup.net

David E. Bengtson (KS #12184)
Patrick A. Edwards (KS #24553)
STINSON LLP
1625 N. Waterfront Parkway, Suite 300
Wichita, KS 67206-6620
Phone: (316) 268-7938; Fax: (316) 268-9792
david.bengtson@stinson.com
patrick.edwards@stinson.com

Attorneys for Plaintiffs/Appellants
American Warrior, Inc. and Brian F. Price

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Appellant was filed electronically with the Court and served via U.S. Mail, postage prepaid, and also by email, on September 9, 2022, to the following opposing counsel:

Shane Luedke (KS #28076)
CALIHAN LAW FIRM, P.A.
212 West Pine Street, PO Box 1016
Garden City, Kansas 67846
Phone: (620) 276-2381
Fax: (620) 276-4120
Email: sluedke@calihanlawfirm.com
Attorney for Defendant/Appellee
Huber Sand, Inc.

Linda Lobmeyer (KS #20026)
CALIHAN LAW FIRM, P.A.
212 West Pine Street, PO Box 1016
Garden City, Kansas 67846
Phone: (620) 276-2381
Fax: (620) 276-4120
Email: linda@calihanlawfirm.com
Attorney for Defendant/Appellee
Board of County Commissioners of Finney County, Kansas

/s/ Patrick A. Edwards
Attorneys for Plaintiffs/Appellants

APPENDIX E

2022 WL 3693619
Unpublished Disposition
Only the Westlaw citation is currently available.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

KAW VALLEY COMPANIES, INC., Appellant,
v.
BOARD OF LEAVENWORTH COUNTY COMMISSIONERS, Appellee.

No. 124,525
|
Opinion filed August 26, 2022.

Appeal from Leavenworth District Court; DAVID J. KING, judge.

Attorneys and Law Firms

Justin J. Johl, and Jessica A.E. McKenney, pro hac vice, of Shook, Hardy & Bacon L.L.P., of Kansas City, Missouri, for appellant.

Christopher L. Heigele and Jacob D. Bielenberg, of Baty Otto Coronado Scheer PC, of Kansas City, Missouri, for appellee.

Before Bruns, P.J., Atcheson and Isherwood, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** This appeal is brought under the provisions of K.S.A. 19-223. It arises out of the Board of Leavenworth County Commissioners (Board of County Commissioners) approval of a Resolution granting a special use permit (SUP) to Kaw Valley Companies, Inc. (Kaw Valley). Under the Resolution, Kaw Valley is authorized to conduct a sand dredging operation in an unincorporated part of Leavenworth County a few miles from the Kansas River. On appeal, Kaw Valley argues—among other things—that two of the conditions contained in the Resolution are unreasonable. In response, the Board of County Commissioners contends that the Resolution is adequate as written because it contemplates further negotiations.

Based on our review of the record on appeal, we do not find the conditions set forth in the SUP to be unlawful or categorically improper. However, we do find that the conditions set forth in the Resolution adopting the SUP are not specific enough to adequately allow for judicial review to determine their reasonableness. Likewise, we find that some of the conditions are not specific enough to allow Kaw Valley to make a well-informed decision whether to go forward with the project. Accordingly, Kaw Valley has been "aggrieved" by the adoption of the SUP within the meaning of K.S.A. 19-223. Thus, we reverse the district court's decision, vacate the Resolution granting the SUP application, and remand this matter to the Board of County Commissioners for further proceedings.

FACTS

On January 16, 2019, Kaw Valley filed an application for a SUP with the Leavenworth Planning Department. In the application, Kaw Valley represented that it had leased 224 acres of nonresidential real property near 166th Street and Lenape Road in rural southern Leavenworth County. Kaw Valley desired to change the existing agricultural use of the land to an open surface sand mining operation "to quarry and stockpile sand from the underlying deposits.

Kaw Valley further represented that there would be truck traffic in and out of the quarry on weekdays. According to the representations made in the application, the quarry would have "[a]n estimated 8 to 10 truck trips per hour or 64 to 80 truck trips per day ... to the site each regular weekday between the hours of 7:00 a.m. and 3:00 p.m." According to Kaw Valley, the quarry would produce approximately 2,000 tons of sand each day of operation and use a weight scale to ensure that the outgoing trucks do not exceed legal weight limits for the nearby public roadways.

In a Plant Operations Memorandum prepared by Cook, Flatt & Strobel Engineers P.A. for Kaw Valley, dated June 28, 2019, additional details regarding the quarry were identified. Specifically, the memorandum stated that "[o]nce the sand has been excavated, it would be stockpiled on the site to await transport to Kaw Valley's Edwardsville processing site ...." In addition to Kaw Valley, other companies could also send trucks to the

quarry to load sand and send it to construction sites or concrete mixing plants.

***2** Prior to filing its application for a SUP, Kaw Valley had several preliminary discussions with representatives of Leavenworth County. Likewise, as part of the SUP application process, Kaw Valley submitted various supporting documents and obtained various permits from state and federal agencies relating to the proposed sand-dredging operation. Following the filing of the SUP application, Kaw Valley worked with the professional staff of the Leavenworth County Public Works Department regarding the proposed project.

The staff of the Public Works Department considered two possible routes to be designated for use by the increased truck traffic that would result from the operation of the quarry. Both routes that were proposed connect to Highway K-32—which is several miles north of the project location—and would allow for the extracted sand to be transported to Kaw Valley's processing site in Edwardsville. The proposed western route would have required the trucks to travel 3.8 miles on rural county roads, and the proposed eastern route would have required the trucks to travel 4.2 miles on rural county roads.

Although Kaw Valley's engineers preferred the western route, Leavenworth County's Public Works Department ultimately recommended the eastern route. After receiving a Pavement Exploration Report from its engineers, Kaw Valley purchased real property adjacent to the site of the proposed quarry to construct a private roadway. As a result, the proposed distance for trucks hauling sand to be driven on the rural county roads was reduced from 4.2 miles to 3.3 miles.

On July 10, 2019, the Leavenworth County Planning and Zoning Commission held a public hearing on Kaw Valley's SUP application. Approximately 25 members of the public spoke during the public comment portion of the hearing. Of these, only one member of the public spoke in favor of the SUP application. There are also copies of emails and letters in the record from members of the public. Again, most of the written documentation was submitted in opposition to the SUP application. At the end of the public hearing, the Planning and Zoning Commission recommended that the Board of County Commissioners deny Kaw Valley's SUP application based on "[p]ublic health concerns including safety of the haul route" and "[i]nsignificant economic gain to the County."

After the Planning and Zoning Commission issued its recommendation, the County requested an additional study from Kaw Valley relating to the pavement of the roads on the eastern route. The purpose of this study was to determine whether the rural county roads could accommodate the additional wear and tear that would result from the increased truck traffic if the SUP was approved. Specifically, the County was concerned about the potential damage to the county roads due to truck traffic to and from the quarry during the 25-year duration of the proposed SUP.

In response to the County's request, Kaw Valley retained Kaw Valley Engineering—which evidently has no relationship to Kaw Valley Companies, Inc.—to conduct an evaluation of the proposed eastern route "to define the existing pavement and the subsurface conditions at the proposed haul road and to evaluate the potential impact of the increased traffic loading from the sand plant operations." In performing its study, the Kaw Valley Engineering firm took core samples at nine points on the eastern route.

On November 19, 2019, Kaw Valley Engineering issued a Pavement Exploration Report to Leavenworth County. In the report, the engineering firm rendered the following opinion:

> ***3** "Because the road is in good condition structurally and has been properly maintained, [Kaw Valley Engineering] thinks that at least 50 percent of the structural capacity of the road remains. Using the field and laboratory data from the exploration the 1993 AASHTO Design Guide analysis procedures estimate the proposed haul road has a lifetime traffic capacity of between 830,000 and 1,170,000 [Equivalent Single Axle Loads (ESAL)] before substantial maintenance to rebuild the road would be required. Since the proposed additional traffic load of 524,000 ESAL is equal to, or slightly less than 50 percent of the lifetime capacity of the roadway, it is [Kaw Valley Engineering]'s opinion that the existing proposed haul road has sufficient remaining life to carry the anticipated sand plant traffic over the next 10 years."

In addition, Kaw Valley Engineering opined:

> "Even though the proposed haul road is in good condition, it is unknown how much heavy traffic has used the proposed haul road or what the remaining life of the pavement is. However, since the road is in good condition, it is our opinion that the existing pavement has at least 50 percent of its total traffic capacity left. If at least 50 percent of the lifetime capacity remains, the haul road should be able to support the new levels of traffic for at least 10 years.

....

> "Routine maintenance on the proposed haul road in the future should consist of a minimum of crack sealing on the asphalt surfaced portion of the road ... on a periodic basis. If heavier maintenance actions are required in the future, development of those procedures would require additional engineering work at that time."

Subsequently, the County asked Mitch Pleak, P.E., of Olsson Engineering—who has evidently been designated to serve as county engineer pursuant to K.S.A. 68-501—to review Kaw Valley Engineering's pavement report. After reviewing the report, Pleak believed that the existing pavement life of the proposed haul route would not be sufficient for the proposed 25-year term of the SUP. Instead, Pleak concluded that the county roadway would require a complete reconstruction. Olsson recommended that the reconstruction take place prior to commencement of hauling by Kaw Valley.

In an e-mail to the Leavenworth County Administrator Mark Loughry and Lauren Anderson from the Public Works Department dated December 4, 2019, Pleak recommended:

> "As previously reported, operations are estimated at 25 years or longer. With the existing pavement life not lasting the length of the proposed operation, the roadway will need to be replaced. Staff will recommend the following to the Board of County Commissioners: The Applicant shall bring the specified route/roadway up to County standards prior to hauling. Design and construction of the roadway shall be funded entirely by the Applicant. Complete funds for the improvement shall be received by the County prior to design. Funds may need to be adjusted as the project progresses through construction. A formal executed agreement between the County and the Applicant detailing all requirements and responsibilities of such improvements will be required."

In addition, Leavenworth County retained another engineering firm, Wilson & Co., Inc., to review the engineering studies that had been prepared to that date. In its report dated August 16, 2019, Wilson & Co. estimated the costs of anticipated road required maintenance over the life of the proposed SUP. The Public Works Department also sent a letter to Dan Hays, general manager of the sand division at Kaw Valley, dated January 2, 2020, in which it included—among other things—13 questions seeking clarification of several items contained in the Pavement Exploration Report.

On January 8, 2020, counsel for Kaw Valley sent an e-mail to various representatives of the County in which he stated—among other things—that "our client does not believe it is necessary to build a brand-new road for the route proposed by the County ('Route') at any time during the life of the SUP." In response to counsel's e-mail, Pleak asserted that "as stated in the report regarding the paved portion of the route, the existing proposed haul road has sufficient remaining life to carry the proposed [quarry] traffic over the next 10 years before the road needs to be rebuilt." On January 10, 2020, an engineer retained by Kaw Valley sent an e-mail giving preliminary answers to the 13 questions that had previously been sent by the County regarding the Pavement Exploration Report.

***4** On June 22, 2020, engineers for Kaw Valley submitted a Traffic Impact Study to Leavenworth County. The study recommended that Kaw Valley make improvements to four intersections along the proposed haul route and provide for additional signage due to the increased truck traffic. However, the Traffic Impact Study concluded:

> "[T]he proposed Lenape Sand Quarry by Kaw Valley could be safely and reasonably operated with its trucks on the County and KDOT [road] network. Kaw Valley would compensate Leavenworth County with a road usage fee that would be paid on an agreed-upon basis gauged on the volume of sand extracted from the Lenape site. Kaw Valley would essentially pay a per-ton royalty to the County based on the amount of sand shipped from the site each month or yearly quarter. Kaw Valley would further be responsible for the costs of roadway improvements to the quarry truck route including the intersection improvements to the 158th & Golden Road curve, 158th & Loring Road and Loring Road and Loring Drive. Since Kaw Valley would be paying for the improvements, the company would expect that the work would be administered and bid by their own forces (subject to the oversight and approval of Leavenworth County's Public Works Engineering and Inspection Staff). The planning and execution of the work would be done in accordance with the applicable County and KDOT standards. Kaw Valley would be allowed to supply their own roadway construction materials and select their preferred Contractors subject to the approval of the County."

On June 22, 2020, engineers retained by Kaw Valley submitted an appendix to the Pavement Exploration Report. The appendix consisted of more formal responses to the 13 questions previously asked by the County seeking clarification of the report. The following day, the County Engineer submitted a letter to the Board of County Commissioners in which he reiterated that "[d]ue to the existing pavement life not carrying the duration of

the proposed SUP's operational goal of 25 years, the roadway would require a full reconstruction in lieu of the document's recommended substantial maintenance of a mill and overlay." Pleak explained that "[a]ccording to the Pavement Exploration Report, the proposed haul road only has sufficient remaining life to carry the anticipated sand plant traffic over the next 10 years." As such, Pleak recommended that the road "be reconstructed due to the existing pavement not supporting the additional 15 years of the proposed SUP's operational goal of 25 years."

In addition, Pleak made the following specific recommendations to the Board of County Commissioners should they decide to approve Kaw Valley's SUP application:

> • "The Applicant [Kaw Valley] shall be responsible for bringing the route/roadway up to county standards to include recommended improvements detailed in the submitted reports prior to hauling.
>
> • "Design and construction of the roadway shall be funded entirely by the Applicant. Funds for said design/improvements shall be received by the County prior to design. Funds may need to be adjusted as the project progresses through construction.
>
> • "A formal executed agreement between the County and the Applicant detailing all requirements and responsibilities of the parties will be required.
>
> • "The reconstruction of the roadway will be in lieu of a traffic impact fee.
>
> ***5** • "After the roadway construction improvement is completed and accepted by the County, the applicant will not be responsible for any additional fees associated with the haul route roadway."

On July 8, 2020, the Board of County Commissioners held a public hearing on Kaw Valley's SUP application. At the hearing, a proposed Resolution was presented by the Department of Planning and Zoning. The Board also heard from counsel for Kaw Valley who presented information in support of the SUP application. Also, an engineer retained by Kaw Valley made a presentation in support of the application and answered questions from members of the Board of County Commissioners.

Following the official presentations, the Board heard public comment regarding the proposed SUP application. During this portion of the hearing, 14 members of the public spoke in opposition of the SUP application and none spoke in favor. Notwithstanding the Planning Commission's recommendation that Kaw Valley's SUP application be denied, the Department of Planning and Zoning recommended to the Board of County Commissioners that the application be granted upon certain conditions.

One of the conditions recommended by the Department of Planning and Zoning was that "the entire haul route be completely replaced to County standards prior to the applicants [Kaw Valley] engaging in any activities." The rationale for this condition was that the failure to require reconstruction of the existing roadway "poses a significant risk to the public health, safety and welfare." The Department of Planning and Zoning also recommended that Kaw Valley be responsible for payment of the reconstruction prior to the commencement of hauling in lieu of being required to pay an annual traffic impact fee and royalties. In support of this position, the Department of Planning and Zoning pointed to the fact that the Pavement Exploration Report prepared by engineers retained by Kaw Valley found that "substantial maintenance" would be needed in 10 years if the SUP application was granted.

In response, Kaw Valley proposed that it instead pay an annual traffic impact fee as well as a royalty based on the amount of sand removed from the site to compensate Leavenworth County for the wear and tear caused by the additional truck traffic. In Kaw Valley's opinion, the proposed traffic impact fees and royalties would be sufficient to cover the potential maintenance costs. It was the position of Kaw Valley's engineer that based on the core samples obtained from proposed haul route, the pavement was in "remarkably good condition" and that "[c]hip and seal or maybe an overlay would probably be the only thing required at the 10 years ...." However, the engineer admitted that the scope of his analysis was for only 10 years.

The Board of County Commissioners also received hundreds of written comments submitted by members of the public regarding the proposed sand-dredging operation. The vast majority of those commenting opposed the SUP based on health and safety concerns. The location of the project concerned many members of the public due to the increased truck traffic on the rural county road that might lead to traffic accidents. Specifically, members of the public expressed concerns for the safety of children traveling to and from school as well as area residents traveling to and from work. Other members of the public expressed concerns regarding harmful effects to wildlife as well as to their habitats and

detrimental effects to nearby farm animals. Some members of the public were also concerned with potential pollution, water contamination, increased noise levels, and a decrease in the property values in the area.

***6** At the conclusion of the public hearing, the Board of County Commissioners continued the matter for a final determination to be made on July 15, 2020. The day before the Board took final action, the County Engineer provided the Board with a letter in which he summarized his position. In his letter, Pleak concluded:

> • "Based on our understanding of the pavement exploration report, the 1993 AASHTO Design Guide was used to determine the remaining life cycle of the pavement. Furthermore, Kaw Valley Engineering assumed, based on their analysis of the roadway, that only 50 percent of the structural capacity of the roadway remains. This analysis was based on a lifetime traffic capacity in ESAL's of between 830,000 and 1,170,000 and assuming the additional traffic load only from sand plant trucks (not including existing traffic) would be 524,000 ESAL's. If the more conservative number of 830,000 ESAL's is used, as indicated by Kaw Valley's response letter, the structural capacity reduction is further increased to 63 percent, which results in a remaining life span of around 7 to 8 years as opposed to the 10 years indicated in the report.
>
> • "Regardless of the discrepancy of life span remaining, it is still significantly less than the Sand Plant's operational time of 25 years. Based on the report by Kaw Valley, maintenance will be required during the 10 years and at the end of the 10 years, 'Substantial Maintenance' will be required. According to Kaw Valley 'Substantial Maintenance' would involve a mill and overlay of the roadway. In our opinion, assuming only a mill and overlay will be required after 10 years of continued truck traffic on an approximately 80-year-old roadway would not be sufficient.
>
> • "According to the Federal Highway Administration (FHWA), the Pavement Life Cycle is divided into 6 phases.
>
> • Materials Production
>
> • Pavement Design
>
> • Construction
>
> • Use
>
> • Maintenance and Preservation
>
> • End of Life
>
> • "In our opinion, the roadway is currently in Use with routine Maintenance and Preservation at this time. Based on our understanding of the report prepared by Kaw Valley, the Structural Capacity of the roadway will reach its design life in 7 to 10 years from the start of sand plant operation. Adding a mill and overlay at that time could help address specific pavement deficiencies and slow the rate of deterioration of the base courses but is still classified as maintenance and preservation by FHWA and in our opinion, will likely only increase the life of the pavement a few more years. Continued use by sand plant trucks will noticeably accelerate the deterioration of the new wearing course and/or additional wearing courses, if constructed and significantly decrease the overall structural capacity of the roadway, especially the pavement base, leading to more deep seated failures such as potholing, rutting, random cracking, reflective cracking and transverse cracking from brittle pavement layers below the new surface courses.
>
> • "It is our opinion that, after the design life of 7 to 10 years, the pavement will have reached is End of Life per the AASHTO design guide and per the definitions provided by FHWA. We anticipate that full depth removal and replacement with possible subgrade stabilization will be required at this time."

At its meeting on July 15, 2020, the Board of County Commissioners took final action on a proposed Resolution to approve Kaw Valley's SUP application subject to several of the conditions that are discussed above. In doing so, the Board considered the factors—both in support of and in opposition to the application—set forth in *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978). The original motion was for the adoption of the proposed Resolution 2020-23 with the incorporation "by reference of the findings and recommendations contained in the staff report dated July 8, 2020, and the [County Engineer's] report dated June 23, 2020." But the County Engineer's letter dated July 14, 2020, was not incorporated into the motion.

***7** The conditions expressly identified in the proposed Resolution included—among other things—that Kaw Valley "bring the specified route/roadway up to County standards prior to hauling" and that "[d]esign and construction of the roadway shall be funded by the applicant ... prior to design." In addition, the conditions in the proposed Resolution included a provision that "[a]

formal executed agreement between the County and the applicant dealing with all requirements and responsibilities of such improvement will be required." Likewise, the proposed Resolution provided that "the conditions listed shall be complied with and supporting documentation for such shall be provided to the Planning and Zoning Department within 30 business days."

Before the Board of County Commissioners voted on the proposed Resolution, the Board amended the proposed Resolution by motion to include a "clawback" provision to provide that Kaw Valley would receive "reimbursement in proportion to [its] share of the future use of the road" should other businesses move into the area adjacent to the haul route. Moreover, the Board passed a motion to amend the proposed Resolution to exclude the "road design and construction" from the condition requiring that "all conditions listed shall be complied with and supporting documentation of such compliance provided to the Planning and Zoning Department within 30 business days." Ultimately, the Board passed Resolution 2020-23 as amended with four commissioners voting in favor and one commissioner voting against the motion.

On July 22, 2020, Resolution 2020-23 was signed by the Board of County Commissioners. Unfortunately, the language in the final written Resolution does not mirror the language of the Resolution passed in several respects. Several conditions have been reworded and at least two provisions did not make their way into the Resolution. First, although "the staff report dated July 8, 2020" was to be incorporated by reference, it is not mentioned in the Resolution. Second, although the conditions set forth in the motion expressly excepted "the required road design and construction" from the 30-day requirement for the submission of documents by Kaw Valley to the Planning and Zoning Department, this language is also not included in the Resolution.

After the Resolution was signed by the Board of County Commissioners, it appears that the parties held discussions regarding the formal agreement to be executed by the parties relating to the requirements and responsibilities of each as it relates to the required improvement of the roadway. While these discussions were ongoing, Kaw Valley filed an appeal in the district court pursuant to K.S.A. 19-223. On September 21, 2021, after conducting a bench trial and hearing the arguments of counsel, the district court denied Kaw Valley's appeal and, by doing so, effectively affirmed the decision of the Board of County Commissioners.

Thereafter, Kaw Valley filed a timely notice of appeal.

ANALYSIS

Issues Presented

On appeal, Kaw Valley contends that several of the conditions imposed by the Board of County Commissioners in adopting the Resolution granting its SUP application are unreasonable. Moreover, Kaw Valley contends that one of the conditions constitutes a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In response, the Board of County Commissioners contend that the conditions imposed on the granting of Kaw Valley's SUP application were reasonable based on the evidence presented at the public hearing. In addition, the Board contends that the imposition of conditions on the granting of an SUP application do not constitute an unconstitutional taking of property.

Special Use Permits and Conditions

***8** K.S.A. 12-741 et seq. grants cities and counties the authority to enact planning and zoning regulations for the protection of the public health, safety, and welfare. Specifically, K.S.A. 12-755(a)(5) grants a city or county's governing body to issue "special use or conditional use permits" to allow a particular land use that is not allowed under existing zoning regulations. The procedure to be used by a city or county in considering a SUP application is set forth in K.S.A. 2021 Supp. 12-757. See *Manley v. City of Shawnee*, 287 Kan. 63, 67, 194 P.3d 1 (2008). We pause to note that there is no allegation in the present case that the Board of County Commissioners failed to follow the statutory procedure.

As the Kansas Supreme Court has recognized, "[c]onditions are commonly imposed on special use permits." *Johnson County Water Dist. No. 1 v. City Council of Kansas City*, 255 Kan. 183, 190, 871 P.2d 1256 (1994) (citing 3 Anderson, American Law of Zoning, § 21.30 [3d ed. 1986]). So long as these conditions are reasonable, a reviewing court should uphold the conditions. *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, 305, 49 P.3d 522 (2002). This is because cities and counties have the authority to promote public health, safety, and

welfare. Hence, conditions may be imposed on a SUP that are "rationally related to those objectives and [are] not unreasonable or oppressive." *Johnson County Water Dist. No. 1*, 255 Kan. at 191.

Under the authority granted to it by the Kansas Legislature, Leavenworth County has adopted the Zoning and Subdivision Regulations for Leavenworth County, Kansas (August 1, 2006, Updated January 13, 2022). These zoning regulations apply to the unincorporated portions of the County. Article 1, Section 1 of the zoning regulations provides:

> "The zoning regulations ... herein established ... to promote, in accordance with present and future needs, the safety, morals, order, convenience, prosperity, and general welfare of the citizens of Leavenworth County, Kansas, and to provide for efficiency and economy in the process of development, for the appropriate and best use of land, for the convenience of traffic and circulation of people and goods ...."

Furthermore, Article 22 of the County's zoning regulations applies to "Special Use Permits and Temporary Use Permits." Section 1 of Article 22 recognizes that "[c]ertain uses ... are of a type or nature which may be desirable ... to be located in the County, but, due to their nature, may be incompatible with the surrounding area without a thorough review and possibly the placing of conditions on the use to protect health, safety and welfare." Additionally, Article 22, Section 2 sets out the procedure to be followed in applying for an SUP and Article 22, Section 3 sets out the procedure to be followed by the County in considering an application.

Significant to the issues presented in this case, Article 22, Section 5 addresses "Conditions on Approval" of an SUP application:

> "Every Special Use Permit issued by Leavenworth County to a non-governmental person, business or corporation shall be valid for a specified period of time. When necessary, the Board of County Commissioners may attach conditions to the approval of a Special Use Permit. Failure to abide by the conditions of the approval by the applicant shall be cause for an action to rescind approval of the Special Use Permit. "

The "Special Use Permit Application" submitted by Kaw Valley to the Board of County Commissioners on January 16, 2019, recognized that "[c]onditions will be attached to most Special Use Permits." The application also recognized that an SUP "may impose any conditions they consider necessary to ensure public safety, health, and welfare. "

Standard of Review

***9** In *Combined Investment Co. v. Board of Butler County Comm'rs*, 227 Kan. 17, 28, 605 P.2d 533 (1980), the Kansas Supreme Court articulated the limited standard of review to be applied by appellate courts in zoning cases. Subsequently, our Supreme Court applied this standard of review to decisions granting or denying SUP applications. *Daniels v. Board of Kansas City Comm'rs*, 236 Kan. 578, 584, 693 P.2d 1170 (1985). A few years later, the court also applied this standard of review to appeals challenging the conditions imposed by a governing body in granting a SUP application. *Johnson County Water Dist. No. 1*, 255 Kan. at 184.

The *Combined Investment* standard provides:

> "(1) The local zoning authority, and not the court, has the right to prescribe, change or refuse to change, zoning.
>
> "(2) The district court's power is limited to determining
>
> (a) the lawfulness of the action taken, and
>
> (b) the reasonableness of such action.
>
> "(3) There is a presumption that the zoning authority acted reasonably.
>
> "(4) The landowner has the burden of proving unreasonableness by a preponderance of the evidence.
>
> "(5) A court may not substitute its judgment for that of the administrative body; and should not declare the action unreasonable unless clearly compelled to do so by the evidence.
>
> "(6) Action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate.
>
> "(7) Whether action is reasonable or not is a question of law, to be determined upon the basis of the facts which were presented to the zoning authority. "(8) An appellate court must make the same review of the zoning authority's action as did the district court." 227 Kan. at 28.

In addition, our Supreme Court has found that the factors set forth in *Golden*, 224 Kan. at 596, should be considered by governing bodies in determining whether to grant or deny special use permits. *Johnson County Water Dist. No. 1*, 255 Kan. at 184-85. Formal findings and conclusions based on the *Golden* factors are not required. See *Manly*, 287 Kan. at 76. Moreover, traditional tests of reasonableness have not been replaced by the *Golden* factors. Instead, these tests have been "enhanced by the eight factors which provide a reviewing court with a basis for testing the action of a governing body in a meaningful way." *K-S Center Co. v. City of Kansas City*, 238 Kan. 482, 494, 712 P.2d 1186 (1986).

Because cities and counties are entitled to determine how land within their boundaries is zoned, "[n]o court should substitute its judgment for the judgment of the elected governing body merely on the basis of a differing opinion as to what is a better policy in a specific zoning situation." *Landau v. City Council of Overland Park*, 244 Kan. 257, 274, 767 P.2d 1290 (1989) ("Elected officials are closer to the electorate than the courts and, consequently, are more reflective of the community's perception of its image."). Even so, this does not mean that a reviewing court is to simply rubber stamp a zoning decision made by a city or county. Instead, there must be a meaningful review on appeal to determine the lawfulness and the reasonableness of the governing board's action. See *143rd Street Investors, L.L.C. v. Board of Johnson County Comm'rs*, 292 Kan. 690, 709-15, 259 P.3d 644 (2011). In addition, we note the challenger to the zoning decision—in this case Kaw Valley—has the burden to show by a preponderance of the evidence that the action taken by the governing body was not reasonable. 292 Kan. at 720.

***10** We also find it important to recognize that this appeal involves interpretation of Resolution 2020-23, which was adopted by the Board of County Commissioners on July 22, 2020. The interpretation of a county resolution involves a question of law over which we have unlimited review. See *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015). Like a statute, the words in a resolution "should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it." *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001). Further, it is not the function of the court to rewrite a statute, ordinance, or resolution. See *Rural Water Dist. No. 2 v. City of Louisburg*, 288 Kan. 811, Syl. ¶ 3, 207 P.3d 1055 (2009); *State v. Prosper*, 260 Kan. 743, 747, 926 P.2d 231 (1996).

Reasonableness of Conditions Imposed

Kaw Valley primarily focuses on 2 of the 22 conditions contained in Resolution 2020-23. The first condition—found in paragraph 2(a) of the Resolution—relates to the requirement that Kaw Valley bring the rural county road on the proposed route for the hauling of sand from the quarry "up to county standards" and to pay for the improvements. The second condition—found in paragraph 22 of the Resolution—requires that Kaw Valley comply with all the conditions within 30 business days from the date on which the SUP application was approved.

In its entirety, Condition 2(a) of Resolution 2020-23 states:

> "Kaw Valley shall bring the specified route/roadway up to county standards prior to hauling ('improvement.'). Design and construction of the improvement shall be funded by Kaw Valley. Funds for the improvement shall be received or otherwise adequately secured by the county prior to the initiation of design and construction of the improvement. Funds may need to be adjusted as the project progresses through completion."

The Board of County Commissioners argues that it is unnecessary for Resolution 2020-23 to contain additional information regarding the conditions required because "there was no final decision, and [Kaw Valley] knew negotiations would continue." In support of this argument, the Board refers us to paragraph 3 of the Resolution which provides that "[a] formal executed agreement between the county and ... Kaw Valley detailing all requirements and responsibilities of the parties regarding such improvement shall be required." Thus, the Board argues that Resolution 2020-23 was akin to a preliminary approval of an SUP.

The Board also cites *K-S Center Co.*, 238 Kan. 482, for the proposition "that preliminary approval of a special use permit is a well-recognized concept in Kansas." In *K-S Center Co.*, a governing body expressly voted "to grant preliminary approval of the special use permit, subject to the drafting of suggested Findings of Fact and Conclusions of Law by the City Planning and Legal Departments for later submission to the Council." 238 Kan. at 484. But in this case, a review of the minutes of the meeting held on July 15, 2020, reveals that there was no motion to grant preliminary approval to Kaw Valley's SUP application. Rather, the minutes state that the Board

passed a motion "to approve ... the application for a special use permit submitted by Kaw Valley Companies, LLC" and to adopt Resolution 2020-23 as amended.

If the Board desired to simply grant preliminary approval to the application submitted by Kaw Valley, it could have easily done so by approving a motion like the one passed by the governing body in *K-S Center Co.*, which made it clear that it was only granting preliminary approval. However, no such motion was presented, and the Board instead approved Resolution 2020-23 subject to conditions. Accordingly, we conclude that the Board took final—and not preliminary—action on Kaw Valley's SUP application.

***11** As discussed above, it is common for a governing body to approve an SUP application subject to reasonable conditions. Moreover, we do not find it to be categorically improper for a governing body to require an applicant to pay for certain public improvements as a condition for granting an SUP application. The particular condition must be reasonable under the circumstances. Nor do we find it to be categorially improper to leave some of the procedural or technical details regarding a particular condition for further good-faith negotiations and final agreement between the governing body and the applicant.

Notwithstanding, we find that a condition required by the governing body in granting an SUP application must be sufficiently definite as to its essential terms to allow for a judicial determination of its reasonableness on appeal. See *In re JSCL, LLC CU Permit*, 253 A.3d 429, 442 (Vt. 2021) ("To be valid, a permit condition must contain sufficiently definite standards for the applicant to follow."); *Bernstein v. Board of Appeals, Village of Matinecock*, 302 N.Y.S.2d 141, 146, 60 Misc. 2d 470 (1969) (conditions imposed on special use permit "must be sufficiently clear and definite" that parties are not left in doubt "concerning the extent of the use permitted"); see also *Weld v. Board of Appeals of Gloucester*, 345 Mass. 376, 378-79, 187 N.E.2d 854 (1963). In this case, Condition 2(a) falls short of the standard of language that is sufficiently clear and definite to provide Kaw Valley with a path forward.

In the present case, we do not find that the language of Resolution 2020-23 sufficiently identifies the essential terms necessary to determine the reasonableness of the conditions imposed. Likewise, we do not find that the language of the Resolution is sufficient to allow Kaw Valley to know whether it is financially feasible to continue with the proposed sand-dredging operation. In particular, we find paragraph 2(a) is incomplete and lacks significant information regarding what the Board of County Commissioners is requiring Kaw Valley to do. We also find it significant that although the motion passed by the Board excepted the "road design and construction" from the requirement that "all conditions listed shall be complied with and documentation of such compliance provided to the Planning and Zoning Department within 30 business days," this exception never made it into paragraph 22 of the written version of the Resolution.

Specifically, we find paragraph 2(a) to be deficient in the following respects:

- Although it appears from other documents in the record that the Board's intent is to require a complete reconstruction of the rural county roadway to be used as the haul route in advance, the Resolution simply states that "Kaw Valley shall *bring the specified route/roadway up to county standards* prior to hauling ...." (Emphasis added.)

- Neither the "route/roadway" to be improved nor the "county standards" to be followed are identified in the Resolution. Likewise, counsel for the Board was unable to identify such standards in either his brief or during oral argument.

- Even though the County Engineer's letter dated July 14, 2020, identifies several other improvements—including drainage structures, widening of at least one intersection, and additional traffic signage—the Resolution does not mention these other improvements and this letter is not incorporated by reference as are various other documents.

- While the Resolution provides that Kaw Valley shall fund the "[d]esign and construction of the improvement," it does not provide who is responsible for selecting the design consultant or the contractor.

***12** - The Resolution provides that "[f]unds for the improvement shall be received or otherwise adequately secured by the county *prior to the initiation of design and construction* of the improvement." (Emphasis added.) Moreover, it recognizes that "[f]unds may need to be adjusted as to the project progresses through completion." However, the Resolution does not include a preliminary estimate of the cost of design and construction nor is sufficient information provided upon which a reasonable estimate could be obtained to determine the amount of the payment or security required prior to the commencement of design.

Again, we recognize that the Board of County Commissioners—and not this court—has the authority to prescribe, change, or refuse zoning to promote the health, safety, and welfare of its citizens. We also recognize that it is appropriate for the Board to impose reasonable conditions when granting an SUP application. Furthermore, we recognize that there is a presumption the Board acted reasonably. Nevertheless, we find that the conditions being required by a governing body when taking final action on an SUP application must be sufficiently definite to allow a court to determine its lawfulness and reasonableness in an appeal brought under K.S.A. 19-223. Likewise, if SUP is so indefinite that the applicant cannot reasonably determine what is required under its terms, then the applicant has been "aggrieved" by the Board of County Commissioners action permitting the statutory appeal.

In summary, we find that Resolution 2020-23 does not mirror the actual motion passed by the Board in approving Kaw Valley's SUP application, it fails to sufficiently define the conditions the Board of County Commissioners seeks to impose on Kaw Valley, and it does not include the essential terms necessary for this court to determine the reasonableness of such conditions. Similarly, the Resolution does not provide sufficient information to the applicant to make an informed decision whether to comply with the conditions or withdraw from the proposed project. Consequently, we conclude that Resolution 2020-23 is too vague and indefinite to be enforced as written and must be vacated. We may vacate the resolution and, thus, the SUP without remanding to the district court for the ministerial task of entering a new judgment to that effect. Our decision voids the SUP—leaving the Board of County Commissioners to go forward from the posture of these proceedings in July 2020 immediately before its consideration of and vote on the resolution.

Constitutionality of Conditions

Kaw Valley also contends that that the conditions set forth in paragraph 2(a) of Resolution 2020-23 are unconstitutional under the *Nollan-Dolan-Koontz* line of decisions issued by the United States Supreme Court. See *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 605, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1989). These cases provide that under certain circumstances, it is unconstitutional for a governing body to place excessive conditions on those seeking land-use permits.

However, it is unnecessary for us to address this issue in light of our decision to vacate Resolution 2020-23. This is because at this point in time, there has neither been a "taking" of property nor has there been a showing that the Board of County Commissioners has impermissibly interfered with Kaw Valley's constitutional rights.

CONCLUSION

***13** In conclusion, we find that the proper remedy under the circumstances presented is to reverse the district court's decision, to vacate Resolution 2020-23, and to remand this matter to the Board of County Commissioners for further proceedings consistent with this opinion. As discussed above, it is not the role of this court to rewrite the Resolution, to determine whether the SUP application should be granted, or to decide what conditions—if any—should be imposed on Kaw Valley to protect the health, safety, and welfare of the citizens of Leavenworth County. Those responsibilities fall squarely within the power of the Board of County Commissioners as granted to it by the Kansas Legislature.

Reversed in part, vacated in part, and remanded with directions.

All Citations

Slip Copy, 2022 WL 3693619 (Table)

End of Document

APPENDIX F

2022 WL 3693052
Only the Westlaw citation is currently available.

PRETTY PRAIRIE WIND LLC, et al., Appellants,
v.
RENO COUNTY and Board of Reno County Commissioners, Appellees.

No. 123,277
|
Opinion filed August 26, 2022.

Syllabus by the Court

***1** 1. Kansas law requires an appellee to cross-appeal a district court's adverse decisions before those rulings may be challenged on appeal. The failure to cross-appeal a district court's adverse decision creates a jurisdictional bar preventing appellate review.

2. While a cross-appeal is necessary to bring other adverse rulings before the appellate courts, it is not generally required when a party is merely challenging the district court's reasoning underlying a decision already subject to appeal.

3. The requirements of K.S.A. 25-3601 through K.S.A. 25-3608 do not apply to zoning protest petitions. Those petitions are governed by K.S.A. 2021 Supp. 12-757(f)(1).

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge.

Attorneys and Law Firms

Timothy J. Sear, of Polsinelli PC, of Kansas City, Missouri, Alan Claus Anderson, of Kansas City, Missouri, and Gerald L. Green, of Gilliland Green LLC, of Hutchinson, for appellants.

S. Eric Steinle, of Martindell Swearer Shaffer Ridenour LLP, of Hutchinson, and Joseph P. O'Sullivan, Reno County Counselor, for appellees.

Patrick B. Hughes and Susan M. Locke, of Adams Jones Law Firm, P.A., of Wichita, for intervenors Lynn Thalmann, et al.

Before Schroeder, P.J., Warner and Isherwood, JJ.

Opinion

Warner, J.:

This appeal concerns the statutory requirements for petitions protesting proposed zoning changes. The current dispute began when Pretty Prairie Wind LLC sought a conditional-use permit from the Board of Reno County Commissioners to operate a wind farm. Several local property owners challenged Pretty Prairie's permit application by filing zoning protest petitions, triggering a heightened voting requirement to approve the permit. The Board of County Commissioners' vote failed to meet this requirement, resulting in the denial of Pretty Prairie's application.

Pretty Prairie filed suit, challenging the form of the protest petitions. The district court concluded that the protest petitions were valid under Kansas law and entered judgment for the County. After carefully reviewing the record before us and the parties' arguments, we agree with the district court's decision to grant judgment in favor of the County, albeit for different reasons. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2019, Pretty Prairie applied for a conditional-use permit to build a wind farm near Haven in Reno County. After receiving a report from county staff, the Reno County Planning and Zoning Commission held several public hearings and received public comments concerning the proposed permit. That April, the Commission recommended to the three-member Board of County Commissioners that the application be denied.

Under Kansas law, the vote needed to overcome a planning commission's recommendation depends on the community's reaction to the recommended outcome. In most instances, a board of county commissioners can overrule a planning commission's recommendation by a two-thirds majority vote. See K.S.A. 2021 Supp. 12-757(d). But when the owners of at least 20% of the land within 1,000 feet of the property at issue sign and file protest petitions within 14 days after the end of the public hearings, a three-fourths majority is needed to overrule

the recommendation. K.S.A. 2021 Supp. 12-757(b), (f)(1); Reno County Zoning Regulations § 20-102 (2016).

The Board of Reno County Commissioners has three members. Practically speaking, this means that a vote of two of the three members is necessary to overcome the Reno County Planning and Zoning Commission's recommendations in most circumstances. But when a sufficient proportion of landowners file petitions protesting a proposed zoning action, a decision rejecting a recommendation requires the vote of all three Board members.

***2** Reno County residents began organizing to submit protest petitions against the wind farm, holding several community events to mobilize neighboring landowners. The protest petitions provided at these events included the date, the protesting landowner's name, a description or address of the landowner's property, and the landowner's signature. The petitions also included a section for the signature and address of a "circulator," along with a declaration stating, "I declare under penalty of perjury I am a circulator of this petition, duly qualified, and personally witnessed each signature on this page."

Shortly before its June 2019 meeting, the Board determined that 114 valid petitions—from owners representing 46% of the property within the 1,000-foot boundary—had been filed, triggering the three-fourths majority requirement. Of these petitions, approximately 110 included a circulator's signature. The Board voted 2-1 to approve the permit, falling short of the required vote to override the planning commission's recommendation. As a result, the permit was denied.

Pretty Prairie filed a petition in district court challenging this outcome, raising procedural and substantive claims. From a procedural standpoint, Pretty Prairie asserted that the protest petitions were invalid because the circulators failed to comply with K.S.A. 25-3602(b)(4), a statute governing petitions submitted for elections; this statute requires a circulator to verify before a notarial officer that the circulator witnessed each person sign a petition. Pretty Prairie argued that the protest petitions were void because the circulator signatures were not notarized, so the Board's 2-1 vote was sufficient to overrule the Commission's recommendation. Turning to the substance of the Board's decision, Pretty Prairie asserted that the decision to deny the permit was unreasonable.

As the case progressed before the district court, Pretty Prairie sought partial summary judgment on its procedural claim. The County, as well as various adjacent landowners (the Intervenors) who were permitted to intervene as defendants, opposed this request. The district court denied Pretty Prairie's motion. Most relevant to this discussion, the court found that the notarial-affirmation requirement under K.S.A. 25-3602(b)(4) applied to zoning protest petitions, but the circulators' declaration on the protest petitions substantially complied with that statute.

Following the ruling, Pretty Prairie sought to file an interlocutory appeal, which the court denied. Pretty Prairie then dismissed its outstanding substantive claim and asked that final judgment be entered on its procedural claim. The court granted this request, and Pretty Prairie appealed. Neither the Intervenors nor the County filed a cross-appeal.

DISCUSSION

The primary point of contention in this appeal is the standard that governs petitions protesting potential zoning changes. Pretty Prairie asserts—and the district court found—that protest petitions must comply with Kansas statutes governing election petitions, K.S.A. 25-3601 through K.S.A. 25-3608. The County argues that the protest petitions are governed solely by K.S.A. 2021 Supp. 12-757.

Unraveling these issues turns on the language and interplay of these various statutory provisions. Statutory interpretation is a legal question over which appellate courts' review is unlimited. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). Our primary aim when interpreting statutes is to give effect to the legislature's intent, expressed through the statutory language it adopted. *State v. Spencer Gifts*, 304 Kan. 755, Syl. ¶ 2, 374 P.3d 680 (2016). We thus follow the statutes' plain language—we do not add or ignore statutory requirements, and we give ordinary words their ordinary meanings. 304 Kan. 755, Syl. ¶ 3, 374 P.3d 680.

***3** When legislative intent is unclear from the statute's text, courts employ canons of construction to ascertain the legislature's aim. Primary among these is the presumption that the legislature does not intend to enact meaningless legislation, and that statutory language should be construed to avoid unreasonable or absurd results. See *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014). In a similar vein, courts attempt to reconcile conflicting statutes and bring them into workable harmony, if possible. See *Miller v. Board of Wabaunsee*

County Comm'rs, 305 Kan. 1056, 1066, 390 P.3d 504 (2017). Statutes that specifically address a matter tend to control over a more general statutory provision. *State ex rel. Schmidt v. Governor Kelly*, 309 Kan. 887, 898, 441 P.3d 67 (2019).

Applying these principles here, we agree with the County that zoning protest petitions are governed by K.S.A. 2021 Supp. 12-757, not by K.S.A. 25-3601 et seq. While most of the protest petitions filed in this case contained a signature and declaration for the petition circulator, those sections were not required by Kansas law. Because these petitions comply with K.S.A. 2021 Supp. 12-757, the district court correctly granted judgment to the County, even though it employed different reasoning to reach that result. Accord *Gannon v. State*, 302 Kan. 739, 744, 357 P.3d 873 (2015) (" 'If a trial court reaches the right result, its decision will be upheld even though the trial court relied upon the wrong ground or assigned erroneous reasons for its decision.' ").

1. *The absence of a cross-appeal does not constrain our review of the district court's summary-judgment ruling.*

Before explaining our analysis of these relevant statutes, we must consider a threshold jurisdictional question. Pretty Prairie asserts that we do not have jurisdiction to consider this statutory question—which Kansas statute governs the protest petitions—at all because the County and Intervenors did not cross-appeal that finding. According to Pretty Prairie, in the absence of a cross-appeal, this court is constrained by the district court's conclusion as to which statute applies. Thus, the only issues in this appeal are whether protest petitions must strictly or substantially comply with K.S.A. 25-3602 and whether the petitions here satisfied that level of compliance. We disagree.

In denying Pretty Prairie's summary-judgment motion, the district court found that the zoning protest petitions were valid. To arrive at that ruling, the court made several intermediate determinations. Most notably, the court concluded:

- that K.S.A. 25-3602, not K.S.A. 2021 Supp. 12-757, established the requirements for zoning protest petitions;
- that only substantial compliance (not strict compliance) with K.S.A. 25-3602 was required for the protest petitions to be valid; and
- that the protest petitions substantially complied with that statute.

The County and the Intervenors present two alternative bases for why the district court's ultimate ruling—the zoning protest petitions were valid—was correct. They claim that K.S.A. 2021 Supp. 12-757, not K.S.A. 25-3602, governs the protest petitions. And they assert that if the district court's statutory analysis of K.S.A. 25-3602 was correct, then it correctly determined that the protest petitions complied with that statute.

It is true—as Pretty Prairie indicates—that Kansas law requires an appellee to cross-appeal a district court's adverse decisions before those rulings may be challenged on appeal. *Cooke v. Gillespie*, 285 Kan. 748, 755, 176 P.3d 144 (2008); see K.S.A. 2021 Supp. 60-2103(h) (cross-appeal required when "the appellee desires to have a review of rulings and decisions of which such appellee complains"). The failure to cross-appeal a district court's adverse decision creates a jurisdictional bar preventing appellate review. *Lumry v. State*, 305 Kan. 545, 555, 385 P.3d 479 (2016).

***4** But while a cross-appeal is necessary to bring other adverse *rulings* before the appellate courts, it is not generally required when a party is merely challenging the district court's *reasoning* underlying a decision already subject to appeal. See *Lacy v. Kansas Dental Board*, 274 Kan. 1031, 1044, 58 P.3d 668 (2002); *Williams v. Amoco Production Co.*, 241 Kan. 102, 116, 734 P.2d 1113 (1987). In *Lacy*, for example, the Kansas Supreme Court upheld a district court's decision under a different statutory provision than the one the district court relied on. 274 Kan. at 1044, 58 P.3d 668. While the district court's conclusion was correct, its reasoning was not—the provision that it thought resolved the question did not apply, but another provision did and led to the same result. 274 Kan. at 1044, 58 P.3d 668.

In its brief, Pretty Prairie cites *Reinecker v. Board of Trustees*, 198 Kan. 715, 722, 426 P.2d 44 (1967), for its assertion that the County and Intervenors were required to cross-appeal the district court's conclusion that K.S.A. 25-3602—not K.S.A. 12-757—applies to protest petitions. But *Reinecker* is readily distinguishable. In that case, various landowners appealed the denial of an injunction in an eminent-domain action. In its response brief, the appellee argued that although the district court had ultimately ruled in its favor at trial, the court erred in admitting certain trial testimony. The Kansas Supreme Court found that the evidentiary challenge was not properly before the court since no cross-appeal had been

filed. 198 Kan. at 722, 426 P.2d 44. Thus, the issue barred by the absence of a cross-appeal in *Reinecker* was separate and distinct from the questions on appeal. That is not the case here.

The Kansas Supreme Court revisited the nature of cross-appeals in *Cooke*. That case had yo-yoed between the district and appellate courts several times. In the most recent appeal, the appellant, Cooke, challenged the district court's distribution of settlement proceeds. Cooke argued that the statute of limitations barred the district court's action; the opposing party, Gillespie, asserted that this question was not properly before the court because Cooke had not cross-appealed the district court's adverse ruling on that question during a previous appeal. Our Supreme Court agreed with Gillespie. The court explained that "Cooke failed to cross-appeal an earlier, and clearly adverse, ruling: Judge Kennedy's denial of her summary judgment motion that was based upon the statute of limitations." 285 Kan. at 755, 176 P.3d 144.

In reaching this conclusion, the *Cooke* court reviewed several earlier decisions discussing the necessity of a cross-appeal. In each instance, the Supreme Court had held that an issue must be presented through a cross-appeal when it arises from a district court's interim, adverse ruling. See, *e.g.*, *Scammahorn v. Gibraltar Savings & Loan Ass'n.*, 197 Kan. 410, 416 P.2d 771 (1966) (party must file cross-appeal to challenge district court's denial of a motion to dismiss); *James v. City of Pittsburg*, 195 Kan. 462, 407 P.2d 503 (1965) (same); *Chavez v. Markham*, 19 Kan. App. 2d 702, 875 P.2d 997 (1994), *aff'd* 256 Kan. 859, 889 P.2d 122 (1995) (party must cross-appeal denial of a motion for summary judgment).

As these cases illustrate, cross-appeals are always necessary when an appellee is challenging some adverse "ruling" or "judgment" against that party. *Cooke*, 285 Kan. 748, Syl. ¶ 2, 176 P.3d 144; *Williams*, 241 Kan. at 116, 734 P.2d 1113. The law is admittedly less clear as to when a party must cross-appeal some other determination, however.

In many cases, courts have considered alternative reasons supporting the district court's ultimate decision when no cross-appeal was filed. See *Gannon*, 302 Kan. at 744, 357 P.3d 873 (denial of motion to intervene was correct for a different reason than that given by the district court because the motion was untimely filed); see also *Atkins v. Webcon*, 308 Kan. 92, 97, 419 P.3d 1 (2018) (" '[W]hen an agency tribunal reaches the right result, its decision will be upheld even though the tribunal relied upon the wrong ground or assigned erroneous reasons for its decision.' "). But in a few cases, appellate courts have found that the absence of a cross-appeal precludes review of a district court's adverse factual finding or of the court's rejection of an alternative basis for its decision. See *Lumry*, 305 Kan. at 554, 385 P.3d 479 (because appellee had not cross-appealed district court's factual finding that appellee was an employer, appellate court did not have to consider that question); *State v. Novotny*, 297 Kan. 1174, 1181, 307 P.3d 1278 (2013) (State did not cross-appeal district court's finding that the photo lineup was unnecessarily suggestive). But see *State v. Bates*, 316 Kan. ——, 513 P.3d 483 (2022) (affirming the district court's denial of suppression motion for alternative legal grounds previously rejected by the district court with no mention of need for cross-appeal).

***5** This difference in treatment may be interesting in an academic sense. But we need not finally resolve the scope of all potential cross-appeals here. Instead, we find the facts of this case demonstrate that no cross-appeal is necessary for two reasons.

First, there was no adverse ruling from which the County or Intervenors could seek our review. The district court made two rulings relevant to this appeal. It denied Pretty Prairie's summary-judgment motion, and then it granted the parties' agreed-upon motion to dismiss Pretty Prairie's remaining claims so that Pretty Prairie could appeal the summary-judgment denial. Neither ruling was adverse to the County or the Intervenors—in both instances, judgment was entered in their favor on the merits.

Second, the statutory analysis of K.S.A. 25-3602 and K.S.A. 2021 Supp. 12-757 is key to deciding Pretty Prairie's appeal. Determining whether the district court erred in denying summary judgment—that is, in deciding that the protest petitions were valid—requires determining what statute governs, and in turn what standards govern protest petitions for conditional-use permits. Pretty Prairie apparently perceived the importance of this statutory question, as it presented and pressed the issue in its opening brief. To hold otherwise would require this court to engage in a bizarre and potentially misleading discussion—to conduct a legal analysis under a statute that may not, in actuality, apply. This statutory analysis is thus different from other determinations, which have been involved in case-specific factual findings, where Kansas courts have found cross-appeals necessary. See *Lumry*, 305 Kan. at 554, 385 P.3d 479; *Novotny*, 297 Kan. at 1181, 307 P.3d 1278.

Under these circumstances, we are not persuaded by

Pretty Prairie's argument that the absence of a cross-appeal limits our review of the district court's summary-judgment ruling. We thus proceed to our analysis of the relevant statutory provisions.

2. *K.S.A. 2021 Supp. 12-757(f)(1), not* K.S.A. 25-3602, *governs the zoning protest petitions.*

As we have indicated, the primary question in this appeal is whether K.S.A. 25-3602 applies to zoning protest petitions. The district court found the petition requirements in K.S.A. 25-3602(b) apply to zoning protest petitions under K.S.A. 2021 Supp. 12-757. In reaching this decision, the court noted the absence of many specific requirements in K.S.A. 2021 Supp. 12-757(f)—particularly with regard to circulator certifications—for protest petitions' signatures. The court also noted that K.S.A. 25-3601(c) states the section applies to petitions "protesting" an ordinance or resolution.

On appeal, Pretty Prairie supplements this reasoning by pointing to *Deffenbaugh Disposal Services, Inc. v. City of Kansas City*, No. 63,131, 776 P.2d 835, unpublished opinion filed June 6, 1989 (Kan. App.), and Kansas Attorney General Opinion No. 2003-18, which both assumed—without deciding—that K.S.A. 25-3602 applies to zoning protest petitions. The County and Intervenors note that we are not bound by these decisions. They also argue that K.S.A. 25-3602 relates specifically to petitions in the elections context, and applying K.S.A. 25-3602 to a protest petition would require courts to disregard most of that statute's requirements.

K.S.A. 25-3601 through K.S.A. 25-3608 govern petitions "required or authorized as part of the procedure applicable to the state as a whole or any legislative election district or to any county, city, school district[,] or other municipality." K.S.A. 25-3601(a). A previous panel of this court described K.S.A. 25-3601 as "a procedural statute" that "provides a format for submitting ballot questions and a process for getting official approval of questions before getting citizen signatures on petitions seeking a public vote." *Ramcharan-Maharajh v. Gilliland*, 48 Kan. App. 2d 137, 141, 286 P.3d 216 (2012), *rev. denied* 297 Kan. 1247 (2013). K.S.A. 25-3601 and K.S.A. 25-3602 include several requirements for petitions to be effective. For example:

***6** • K.S.A. 25-3601(c) sets forth the "form of any question in a petition requesting an election on or protesting an ordinance, or resolution, adopted by" the relevant governing body must take.

• K.S.A. 25-3602(b) requires a petition to include various information, such as the question "which petitioners seek to bring to an election" and the political or taxing subdivision "in which an election is sought to be held." K.S.A. 25-3602(b)(1), (2).

• K.S.A. 25-3602(b)(3) requires a petition to include the statement, " 'I have personally signed this petition. I am a registered elector of the State of Kansas and of [the relevant political subdivision] and my residence address is correctly written after my name.' "

• If a circulator is involved in the petition process, K.S.A. 25-3602(b)(4) requires the petition contain a recital stating the circulator (as defined by K.S.A. 25-3608) is qualified as a circulator and personally witnessed the signers sign the petition. The circulator's recital must be "verified upon oath or affirmation before a notarial officer in the manner prescribed by the revised uniform law on notarial acts." K.S.A. 25-3602(b)(4).

These requirements do not apply to petitions in all contexts. For example, K.S.A. 25-3601(f) explicitly excludes recall petitions and grand-jury petitions from complying with these provisions. And K.S.A. 25-3601(d) states that "[w]hen any other statute imposes specific requirements which are different from the requirements imposed by K.S.A. 25-3601 et seq., and amendments thereto, the provisions of the specific statute shall control."

K.S.A. 12-757 governs zoning decisions. K.S.A. 2021 Supp. 12-757(f)(1) states that protest petitions for a potential zoning decision must be "filed in the office of the city clerk or the county clerk within 14 days after the date of the conclusion" of the planning commission's public hearing. If protest petitions "signed ... by the owners of record of 20% or more of the total real property within the area required to be notified by this act" are filed, then a three-fourths vote is required to pass the proposed amendment. K.S.A. 2021 Supp. 12-757(f)(1). For zoning outside city limits, all property owners living within at least 1,000 feet of the area to be altered must be notified. K.S.A. 2021 Supp. 12-757(b). Reno County's zoning ordinance contains a similar requirement. See Reno County Zoning Regulations § 20-102 (requiring a

protest petition to be "duly signed and acknowledged by the owners").

The County points out several textual indications that the legislature did not intend for K.S.A. 25-3601 through K.S.A. 25-3608 to apply to zoning protest petitions. We agree that the language of these statutes concerns elections and signature requirements for electors. See generally K.S.A. 25-3601 (referencing elections and the county election officers throughout); K.S.A. 25-3602(b) (establishing signature requirements for "electors"); K.S.A. 25-3604 (setting forth the method of verifying that the signatures are provided by registered voters). Even K.S.A. 25-3601(f), which specifically excludes recall petitions and grand-jury petitions from its requirements, concerns petitions that involve elections or electors' signatures. See K.S.A. 25-4301 et seq. (governing recall of elected officials); K.S.A. 2021 Supp. 22-3001(c) (grand jury can be summoned by a petition from a requisite number of qualified "electors").

***7** These "election" and "elector" requirements do not make sense for zoning protest petitions. In the zoning context, people signing protest petitions must own property in or adjacent to the area to be rezoned. K.S.A. 2021 Supp. 12-757(f)(1). There is no requirement that those property owners be registered to vote or even be Kansas residents. Thus, most requirements in K.S.A. 25-3601 and 3602 could not apply. The only potential exception is the circulator verification in K.S.A. 2021 Supp. 25-3602(b)(4), which refences "petition circulator[s]" and does not mention elections or electors. But we cannot read this provision in isolation, nor can we read out or ignore the remainder of that statute. See *Spencer Gifts*, 304 Kan. 755, Syl. ¶ 3, 374 P.3d 680.

Our review of other statutes that reference K.S.A. 25-3601 through K.S.A. 25-3608 further underscores our conclusion that those provisions were only intended to apply to election petitions. See K.S.A. 2021 Supp. 12-6a36(d) (requiring election for city to issue full-faith-and-credit bonds if protest petition objecting to issuance is signed by percentage of qualified voters in municipality); K.S.A. 2021 Supp. 12-1774(b)(2) (similar requirement for full-faith-and-credit tax-increment bonds); K.S.A. 41-302(a)-(b) (similar requirement for election questions concerning licensing the retail sale of alcohol in its original packaging). These statutes indicate the types of situations to which K.S.A. 25-3601 applies—petitions requiring signatures from a certain number or percentage of electors to trigger an election. Multiple other statutes reflect this system to prompt an election. See, e.g., K.S.A. 2021 Supp. 2-131b (in counties with fair associations, tax levies for erection and maintenance of fair association buildings); K.S.A. 10-203 (building, purchasing, or repairing of bridges); K.S.A. 12-614 (bonds for resurfacing paved streets); K.S.A. 12-1236 (creating library district); K.S.A. 12-3013 (describing process for proposed ordinances); K.S.A. 24-122 (returning oversight of drainage district to directors) ; K.S.A. 68-598 (abandoning county rural highway system); K.S.A. 72-1143 (establishment of teacherages); K.S.A. 80-1514b (general obligation bonds for fire district).

Zoning protest petitions under K.S.A. 12-757, however, are qualitatively different from election petitions. Unlike statutes concerning elections, rezoning begins by submitting a zoning amendment to a planning commission, not through a petition process. K.S.A. 2021 Supp. 12-757(b). Protest petitions do not trigger public involvement in the rezoning decision—a successful petition simply increases the threshold required for the Board to pass a rezoning ordinance or resolution. K.S.A. 2021 Supp. 12-757(f)(1). The petition-signing requirement is based on land ownership, not the ability to vote. K.S.A. 2021 Supp. 12-757(f)(1). And petitions are filed with the city or county clerk, not an election officer. K.S.A. 2021 Supp. 12-757(f)(1).

The authorities that Pretty Prairie references on appeal do not persuade us otherwise. In *Deffenbaugh*, a panel of this court found a circulator properly verified signatures on zoning protest petitions under the predecessor to K.S.A. 25-3602(b)(4). *Deffenbaugh* assumed, rather than decided, that K.S.A. 25-3601 applied to zoning protest petitions; that issue was not presented for the panel's consideration, nor was it given any consideration or meaningful discussion in that opinion. Accord *State v. Fleming*, 308 Kan. 689, 706, 423 P.3d 506 (2018) (Court of Appeals panels are not required to follow decisions of previous panels); *Graham v. Herring*, 297 Kan. 847, 861, 305 P.3d 585 (2013) (unpublished opinions are not binding precedent).

***8** Similarly, in Attorney General Opinion No. 2003-18, the attorney general relied on the broad language of K.S.A. 25-3601(a) and (d)—stating the statute applies generally to petitions unless a more specific statute controls—to conclude the signatures of individual petitioners need not be notarized. But we owe no deference to this interpretation. Accord *Willis v. Kansas Highway Patrol*, 273 Kan. 123, 130, 41 P.3d 824 (2002) ("[A]ttorney general opinions are not binding law in Kansas."). And the statutory language, when read in context, shows that K.S.A. 25-3601 applies to election

petitions, not zoning petitions.

In short, we conclude that the requirements of K.S.A. 25-3601 through K.S.A. 25-3608 do not apply to zoning protest petitions. K.S.A. 2021 Supp. 12-757(f)(1) requires protest petitions in the zoning context to be signed by a qualifying property owner and submitted to the county clerk within the timeframe provided in that statute. Contrary to the district court's statements in its ruling, the absence of further requirements does not indicate that courts must use other provisions to supplement that statute; it simply means that the legislature intended zoning protest petitions to be subject to fewer statutory restrictions. Likewise, the fact that most of the protest petitions here included a circulator declaration does not mean such a declaration was required by law, or that the decision to include this declaration somehow transformed the documents into election petitions under K.S.A. 25-3601.

There is no question that the protest petitions here meet the requirements of K.S.A. 2021 Supp. 12-757(f)(1). Thus, the district court correctly concluded that the petitions were valid, albeit for a different reason than that court provided.

Before closing, we observe that the Intervenors urge several procedural reasons why we should not consider Pretty Prairie's appeal. They allege Pretty Prairie invited any error because it asked that final judgment be entered (even though all parties consented to that procedure), and they challenge the way Pretty Prairie brought this case before the district court. We do not find these arguments persuasive. And in light of our conclusion that the protest petitions in this case were valid under K.S.A. 2021 Supp. 12-757(f)(1), we need not address them further.

Affirmed.

All Citations

--- P.3d ----, 2022 WL 3693052

End of Document