Case No. 22-124998-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

JOINT BRIEF OF APPELLEES

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Oral Argument 15 minutes

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NATURE OF THE CASE

The current appeal concerns the Conditional Use Permit ("CUP") issued to Defendant/Appellee, Huber Sand, Inc. ("Huber Sand") and whether the processes and procedures utilized by Finney County in issuance of that CUP conform with Kansas law.

The Defendant/Appellee, Board of County Commissioners of Finney County, Kansas ("County Commission") authorized the issuance of CUPs that conform with the Finney County, Kansas, Zoning Regulations ("Zoning Regulations") to its Board of Zoning Appeals ("BZA") in the within its adopted Zoning Regulations. The BZA was given restricted authority to decide on CUP applications. This restricted authority was restricted by the Zoning Regulations themselves, which were adopted by the Board of County Commissioners of Finney County, Kansas.

This oversite and review was exercised by the BZA in determining Huber Sand's CUP application should be approved, after following the steps set forth in the Finney County Zoning Regulations. First, Huber Sand applied for the CUP through the Neighborhood and Development Services office which oversees the execution and enforcement of the County's Zoning Regulations. Next, the Neighborhood and Development Services' staff prepared a Staff Report for the June 16, 2021 BZA meeting that addressed Huber Sand's CUP Application. Prior to the BZA hearing, the BZA published notices of public hearings on the CUP. Finally, the BZA held two public hearings on the CUP. By a 2-1 vote, the BZA approved the CUP and issued the CUP to Huber in compliance with the Finney County Zoning Regulations.

Plaintiffs/Appellants, American Warrior, Inc. ("AWI") and Brian F. Price ("Price") (collectively, "Plaintiffs"), filed the appealed case and this appeal against Board of County Commissioners of Finney County, Kansas and Huber Sand, Inc. (collectively, "Defendants") contending that because the decision on Huber Sand's CUP was made by the BZA and not the County Commission the CUP is invalid in that it failed to follow the two-part process and procedures in K.S.A. § 12-757. The Plaintiffs/Appellants did not file any actions contesting the finding and approval of the CUP by the BZA on grounds it violated the Zoning Regulations or was invalid for any reason other than the failure to follow the two-part process and procedures in K.S.A. § 12-757. AWI separately filed an additional claim against Huber Sand, Inc. concerning the superiority of lease interests on the land, but that claim has been voluntarily dismissed without prejudice pursuant to a stipulation and is this not a matter in this appeal.

In the District Court, the Plaintiffs and the Defendants filed a stipulation of uncontroverted facts, cross motions for summary judgment and responses to said motions in the District Court case upon which this appeal is based. The Plaintiffs also filed a reply to Defendants' response to Plaintiffs' motion for summary judgement. Judge Wendel W. Wurst of the Finney County District Court of Kansas Twenty-fifth Judicial District issued a Memorandum Decision on the motions for summary judgment. This Memorandum Decision granted Defendants' motion and denied Plaintiffs' motion finding that the process and procedures utilized to approve Huber Sand's CUP was not in conflict with K.S.A. §12-757, and Huber Sand's CUP was valid. Subsequently, the parties jointly submitted a stipulation to the dismissal of all remaining claims not adjudication in the motions for

summary judgment, thereby voluntarily dismissing AWI's claim against Huber sand concerning superiority of leases on the land. Plaintiffs then filed this joint appeal on the District Court's summary judgement rulings and Memorandum Decision on their joint claim against the Defendants.

STATEMENT OF THE ISSUES

Issue #1: Whether all of the processes and procedures of K.S.A. § 12-757 apply to; govern; and are mandatory for an approval of a CUP in Kansas when the governing body exercises power given to it by the Legislature to device its own system for the issuance of a CUP pursuant to K. S. A. § 12-755, and thus, are the Finney County Kansas processes and procedures for approval of CUPs valid and is Huber Sand's CUP valid.

STATEMENT OF THE FACTS

The County Commission adopted the Zoning Regulations on August 14, 1995 by Resolution 40-95 and last revised those regulations prior to this case on March 10, 2021. (R. II, 321). The following Zoning Regulations apply to this appeal:

- "1.020 PURPOSE. These Regulations are intended to serve the following purposes: ... (C). To conserve good agricultural land and protect it from the intrusion of incompatible uses, but not to regulate or restrict the principal use of land for agriculture uses. Section 1.020(C). (R., III, 6).

- "1.020 PURPOSE. These Regulations are intended to serve the following purposes: ... (I). To facilitate the adequate provisions of transportation, water, sewage, schools, parks, and other public improvements and services, and to carry out the goals and objectives as set forth in applicable laws of the State of Kansas and the Finny County, Kansas, Comprehensive Plan." Section 1.020(I). (R., III, 7).

- "1.050 LICENSES TO CONFORM. All Departments, Officials, and Employees of Finney County which are vested with the duty or authority to issue permits and licenses shall conform to the provisions of these regulations and shall issue no permit or license for a use, building, or purpose where the same would be in conflict with the provisions contained herein." Section 1.050. (R., III, 7).

- "1.080 PERMITS TO COMPLY WITH THE ZONING REGULATIONS. Permits shall not be granted for the construction or alteration of any building or structure, or for the moving of a building onto a lot or parcel of land, or for the change of the use in any land, building, or structure, if such construction, alteration, moving, or change in use would be a violation of any of the provisions of these regulations. No liquid waste service line, no water line, no electrical, gas, or telephone utilities shall be installed to serve such premises if such use will be in violation of the regulations contained herein." Section 1.080. (R., III, 8).

- "1.110 CONDITIONAL USES. No use of a structure or land that is designed as a conditional use in any zoning district shall hereafter be established, and no existing conditional use shall hereafter be changed to another conditional use in such district unless a conditional use permit is secured in accordance with the provisions of Article 29 in this Zoning Regulation." Section 1.110. (R., III, 10).

- "1.140 USE LIMITATIONS. No permitted or conditional use hereafter established, altered, modified, or enlarged shall be operated or designed so as to conflict with the use limitations for the zoning district in which such use is, or will be, located. No permitted or conditional use already established on the effective, date of this Zoning Regulation shall be altered, modified, or enlarged so as to conflict, or further conflict with, the use limitations for the zoning district in which such use is located." Section 1.140. (R., III, 11).

- "2.030 DEFINITIONS. (Res.#22-2020 08/07/20, Res.#20-25 10/03/20) For the purpose of this Zoning Regulation, words or terms not herein defined shall have their ordinary and customary meaning in relation to the context and certain terms or words used herein shall be interpreted or defined as follows: ... (6). ... Land used for agricultural purposes shall not include the following: ... (I). The operation of or maintenance of Open Pit Mining within Finney County unless specially authorized by Conditional Use Permit only after they have been reviewed and approved as required by

Article 29 and licensed by the State of Kansas." Section 2.030 (6)(I). (R., III, 15-16).

- "2.030 DEFINITIONS. (Res.#22-2020 08/07/20, Res.#20-25 10/03/20) ... (18). Board of Zoning Appeals - That board created herein which has the statutory authority to hear and determine appeals, exceptions and variances to these Regulations." Section 2.030(18) (R., III, 17).

- "2.030 DEFINITIONS. (Res.#22-2020 08/07/20, Res.#20-25 10/03/20) ... (36). Conditional Use - A use of any building, structure or parcel of land that, by its nature, is perceived to require special care and attention in siting so as to assure compatibility with surrounding properties and uses. Conditional uses are allowed only after public notice, hearing and approval as prescribed in these Regulations and may have special conditions and safeguards attached to assure that the public interest is served." Section 2.030(36) (R., III, 19).

- "2.030 DEFINITIONS. (Res.#22-2020 08/07/20, Res.#20-25 10/03/20) ... (37). Conditional Use Permit - A written document of certification issued by the Zoning Administrator permitting the construction, alteration or establishment of a Conditional Use." Section 2.030(37). (R., III, 19).

- "2.030 DEFINITIONS. (Res.#22-2020 08/07/20, Res.#20-25 10/03/20) ... (60). Exception - An exception shall always mean the allowance of otherwise prohibited use within a given district, such use and conditions by which it may be permitted being clearly and specifically stated within this Zoning Regulation, and the allowance being granted by conditional use permit from the Board of Zoning Appeals." Section 2.030(60). (R., III, 21).

- "2.030 DEFINITIONS. (Res.#22-2020 08/07/20, Res.#20-25 10/03/20) ... (138). Planning Commission - The Holcomb-Garden City-Finney County Area Planning Commission." Section 2.030(138). (R., III, 29).

- "2.030 DEFINITIONS. (Res.#22-2020 08/07/20, Res.#20-25 10/03/20) ... (183). Zone or District - A section of the zoning area for which uniform regulations governing the use, height, area, size and intensity of use of buildings, land and open space about buildings are herein established." Section 2.030(183). (R., III, 35).

- "2.030 DEFINITIONS. (Res.#22-2020 08/07/20, Res.#20-25 10/03/20) ... (184). Zoning Administrator - The person or persons authorized and empowered by the Governing Body to administer the requirements of these Regulations." Section 2.030(184). (R., III, 35).

- "4.010 PURPOSE AND INTENT. *Agricultural(A).* The purpose of this land use category is to provide for a full range of agricultural activities on land used for agricultural purposes, including processing and sale of agricultural products raised on the premises; and at the same time offer protection to land used for agricultural purposes from the depreciating effect of objectionable, hazardous, incompatible and unsightly uses. This land use category is also intended to protect watersheds and water supplies; to protect forest and scenic areas; to conserve fish and wildlife habitat; to promote forestry; and to prevent and/or discourage untimely scattering of suburban residential, rural residential, and/or more dense urban development." Section 4.010. (R, III, 40).

- "4.030 CONDITIONAL USES. The following uses and structures may be permitted only after they have been reviewed and approved as required by Article 29. (Res.#22-202 08/07/20, Res. #25-2020 10/03/20) ... (6). State approved and sand and gravel quarries." Section 4.030(6). (R, III, 41).

- "28.010 THE BOARD OF ZONING APPEALS ESTABLISHED. A Board of Zoning Appeals is hereby created by the Governing Body of the City as prescribed by law. Such Board of Zoning Appeals shall consist of three members all of whom shall be taxpayers and residents of the County of Finney County. They shall be appointed by the Governing Body. Not less than one or more than two members of the Board of Zoning Appeals shall be members of the Planning Commission. One member of said Board of Zoning Appeals shall be appointed to serve for a period of two years, one for a period of three years, and one for a period of four years. Each successor shall be appointed for four years. Vacancies shall be filled by appointment for the unexpired term only. Members of the Board of Zoning Appeals serve without compensation." Section 28.010. (R. III, 209).

- "28.030 POWERS AND JURISDICTION. The Board of Zoning Appeals shall have the following powers and jurisdictions: . . . (6) To hear and grant exceptions to the provisions of the zoning regulation in those instances where the Board of Zoning Appeals is specifically authorized to grant such exceptions and only under the terms of the zoning regulation. In no event shall exceptions to the provisions of the zoning regulation be granted where the use or exception

contemplated is not specifically listed as an exception in the zoning regulation. Further, under no conditions shall the Board of Zoning Appeals have the power to grant an exception when conditions of this exception, as established in the Zoning regulation by the Governing Body, are not found to be present." Section 28.030(6). (R. III, 210).

- "28.070 APPLICATIONS. Applications to the Board of Zoning Appeals shall be on forms furnished by the Neighborhood & Development Services Department of the City. All conditional use permits shall be valid for one (1) year from the date it was approved by the Board of Zoning Appeals; if project has not been substantially completed within one (1) year of approval, the conditional use permit shall expire." Section 28.070. (R. III, 212).

- "28.080 JUDICIAL APPEAL. Any person or persons jointly or severally aggrieved by any decision of the Board of Zoning Appeals or of any officer, department, board or bureau of Finney County may bring an action in the District Court having jurisdiction in Finney County, to determine the reasonableness of any such order or determination. Provided, any action brought in the District Court shall be within thirty (30) days after the filing of the decision in the office of the Board of Zoning Appeals." Section 28.080. (R. III, 212).

- "29.040 EXCEPTIONS — PROCEDURE. The Board of Zoning Appeals may authorize, as an exception to the provisions of these zoning regulations, the establishment of those conditional uses that are expressly authorized to be permitted as a conditional use in a particular zoning district or in one or more zoning districts. No conditional use shall be authorized as an exception to these regulations unless the Board is specifically authorized, by these regulations, to grant such conditional use and unless such grant complies with all of the applicable provisions of these regulations.

  The purpose of the conditional use permit is to allow proper integration of uses into the community which may only be suitable in specific locations, and may have potentially detrimental characteristics if not properly designed, located, and conditioned. A conditional use permit may be granted only for uses listed as conditional uses in respective zones, and for such other uses as are set forth in various provisions of this Title.

  The following requirements and procedures shall apply in the issuance of a conditional use permit: (A) Application for a conditional use permit must be filed with the Secretary of the Board of Zoning Appeals in the office of the Planning and Community Development Department at least twenty-eight (28)

days prior to the date of the Zoning Board of Appeals meeting. Application forms are available at the Community Development Department. The application shall contain the following information:

(1) Plots, plans, or drawings, drawn to scale, as may be required to clearly show how a conditional use will occupy a site and/or buildings; and what the effect of said conditional use will be upon adjacent properties.

(2) Legal dimension of the tract to be used.

(3) Location of all proposed improvements, including curb-cut access, off-street parking, and other such facilities as the applicant proposed to install.

(4) Grade elevations.

(5) Building setback from all property lines.

(6) Such perspective drawings, of the proposed improvements, in such detail as the Board may require to clearly show the finished appearance of the improvements proposed.

(7) Location and type of planting, screening, or walls.

(8) Such other items as the Board shall deem reasonably necessary to properly process the application."

Section 29.040. (R. III, 214-215).

- "29.050 CONSIDERATION OF A CONDITIONAL USE. In considering an application for a conditional use permit hereunder, the Board of Appeals shall give consideration to the Comprehensive Zoning Plan of the County, the health, safety, morals, comfort, and general welfare of the inhabitants of the County, including but not limited to the following factors: (A) The stability and integrity of the various zoning districts to include:

(1) Conservation of property values.

(2) Protection against fire and casualties.

(3) Observation of general police regulations.

(4) Prevention of traffic congestion.

(5) Promotion of traffic safety and the orderly parking of motor vehicles.

(6) Promotion of the safety of individuals and property.

(7) Provision for adequate light and air.

(8) Prevention of over-crowding and excessive intensity of land uses.

(9) Provision for public utilities and schools.

(10) Invasion by inappropriate uses.

(11) Value, type, and character of existing or authorized improvements and land uses.

(12) Encouragement of improvements and land uses in keeping with overall planning.

(13) Provisions for orderly and proper urban renewal, development, and growth.

(B) The Board of Appeals shall impose such restrictions, terms, time limitations, landscaping, and other appropriate safeguards to protect adjoining property." Section 29.050. (R. III, 215-216).

AWI has owned an oil and gas lease, which is dated November 1, 1979 and recorded on February 26, 1980, on a tract of land that is approximately 177 acres ("the Tract") since March 1, 2017. (R. II, 321). The Tract is located directly southeast of the city of Pierceville, between Highway 50 to the north and the Arkansas River to the south, and between the town of Pierceville and South Pierceville Road to the west and the Finney County/Gray County line to the east. (R. II, 321). AWI operates one active gas well on the Tract, which has been producing since 2001. (R. II, 322). Huber purchased the surface of the Tract in approximately December 2020. (R. II, 322). Price has owned the property approximately one mile southwest of the Tract since 2011. (R. I, 4).

On or about May 12, 2021, Huber applied for a Conditional Use Permit ("CUP Application") to the BZA, seeking approval from the BZA to operate a sand and gravel quarry on the Tract as an approved conditional use. (R. II, 322). 10. The BZA published notice of Huber's CUP Application in the Garden City Telegram on or about May 27, 2021, stating that the CUP Application would be heard at a public meeting of the BZA on June 16, 2021. (R. II, 322). The Neighborhood and Development Services ("NDS") is a joint city and county department serving Garden City, Finney County, and Holcomb, with staff made up of public employees appointed by the City of Garden City. (R. II, 322). NDS' staff prepared a Staff Report for the June 16, 2021, BZA meeting that addressed Huber's CUP Application. (R. II, 323). At the June 16, 2021, BZA meeting, after Huber's CUP Application was introduced, public comment was provided, and additional discussion took place amongst BZA members, the BZA voted to table Huber's CUP Application until the next BZA meeting. (R. II, 323).

NDS' staff prepared a Staff Report for the July 21, 2021 BZA meeting that addressed Huber's CUP Application. (R. II, 323). At the July 21, 2021 BZA meeting, following public comment and discussion amongst BZA members about Huber's CUP Application, BZA Vice Chairman Leonard Hitz made a motion to approve Huber's CUP Application with the following conditions: "exempt fifteen to twenty acres on the northwest corner from the conditional use permit, maintain the Huber road to keep dust to a minimal (sic), keep equipment at the southeast corner of the property, maintain a one-hundred fifty foot mining setback from the west property line, install a permanent six-foot fence with barbed wire on the top along the property line with planted trees." (R. II, 323-324). At

this meeting, BZA Chairman Butch Leiker seconded the motion by BZA Vice Chairman Leonard Hitz and Huber's CUP Application was approved by the BZA by a 2 to 1 vote, with BZA member Vicki Germann as the only vote in opposition to the CUP Application. (R. II, 324).

The BZA issued the CUP to Huber following the July 21, 2021, BZA meeting, concluding the conditional use permit process on Huber's CUP Application. (R. II, 324). The BZA is not an elected body, but instead its members are appointed by the County Commission. (R. II, 324). To date, Huber's CUP application has never been presented to, evaluated by, or voted upon by the Finney County Planning Commission or the County Commission. (R. II, 324).

Plaintiffs appealed the CUP by filing this lawsuit in Finney County District Court on August 20, 2021 and jointly asserting a claim that the CUP was invalid, void, and unenforceable because Finney County failed to follow the two-part process and procedure in K.S.A. § 12-757 and Kansas case law interpreting and apply the statute. (R. I, 4). The parties submitted a stipulated set of uncontroverted facts and competing motions for summary judgment. (R. I, 148, 190; R. II., 192, 266, 269, 282, 302, 314). On February 8, 2022, the District Court issued its Memorandum Decision, granting summary judgment in favor of Defendants and against Plaintiffs and finding that the processes and procedures used by Finney County for Huber Sand's CUP complied with Kansas law and the rules of statutory construction and relevant case law do not support Plaintiff's position that the zoning regulations adopted by the Board for processing applications for CUPs conflict with

K.S.A. § 12-757. (R. II, 350). On February 16, 2022, the parties filed a joint order dismissing with prejudice all remaining claims of the Plaintiffs that were not decided in Memorandum Decision. (R. II, 353). Plaintiffs then filed this appeal of the District Court's summary judgment rulings on their joint claim. (R. II., 356).

ARUGUMENT AND AUTHORITIES

I. The Processes and Procedures in K.S.A. § 12-757 DO NOT Apply to and Govern Applications for a CUP in Kansas and Are NOT Mandatory.

Standard of Review

This issue is addressed at R. II, 319-350 in the record on appeal. As a matter of statutory interpretation, this issue is a question of law that is subject to *de novo* review. *Nauheim v. City of Topeka*, 309 Kan. 145, Syl. ¶ 1, 432 P.3d 647, 648 (2019). The Kansas Supreme Court recently held that "[i]ssues of statutory interpretation present questions of law to which we apply an unlimited standard of review. This means we give no deference to the district court's . . . interpretation of the statute." *Jarvis v. Dep't of Revenue*, 312 Kan. 156, 159, 473 P.3d 869, 873 (2020).

Analysis

No portions of K.S.A. § 12-757, including but not limited to subsections, (a), (b), and (d), require the two-part process and procedure to be applied in evaluating, voting upon, and issuing a CUP.

A plain reading of K. S.A. § 12-757(a) shows that K. S.A. § 12-757 applies to supplementing, changing or revising the boundaries or regulations contained in the zoning regulations by amendment:

> "(a) The governing body, from time to time**, may supplement, change or generally revise the boundaries or regulations contained in zoning regulations by amendment.** A proposal for **such amendment** may be initiated by the governing body or the planning commission. If such **proposed amendment** is not a general revision of the existing regulations and affects specific property, the **amendment** may be initiated by application of the owner of property affected. Any such **amendment**, if in accordance with the land use plan or the land use element of a comprehensive plan, shall be presumed to be reasonable. The governing body shall establish in its zoning regulations the matters to be considered when approving or disapproving a **rezoning request**s. The governing body may establish reasonable fees to be paid in advance by the owner of any property at the time of making application for a **zoning amendment**."

K.S.A. § 12-757 (a) (bold added for emphasis).

Additionally, a plain reading of K.S.A. § 12-757 (b) shows it applies to the zoning amendments outlined in K.S.A. § 12-757 (a):

> "(b) **All such proposed amendments** first shall be submitted to the planning commission for recommendation. The planning commission shall hold a public hearing thereon, shall cause an accurate written summary to be made of the proceedings, and shall give notice in like manner as that required for recommendations on the original proposed zoning regulations provided in K.S.A. 12-756, and amendments thereto. Such notice shall fix the time and place for such hearing and contain a statement regarding the proposed changes in regulations or restrictions or in the boundary or classification of any zone or district. If **such proposed amen**dment is not a general revision of the existing regulations and affects specific property, the property shall be designated by legal description or a general description sufficient to identify the property under consideration. In addition to such publication notice, written notice of such proposed amendment shall be mailed at least

20 days before the hearing to all owners of record of real property within the area to be altered and to all owners of record of real property located within at least 200 feet of the area proposed to be altered for regulations of a city and to all owners of record of real property located within at least 1,000 feet of the area proposed to be altered for regulations of a county. If a city proposes a zoning **amendment** to property located adjacent to or outside the city's limits, the area of notification of the city's action shall be extended to at least 1,000 feet in the unincorporated area. Notice of a county's action shall extend 200 feet in those areas where the notification area extends within the corporate limits of a city. All notices shall include a statement that a complete legal description is available for public inspection and shall indicate where such information is available. When the notice has been properly addressed and deposited in the mail, failure of a party to receive such notice shall not invalidate any subsequent action taken by the planning commission or the governing body. Such notice is sufficient to permit the planning commission to recommend amendments to zoning regulations which affect only a portion of the land described in the notice or which give all or any part of the land described a zoning classification of lesser change than that set forth in the notice. A recommendation of a zoning classification of lesser change than that set forth in the notice shall not be valid without republication and, where necessary, remailing, unless the planning commission has previously established a table or publication available to the public which designates what zoning classifications are lesser changes authorized within the published zoning classifications. At any public hearing held to consider a proposed rezoning, an opportunity shall be granted to interested parties to be heard."

K.S.A. § 12-757(b) (bold added for emphasis).

Furthermore, a plain reading of K.S.A. § 12-757(d) show that it applies to consideration and adoption of amendments to zoning regulations:

"(d) Except as provided in subsection (g) and unless otherwise provided by this act, the procedure for the **consideration and adoption of any such proposed amendment** shall be in the same manner as that required for the consideration and adoption of the original zoning regulations. A majority of the members of the planning commission present and voting at the hearing shall be required to recommend approval or denial of the amendment to the governing body. If the planning commission fails to make a recommendation

on a rezoning request, the planning commission shall be deemed to have made a recommendation of disapproval. When the planning commission submits a recommendation of approval or disapproval of **such amendment** and the reasons therefor, the governing body may: (1) Adopt such recommendation by ordinance in a city or by resolution in a county; (2) override the planning commission's recommendation by a 2/3 majority vote of the membership of the governing body; or (3) return such recommendation to the planning commission with a statement specifying the basis for the governing body's failure to approve or disapprove. If the governing body returns the planning commission's recommendation, the planning commission, after considering the same, may resubmit its original recommendation giving the reasons therefor or submit new and amended recommendation. Upon the receipt of such recommendation, the governing body, by a simple majority thereof, may adopt or may revise or amend and adopt such recommendation by the respective ordinance or resolution, or it need take no further action thereon. If the planning commission fails to deliver its recommendation to the governing body following the planning commission's next regular meeting after receipt of the governing body's report, the governing body shall consider such course of inaction on the part of the planning commission as a resubmission of the original recommendation and proceed accordingly. The **proposed rezoning** shall become effective upon publication of the respective adopting ordinance or resolution."

K.S.A. § 12-757 (d) (bold added for emphasis).

K.S.A. § 12-741(a) provides:

"This act is enabling legislation for the enactment of planning and zoning laws and regulations by cities and counties for the protection of the public health, safety, and welfare, and is not intended to prevent the enactment or enforcement of additional laws and regulations on the same subject which are not in conflict with the provisions of this act."

K.S.A. § 12-741(a).

K. S. A. § 12-755 provides:

"...(a) The governing body may adopt zoning regulations which may include, but not be limited to, provisions which:

(1) Provide for planned unit developments;

(2) permit the transfer of development rights;

(3) preserve structures and districts listed on the local, state or national historic register;

(4) control the aesthetics of redevelopment or new development;

(5) provide for the issuance of special use or conditional use permits; and

(6) establish overlay zones.

(b) The provisions of this section shall become effective on and after January 1, 1992."

K.S.A. § 12-755 (bold added for emphasis).

K.S.A. § 12-759 authorizes the establishment of, delineates the powers which may be exercised by, and outlines procedures for hearings conducted by a board of zoning appeals. With regard to matters over which it presides the statute states:

> (c) The board of zoning appeals shall administer the details of appeals from **or other matters referred to it regarding the application of the zoning ordinance or resolution as hereinafter provided**. The board shall fix a reasonable time for the hearing of an appeal or any other matter referred to it. Notice of the time, place and subject of such hearing shall be published once in the official city newspaper in the case of a city and in the official county newspaper in the case of a county at least 20 days prior to the date fixed for hearing. A copy of the notice shall be mailed to each party to the appeal and to the appropriate planning commission.

K.S.A. § 12-759(c).

The District Court correctly applied the rules of statutory construction and relevant case law to makes its decision and concluded that K.S.A. § 12-757 does not apply to Huber Sand's CUP application and that the zoning regulations adopted by the County Commission for the processing and decision on CUP applications does not conflict with K.S.A. § 12-757. As explained below, the District Court's conclusions are the correct conclusion as there is no binding precedent that actually holds that K.S.A. § 12-757 applies

to the consideration of and decision on CUP applications. This Court was presented with the same process used by the BZA in the case at hand and took no action to indicate to invalidate that process. The District Court made no error in its decision.

A Nine Kansas Cases Mention the Application of K.S.A. § 12-757 to the consideration and approval of a CUP or SUP or Ignore the Precise Method Used by the BZA in this Case to approve Huber Sand's CUP.

A review of the case law and unpublished opinions establishes that no court has ever determined that a County Commission cannot establish a process for reviewing Conditional Use Permits.

The Kansas Supreme Court first analyzed a Special Use Permit ("SUP") and mentions K.S.A. § 12-757 in ***Water Dist. No. 1 of Johnson Cty. v. City Council of City of Kansas City***, 255 Kan. 183, 186, 871 P.2d 1256, 1259 (1994). In that case the Court noted in its recitation of the Facts that, "A five-to-two vote was required to deny the permit because the Planning Commission had recommended that the permit be approved. K.S.A. 12–757(c)." *Id.*, 255 Kan. at 186, 871 P.2d at 1259. Context is needed to fully follow the Supreme Court's finding. The City Council of Kansas City had a system set up whereby the City itself and not a BZA or the Planning Commission made the ultimate decision on the SUP application. This context distinguishes its finding from the central issue of this case: whether a governing body can enact zoning regulations delegating authority to decide a CUP to a BZA, when limited by the Zoning Regulations themselves, which require public hearing. The Court in that case was not presented with this question because the City Council of Kansas City never delegated their authority and the Council itself made the

decision on the SUP after a recommendation from the Planning Commission. This is the procedure envisioned by K.S.A. § 12-757. In the present case the County Commission enacted Zoning Regulations that gave the authority to process and approve CUPs to the BZA, limited by the Zoning Regulations themselves and providing for public notice and public hearing on the consideration of a CUP application. This case has no bearing on the present matter.

The next case of relevance was decided by the Kanas Appellate Court. That case is ***M.S.W., Inc. v. Bd. of Zoning Appeals of Marion Cty.***, 29 Kan. App. 2d 139, 24 P.3d 175 (2001). This case in more instructive than any cases presented by the Appellants. In that case, the decision to be analyzed by the Court was a decision on a CUP made by Marion City's Board of Zoning Appeals. *MSW,* 29 Kan. App. 2d at 143, 24 P.3d at 180. In this case MSW argued that

> "the procedures for the adoption of CUPs as set forth in the zoning regulations were not followed, namely that Grosse never applied for the CUP, the County never specifically voted on or adopted the CUP, there was never a development plan prepared, and a written document was never issued"

Id., 29 Kan. App. 2d at 147–48, 24 P.3d at 182–83. The Court then stated,

> "The zoning regulations have procedures and requirements for obtaining a CUP. Pursuant to the zoning regulations, the only way property can be used as a landfill in Marion County is by a CUP. Pursuant to Regulation § 21–103, a CUP can be granted for: Solid waste disposal area, construction/demolition landfills, industrial landfills, or other solid waste processing facility or scrap material recycling and processing facility. The zoning regulations set forth the following procedures to obtain a CUP:…"

Id., (internal quotation marks omitted). This Court made no finding invalidating the procedure used by Marion City to process and decide CUPs nor any findings stating that the process to decide a CUP must conform with K.S.A. § 12-757. See *M.S.W., Inc. v. Bd. of Zoning Appeals of Marion Cty.*, 29 Kan. App. 2d 139, 24 P.3d 175 (2001). The procedure and process used in *M.S.W.* is analogous to, if not exactly the same as, the processes and procedure utilized by BZA in the present matter to review and approve the CUP.

Two years after *M.S.W.*, the Kansas Supreme Court decided the annexation case of ***Crumbaker v. Hunt Midwest Min., Inc.,*** 275 Kan. 872, 69 P.3d 601 (2003). In this case a quarry asked the city for annexation prior to the expiration of its CUP with the county. *Id.*, 275 Kan. at 874, 69 P.3d at 604. Neighboring property owners argued that the Annexation Agreement between the city and the quarry was a CUP that changed the land use and thus was in violation of Kansas Law. *Id.*, 275 Kan. at 877, 69 P.3d at 606. The Court agreed with the neighboring land owners, stating:

> "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. *Ford v. City of Hutchinson,* 140 Kan. 307, 311, 37 P.2d 39 (1934). In the instant case, some landowners did not receive proper notice of the proposed action as required by K.S.A. 12–757(b)."

Id., 275 Kan. at 886, 69 P.3d at 611 (bold added for emphasis). The issue with this holding is it is not support by any analysis that would conclude that when issuing a SUP the process must follow K.S.A. § 12–757 nor does the case it cites to even speaks of CUPs or SUPs at all. *See Ford v. City of Hutchinson,* 140 Kan. 307, 37 P.2d 39 (1934). *Ford* is not a CUP case. In *Ford*, "the city government amended the zoning ordinance so as to change the site

(parts of two town lots) from a B residence district to a commercial zone." *Id.*, 140 Kan. 307, 37 P.2d at 39. The Court in *Ford* held: "that **proposed changes in the zoning districts** could not be made by the governing officials of a city merely to gratify the behests of the solicitous and the influential." *Id.*, 140 Kan. 307, 37 P.2d at 40 (bold added for emphasis). *Ford* is a rezoning case and or a zoning reclassification case. *Ford* cited ***Armourdale State Bank v. Kansas City***, 131 Kan. 419, 292 P. 745 (1930), which was not a CUP case, but rather "was an action to enjoin the city government of Kansas City **from enforcing an amendment to its general zoning ordinance which would have the effect of changing the classification of some town lots of plaintiff from one for light industrial purposes to another for residential purposes."** *Id.*, 131 Kan. at 419, 292 P. at 745 (bold added for emphasis).

The issuance of a conditional use permit does not involve the rezoning of a property; it does not involve amendment of zoning regulations; it does not involve change in zoning boundaries; and it does not involve the amendment of or change to the zoning classification of a parcel. A conditional use permit allows a parcel to be conditionally used for a specific purpose (otherwise excluded in the zoning classification in which the parcel is located) because such use is specifically permitted by existing zoning regulations if granted in accordance with those regulations. The zoning classification of the parcel is not changed by a conditional use permit; the special permit simply allows the property within the zoning classification to be used for an otherwise excluded purpose.

Therefore, cases holding that K.S.A. 12-757 applies to zoning amendments, to changes in zoning classifications, to rezoning of property, or to changes in zoning ordinances does not support the conclusion that K.S.A 12-757 applies to requests for conditional use permits.

Furthermore, this holding in *Crumbaker* actually only holds that in that case notice to landowners was not given for the proposed action, annexation. This case was not a SUP or CUP approval case. No CUP nor SUP was applied for nor processed and approved. The present appeal involves a CUP where neighboring landowners were given notice via public notice and public hearings were held. (R. II, 322-323). This appeal is not a case where the County Commission was changing the zoning of property nor changing land use as was the case in *Crumbaker.* The *Crumbaker* Court incorrectly and without analysis erroneously equated a governing body changing the zoning of property to that of the issuance of a SUP. If this were in fact what the legislature intended then why were SUP and CUPs not discussed along with changes to zoning in K.S.A. § 12–757 but instead only legislated in K.S.A. § 12–755, which gave governing bodies the authority to enact zoning regulations to "... provide for the issuance of special use or conditional use permits**; ...**" K.S.A. § 12–755. There is no case law foundation for concluding *Crumbaker* found K.S.A. §12-757 applies to conditional use and special use permits. The supporting precedent is nonexistent, and contradicted by K.S.A. §12-755. *Crumbaker* further cites ***Carson v. McDowell,*** 203 Kan. 40, 43–44, 452 P.2d 828, 830 (1969) and *Ford,* as the Kansas courts, which have decided K.S.A. § 12-757 applies to conditional use permits. The problem is that neither *Carson* nor *Ford* were conditional use permit cases. *Carson* was not a CUP

case. It involved a petition to change the zoning classification of a property from 'C' single family District to 'E-1' office & professional District. *Id.* *Carson* is a zoning reclassification case.

The most logical reading the *Crumbaker's* holding is that when a SUP changes the zoning of a property, the governing body must follow K.S.A. § 12–757. The CUP issued to Huber Sand did not change the zoning and, in fact, conforms to the Zoning Regulations.

After Crumbaker, the Kansas Appellate Court ruled on the case ***Blessant v. Crawford Cty. Bd. of Cty. Comm'rs,*** No. 89,916, 81 P.3d 461, (Kan. Ct. App. Dec. 24, 2003) (unpublished opinion). That case is unpersuasive. That Court stated in its recitation of the facts that

> "Following a public hearing on November 9, 2001, the Crawford County Planning and Zoning Board recommended approval of the permit request by a 6–0 vote. Although the Board voted 2–1 to follow the recommendation, this was insufficient to award the permit based on K.S.A. 12–757(f). This statute required at least 3/4 approval (here a unanimous vote) by all the Board members when sufficient protest petitions have been filed. Here, four parties filed petitions in opposition to the issuance of the permit, triggering the requirements of K.S.A. 12–757(f)."

Id., at *1. Again, context distinguishes the facts in that manner from the present case. Crawford City Board of City Commissioners had established a procedure whereby the Board of City Commissioners, not a BZA or a Planning Commission, made the ultimate decision on a CUP application. This context is important as that Court was not making any finding on the central issue of this case: whether a governing body can enact zoning regulations dictating that the power to decide a CUP is with the BZA limited by the Zoning

Regulations themselves and requiring public notice and public hearing. The Court in that case was not presented with this question because it is evident from the facts in the case that the Crawford City Board of City Commissioners had a CUP consideration procedure whereby the Crawford City Board of City Commissioners itself made the decision on the CUP after a recommendation from the Crawford County Planning and Zoning Board. This procedure is governed by K.S.A. § 12-757 and the Commission must follow the statute. In the present case the County Commission enacted Zoning Regulations granting the power to process and approve CUPs to the BZA, limited by the Zoning Regulations themselves and providing for public notice and public hearing on the consideration of a CUP application. This delegation is authorized pursuant to K.S.A 12-755.

Five years after *Blessant*, the Kansas Supreme Court decided ***Manly v. City of Shawnee,*** 287 Kan. 63, 194 P.3d 1 (2008). In *Manly*, the Supreme Court stated that K.S.A. § 12-757(d) was "[t]he controlling statutory provision" in evaluating a question about authority to grant a special use permit." *Id.*, 287 Kan. at 67, 194 P.3d at 6. While the Court did hold that K.S.A. 12–757(d) was the "controlling statutory provision", it was not "controlling" on the issue of whether K.S.A. 12-757 must be followed in dealing with CUP or special permit applications. Rather, the *Manly* Court held that K.S.A. 12–757(d) was the controlling statutory provision on "the core question" in that case which was (under the circumstances presented in *Manly)* "whether the City had the authority to grant the special use permit with a simple majority vote". *Id.*, 287 Kan. at 67, 194 P.3d at 6. *Manly* does not address the issue of whether K.S.A. §12-757 prohibits a governing body from granting authority to a BZA limited by the Zoning Regulations themselves to determine CUP

applications. *Manly* does not stand for the proposition that Kansas Law requires that K.S.A. § 12-757 must be followed in the processing and decision on CUP applications. Language to that extent cannot be found anywhere in the *Manly* opinion and *Manly* is silent on the issue of K.S.A. 12-757 applicability to conditional use and special use permits. Nowhere in the opinion is it explicitly stated that the SUP was allowed under the zoning regulations in existence. Rather, it appears that the SUP in *Manly* violated the zoning regulations in place.

After *Manly*, the Kansas Supreme Court decided ***Zimmerman v. Bd. of Cty. Comm'rs***, 289 Kan. 926, 218 P.3d 400 (2009). *Zimmerman* was not a CUP decision. That case involved a proposed zoning amendment. *Id.*, 289 Kan. at 930-934, 218 P.3d 405-407 "K.S.A. 12–757(d) outlines the procedure to be followed when amending a zoning regulation. A planning commission must first recommend approval or denial of a rezoning request" *Id.*, 289 Kan. at 939, 218 P.3d at 410 (2009). Nowhere in the *Zimmerman* opinion does *the Court* say K.S.A. § 12 -757 applies to conditional use permits. Any reliance on *Zimmerman* to support that proposition is misplaced.

Years after *Zimmerman,* this Court decided ***Rural Water Dist. #2 v. Miami Cty. Bd. of Cty. Comm'rs***, No. 105,632, 268 P.3d 12 (Kan. Ct. App. Jan. 27, 2012) (unpublished opinion) *Rural Water District #2* involved an appeal from a county commission denial of a CUP for a water storage tank. *Id.*, at *1. The case involved a landowner protest petition under K.S.A.§12-757(f). *Id.* Though there is dictum in the unpublished opinion which seems to equate a CUP with a zoning amendment,

Rural Water District # 2 did not address the question of whether K.S.A. § 12-757 precluded a governing body from adopting zoning regulations providing for CUP permits to be issued by a BZA. The *Rural Water District #2* court did not have that question before it because the case involved a CUP procedure where the governing body made the ultimate decision on the CUP. *Id.* Rather, *Rural Water District #2* addressed the issues of whether a landowner protest petition pursuant to K.S.A.§ 12–757(f)(1) requiring 3/4 of all the members of the governing body to approve the CUP and whether the commissioner vote siding with the protesting landowners was reasonable. In the present appeal, we do not have the same situation. The County Commission did not make the decision on Huber Sand's CUP and no changes to the zoning of property were consider nor made by the BZA.

Following *Rural Water Dist. #2*, this Court decided the notice case of ***Vickers v. Franklin Cty. Bd. of Commissioners***, No. 118,649, 444 P.3d 380 (Kan. Ct. App. July 19, 2019) (unpublished opinion). *Vickers* simply stands for the proposition that procedural fairness precludes a governing board from adopting a procedure for consideration of CUPs which does not provide for notice to surrounding landowners and an opportunity for a public hearing. *See Id.* The stipulated facts in this case establish that Finney County provided adequate notice and an opportunity for the public to be heard that were lacking in *Vickers*. (R. I, 149). The *Vickers* Court's statutory analysis, stated:

> "A municipality has no inherent power to enact zoning laws. Instead, a municipality's zoning power is derived solely from the authority granted

> to the municipality by Kansas zoning statutes. *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 884, 69 P.3d 601 (2003). In addition to the zoning statutes in K.S.A. 12-741 et seq., municipalities may enact and enforce additional zoning regulations which do not conflict with those statutes. K.S.A. 12-741(a). Our Supreme Court has "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. 275 Kan. at 886.
>
> Under K.S.A. 12-755(a), a county's governing body may adopt zoning regulations that provide for issuing special use permits. But K.S.A. 12-757 demands certain notice and hearing requirements for amending zoning regulations. Importantly, although K.S.A. 12-757 does not explicitly mention special use permits, our Supreme Court has consistently found the procedures in K.S.A. 12-757 apply to special use permits. *Manly v. City of Shawnee,* 287 Kan. 63, 67, 194 P.3d 1 (2008); *Crumbaker,* 275 Kan. at 886."

Vickers v. Franklin Cty. Bd. of Commissioners, No. 118,649, 444 P.3d 380 at *4.

There are several distinguishing features in this matter. Firstly, it is uncertain whether or not the zoning regulations adopted by Franklin County requires review by the Commission. Secondly, the statement that the procedures of K.S.A §12-757 may be a reference to the notice requirements alone. Such a reading would allow K.S.A §12-755 to still have meaning. Otherwise, the interpretation by Appellants creates a statutory contradiction unnecessarily. In the present case, landowners were given notice regarding the application and review of the CUP and were given the opportunity to speak prior to the decision of the BZA. The Conditional Use Permit was applied for pursuant to the land being zoned Agricultural which allows for a sand quarry with the issuance of a Conditional Use Permit. No zoning changes occurred, and all real estate zoned as agricultural has the ability to apply for such a Conditional Use Permit.

As discussed above, the *Vickers* Court's statements based upon *Manly* and *Crumbaker* fails to address the nuanced situation in the present case where the Board of County Commissioner have explicitly stated that the Conditional Use is allowable in certain zoning areas. To rely on these cases to state positively that SUPs or CUPs must utilize all the procedures in K.S.A. § 12-757 fails to recognize the present case where the CUP and SUP are specifically listed in the zoning regulations adopted by the County Commissioners. Due to the misplaced reliance on *Manly* and *Crumbaker*, discussed above, the *Vickers* decision cannot stand for the proposition that the processes and procedures utilized by the County Commission and the BZA to consider and approve Huber Sand's CUP is invalid and the CUP application procedures contained in the Zoning Regulations violate Kansas state law and are invalid.

Furthermore, *Vickers* is an unpublished decision. Unpublished opinions "are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel ... .and are not favored for citation ..." *Riverside Drainage Dist. of Sedgwick County v. Hunt*, 33 Kan.App.2d 225, 23199 P.3d 1135, 1140, (Kan.App.,2004); Supreme Court Rule 7.04.

Following *Vickers*, the Kansas Court of Appeals decided ***Ternes v. Bd. of Cty. Commissioners of Sumner Cty.***, No. 119,073, 464 P.3d 395 (Kan. Ct. App. June 12, 2020) (unpublished opinion), review denied (Nov. 24, 2020). *Ternes* is readily distinguishable from the case at hand. Unlike the Zoning Regulations which delegates

authority for determination of conditional use applications to the Board of Zoning Appeals in the present case, the Sumner County regulations in *Ternes* required CUP applications be "submitted, reviewed, and approved by the Planning Commission and Governing Body..." *Id.* At *3. *Ternes* involved both an application for change of a parcel's zoning classification from Rural to Agricultural/Commercial and an application for a CUP for a wind farm, which Sumner County regulations permitted in an Agricultural/Commercial district. *Id.* at *1. The holding in *Ternes* was that the Sumner County Commission had the authority to approve the zoning change and CUP application over the Planning Commission's recommendation for rejection and that the Commission's approval was reasonable. *Id.* at *8-15. The *Ternes* Court held:

> "K.S.A. 2019 Supp. 12-757(b) provides that proposed zoning amendments must be "submitted to the planning commission for recommendation." The planning commission must hold a public hearing on proposed zoning amendments and create a written summary of the proceedings. K.S.A. 2019 Supp. 12-757(b). After receiving the planning commission's recommendation, the county's governing body may approve the zoning amendment regardless of the planning commission's recommendation. The governing body may adopt the recommendation by resolution, override the planning commission's recommendation by a two-thirds majority vote, or return the recommendation to the planning commission. K.S.A. 2019 Supp. 12-757(d)."

Id. at *7. The discussion above will demonstrate the errors the *Ternes* Court made in its analysis of *Manly, Rural Water Dist. #2, and Zimmerman.* These cases do not stand for the proposition that the requirements K.S.A. §12-757 apply to the issuance of CUPs nor SUPs. *See Id.* at *7-8 and the above analysis of these cases.

B. There is no binding precedent on this Court to follow to decide the question in this Case: Whether all of the processes and procedures of K.S.A. § 12-757 apply to; govern; and are mandatory for an approval of a CUP in Kansas when the governing body exercises power given to it by the Legislature to device its own system for the issuance of a CUP pursuant to K. S. A. § 12-755, and thus, are the Finney County Kansas processes and procedures for approval of CUPs valid and is Huber Sand's CUP valid.

The District Court applied the rules of statutory construction and relevant case law to decide the question this Case in its Memorandum Decision. It analyzed, interpreted and constructed K.S.A. § 12-741, K.S.A. § 12-755, K.S.A. § 12-757, and K.S.A. § 12-759. (See R. II, 337-350). The District Court concluded that (1) K.S.A. § 12-755 allows counties to adopt zoning regulations for the issuance of CUPs or SUPs, (2) Finney County created a BZA under K.S.A. § 12-759, (3) Finney County enacted its Zoning Regulations that provided the BZA with the sole authority to hear, vote upon, and issue CUPs, and (4) K.S.A. § 12-757 does not reference CUPs or SUPs so it does not apply in this case. (R. II, 337-350). The District Court analyzed the Kansas Court Case presented by the parties in the Memos, Responses, and Reply's. The District Court found no binding precedence on the question it had to consider: Whether all of the processes and procedures of K.S.A. § 12-757 apply to; govern; and are mandatory for an approval of a CUP in Kansas when the governing body exercises power given to it by the Legislature to device its own system for the issuance of a CUP pursuant to K. S. A. § 12-755, and thus, are the Finney County Kansas processes and procedures for approval of CUPs valid and is Huber Sand's CUP valid. There is no Kansas precedent

on this question. As discussed above there is no Kansas Court case that has consider the question to be answered in the Case.

There is some guidance in *MSW*. The Court in *MSW* heard a case where the Court analyzed a decision on a CUP made by Marion City's Board of Zoning Appeals. Id., 29 Kan. App. 2d at 143, 24 P.3d at 180. In this case MSW argued that:

> "the procedures for the adoption of CUPs as set forth in the zoning regulations were not followed, namely that Grosse never applied for the CUP, the County never specifically voted on or adopted the CUP, there was never a development plan prepared, and a written document was never issued"

Id., 29 Kan. App. 2d at 147–48, 24 P.3d at 182–83. The Court then stated,

> "The zoning regulations have procedures and requirements for obtaining a CUP. Pursuant to the zoning regulations, the only way property can be used as a landfill in Marion County is by a CUP. Pursuant to Regulation § 21–103, a CUP can be granted for: Solid waste disposal area, construction/demolition landfills, industrial landfills, or other solid waste processing facility or scrap material recycling and processing facility. The zoning regulations set forth the following procedures to obtain a CUP:..."

Id., (internal quotation marks omitted). This Court made no finding invalidating the procedure used by Marion City to process and decided CUPs nor any finding state that the process to decide on a CUP must conform with K.S.A. § 12-757. See M.S.W., Inc. v. Bd. of Zoning Appeals of Marion Cty., 29 Kan. App. 2d 139, 24 P.3d 175 (2001). The procedure and process used in MSW is analogous to, if not exactly the same as, the processes and procedure utilized by BZA in the present matter to process and approve a CUP and that were used to process and approve Huber Sand's CUP.

All other Kansas Cases are distinguishable from the present matter, as discussed above, and thus do not serve as binding precedent. The district court did not violate *stare decisis* as there is no Kansas Supreme Court precedent on the question in the present case.

C. The Rules of Statutory Construction Support the Conclusions of the District Count: K.S.A. § 12-757 does not apply to the issuance of a CUP, the process and procedures utilized by the BZA to approve Huber Sand's do not violate Kansas Law and Huber Sand's CUP is valid.

The language of K.S.A. § 12-757 does not hint at, much less plainly state, that it in any manner deals with conditional use permits. Had the legislature wanted the procedures and requirements of K.S.A. § 12-757 to apply to the process of handling conditional use permits, it simply had to say so. It did not. The District Court was not inclined to ignore the rules of statutory construction by adding language to the statue that is not found within of K.S.A. § 12-757.

The fundamental rule of statutory construction to which all others are subordinate, is to ascertain the legislative body's intent as expressed through the language of the statutory scheme. Article 7 of Chapter 12 of the Kansas Statutes Annotated is, by its plain language, intended to enable cities and counties to enact their own zoning laws and regulations and, by its own plain language, is not intended to authorize the state to prevent or interfere with cities or counties enacting or enforcing additional zoning laws and regulations which are not in conflict with the provisions of the zoning act. K.S.A. 12-741. This appears to be a clear legislative statement of intent to grant cities and counties broad powers to

adopt, enact, and enforce zoning regulations without state interference unless the local enactments clearly conflict with state proscriptions.

When a statute is plain and unambiguous, the court must give effect to the legislative body's intent as expressed rather than determining what the law should or should not be. The plain and unambiguous language in K.S.A. 12-755 specifically authorizes local governing bodies to adopt zoning regulations which provide for the issuance of special use or conditional use permits. And the plain and unambiguous language in K.S.A. 12-759 specifically authorizes local governing bodies to establish boards of zoning appeals and to empower a board so established with jurisdiction over any "matters referred to it regarding the application of the zoning ordinance or resolution." K.S.A. 12-759 further sets out the procedures a board of zoning appeals must follow in exercising those powers delegated to it by the local authority.

Ordinary words are to be given their ordinary meanings. A statute should neither be read to add language that is not found in it, nor to exclude language that is found in it. The language of K.S.A. 12-757 plainly states that it sets forth the process for rezoning property, amending zoning classifications, and amending zoning regulations. The language of K.S.A. 12¬757 does not hint, much less plainly state, that it in any manner deals with conditional use permits. Had the legislature wanted the procedures and requirements of K.S.A. 12-757 to apply to the process of handling conditional use permits, it simply had to say so. It did not.

The rules of statutory construction should not be disregarded by adding language to the statue that is not found in it.

The Supreme Court has consistently noted when dealing with the rules of statutory construction the maxim that *expressio unius est exclusion alterius*.

> *"i.e.,* the inclusion of one thing implies the exclusion of another, may be applied to assist in determining actual legislative intent which is not otherwise manifest, although the maxim should not be employed to override or defeat a clearly contrary legislative intention."

Matter of Marriage of Killman, 264 Kan. 33, 42, 955 P.2d 1228, 1234 (1998) (citing *State v. Luginbill,* 223 Kan. at 20, 574 P.2d 140 (quoting *In re Olander,* 213 Kan. at 285, 515 P.2d 1211). When a statute includes a list a court should exclude any items not expressly included in the specific list. In its title, K.S.A § 12-757 lists what it deals with: "zoning; downzoning or rezoning, amendments and revisions." Conditional use permits are excluded from the matters listed in the title of K.S.A 12-757. The body of the statute, by its plain language, lists specific matters to which the statue applies and specifically lists those local actions which require the statutory procedure to be followed.

The plain language of K.S.A. § 12-757 applies to efforts to amend zoning boundaries, to amend zoning classifications, or to rezone property. Conditional use permits are excluded in the title and body of the statute from the list of the matters to which K.S.A § 12-757 applies thus they should not be read into K.S.A § 12-757 in the present matter

Courts must construe separate provisions of an act in *pari materia* with a view towards reconciling and bringing the provisions into workable harmony; effect must be given, where possible, to the entire act and every part thereof; and, to this end, it is the duty of the court, as far as practicable, to reconcile the different provisions to make them consistent, harmonious, and sensible. It is not difficult to give effect to the entire act and every part of the act relating to planning and zoning in counties and to reconcile the different provisions of that act so as to make them consistent, harmonious, and sensible. K.S.A. § 12-741 is a clear legislative statement of intent to grant counties broad powers to adopt, enact and enforce zoning regulations without state interference unless the local enactments clearly conflict with state proscriptions; K.S.A. § 12-755 plainly, unambiguously and specifically authorizes local governing bodies to adopt zoning regulations which provide for the issuance of special use or conditional use permits; and, K.S.A. § 12-759 plainly, unambiguously and specifically authorizes local governing bodies to establish boards of zoning appeals and to empower a board so established with jurisdiction over any "matters referred to it regarding the application of the zoning ordinance or resolution". Because conditional use permits are not mentioned in and are excluded (in the statute's title and body) from the list of the matters to which K.S.A § 12-757 applies; and, because extending applicability of K.S.A § 12-757 to consideration of conditional use permits would require adding language to the statute not found therein; reconciliation of these different provisions so as to make them consistent,

harmonious, and sensible compels the conclusion that the procedures required in K.S.A. § 12-757 do not apply to applications for conditional use permits.

Additionally, The Kansas Supreme Court has articulated the following standard for when a conflict exists between a county enactment and a state statute:

> "The primary method of determining whether an ordinance or resolution of a county is inconsistent with a statute of the state is to see whether the local law prohibits what the state law permits or the state law prohibits what the local law permits."

Missouri Pac. R. R. v. Bd. of Cnty. Comm'rs of Greeley Cnty., 231 Kan. 225, 227, 643 P.2d 188, 191 (1982). The is no prohibition in any Kansas Statute, including but not limited to K.S.A. § 12-757, that prevents a county for enacting Zoning Regulations that give the authority to a BZA to decide on a CUP application in accordance with Zoning Regulations after public notice is given and public hearings are held. In fact, no conflict between Kansas State Statute and the Zoning Regulations exists. See K.S.A. § 12-755, K.S.A. § 12-757 and Statement of Fact, supra.

Furthermore, a city ordinance or county regulation is entitled to a presumption of validity and should not be stricken unless its infringement upon a statute is clear beyond substantial doubt. The Kansas Supreme Court has consistently found:

> "This court stated the principles and guidelines involved in determining the constitutionality of enactments, whether by statute, city ordinance, or county resolution, as follows:
>
> The constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and before the act may be stricken down it must clearly appear that the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather

> than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond substantial doubt. The propriety, wisdom, necessity and expediency of legislation are *258 exclusively matters for legislative determination. Courts will not invalidate laws, otherwise constitutional, because the members of the court do not consider the statute to be in the public interest; what the views of the members of the court may be upon the **274 subject [are] wholly immaterial. It is not the province nor the right of courts to determine the wisdom of legislation touching the public interest, as that is a legislative function with which courts cannot interfere. See *State v. Rose,* 234 Kan. 1044, 1045, 677 P.2d 1011 (1984); *State v. Dunn,* 233 Kan. 411, 418, 662 P.2d 1286 (1983); and *City of Baxter Springs v. Bryant,* 226 Kan. 383, 385–86, 598 P.2d 1051 (1979)." 237 Kan. at 74–75, 697 P.2d 1310."

City of Wichita v. Wallace, 246 Kan. 253, 257–58, 788 P.2d 270, 273–74 (1990) (internal quotation omitted), **see also,** *Blevins v. Hiebert*, 247 Kan. 1, 16, 795 P.2d 325, 334-335 (1990*)*. The Kansas Supreme Court has also stated: "A city or county ordinance should be permitted to stand unless an actual conflict exists between the ordinance and a statute, or unless the legislature has clearly preempted the field to preclude local governmental action." *Exec. Aircraft Consulting, Inc. v. City of Newton,* 252 Kan. 421, 424–25, 845 P.2d 57, 61 (1993).

In the present matter it is not clearly beyond a substantial doubt that the Zoning Regulations enacted by the County Commission infringed upon K.S.A. § 12-757. K.S.A. § 12-757 does not mention CUPs nor SUPs. The only mention of CUPs and SUP in Kansas statute is in K.S.A. § 12-755, which the County Commission followed when enacting the Zoning Regulations.

Also "... courts should construe statutes to avoid unreasonable results and should presume that the legislature does not intend to enact useless or meaningless legislation." In re Marriage of Traster, 301 Kan. 88, 98, 339 P.3d 778, 786 (2014) (internal quotation and citation omitted) (quoting *Milano's, Inc. v. Kansas Dept. of Labor*, 296 Kan. 497, 501, 293 P.3d 707 (2013)).

If the Appellants' argument prevails, such a ruling would result in K.S.A. § 12-755(a)(5) becoming meaningless. The ability of governing bodies to enact their own zoning regulations for the approval CUPs would be contravened by the language of K.S.A. § 12-757.

A court is not to speculate on legislative and read provision into a stature when that stature is plain and unambiguous. The Supreme Court noted:

> "As aptly noted by the Kentucky court when discussing that its exemption for spouses' and children's benefits was silent regarding attorney fees, neither an agency (in this case, the Retirement Board), a district court, nor an appellate court is free to add words to a statute or ordinance in order to enlarge the scope beyond that which can be gleaned from a reading of the words used by the drafters. *Rue, 32 S.W.3d at 89; see Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 939–40, 218 P.3d 400 (2009) (when statute is plain and unambiguous, an appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there)."

Robinson v. City of Wichita Employees' Ret. Bd. of Trustees, 291 Kan. 266, 280, 241 P.3d 15, 25 (2010), see also *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554 P.3d 695, 701 (2007); *Steffes v. City of Lawrence*, 284 Kan. 380, 386 P.3d 843, 849 (2007). It is improper in the present matter to apply the provisions of K.S.A. § 12-

757 the issuance of CUPs, when the power given to governing bodies to adopt zoning regulations is authorized by K.S.A. § 12-755 and consistent with the intent expressed in K.S.A. § 12-741 and the powers delegated to BZAs in K.S.A. § 12-759. Doing this would effectively make K.S.A. § 12-755(a)(5) impotent.

Lastly, "... (w)hen a statute is plain and unambiguous, the court must give effect to the legislature's intent as expressed rather than determining what the law should or should not be." *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85, 87 (2006) (quoting *State v. McCurry,* 279 Kan. 118, 121, 105 P.3d 1247 (2005)).

In the present matter all of the relevant statutes are plain and unambiguous:

1. K.S.A. § 12-741 plainly and unambiguously enables legislation by cities and counties authority to enact "planning and zoning laws and regulations ...". K.S.A. § 12-741(a).
2. K.S.A. § 12-755 plainly and unambiguously authorizes governing bodies to "adopt zoning regulations adopt zoning regulations which may include, but not be limited to, provisions which: ... (5) provide for the issuance of special use or conditional use permits ..." K.S.A. § 12-755(a)(5).
3. K.S.A. § 12-757 plainly and unambiguously authorized governing bodies to "from time to time, may supplement, change or generally revise the boundaries or regulations contained in zoning regulations by amendment." K.S.A. § 12-757 and provides the processes and procedures a governing body must utilize when

supplementing, changing or generally revising the boundaries or regulations contained in zoning regulations by amendment." See K.S.A. § 12-757.

4. K.S.A. § 12-759 plainly and unambiguously requires a governing body to create a BZA and that BZA "... shall adopt rules in accordance with the provisions of the ordinance or resolution creating the board. ..." K.S.A. § 12-759(a) and such a BZA must

> "administer the details of appeals from or other matters referred to it regarding the application of the zoning ordinance or resolution as hereinafter provided. The board shall fix a reasonable time for the hearing of an appeal or any other matter referred to it. Notice of the time, place and subject of such hearing shall be published once in the official city newspaper in the case of a city and in the official county newspaper in the case of a county at least 20 days prior to the date fixed for hearing...."

K.S.A. § 12-759(c).

The intent of the legislature could not be clearer. The legislature in enacting K.S.A. § 12-757, gave a list of circumstance, under which that statute would apply. The issuance of CUPs nor SUPs was not in the list in K.S.A. § 12-757. However, the legislature did give power to governing bodies to enact regulation for the issuance of CUPs and SUPs in K.S.A. § 12-755.

CONCLUSION

This Appeal and Case are quite simple. This Court merely needs to answer the following question: Under Kansas Law does a governing body have the authority under K.S.A. § 12-755, to enact Zoning Regulations that give the authority to process and decide

on a CUP to a BZA restricted by the Zoning Regulations, which require public notice and public hearings. These are the fact in the present case: the County Commission enacted Zoning Regulations that gave the authority to process and decide on CUPs to a BZA restricted by the Zoning Regulations themselves, which additionally required public notice and public hearings. See Section 29.040. (R. III, 214-215), Section 29.050. (R. III, 215-216), Section 2.030(36) (R., III, 19).

Statutory interpretation and a critical analysis of Kansas case law indicates that a governing body has such authority. There is no binding precedent that has ruled on the issue in the present case. Therefore, the County Commission's processes and procedures for approval of CUPs are valid and Huber Sand's CUP is valid.

APPENDIX OF UNPUBLISHED CASES

A. *Blessant v. Crawford Cty. Bd. of Cty. Comm'rs*, No. 89,916, 81 P.3d 461 (Kan. Ct. App. Dec. 24, 2003) (unpublished opinion).

B. *Rural Water Dist. #2 v. Miami Cty. Bd. of Cty. Comm'rs*, No. 105,632, 268 P.3d 12 (Kan. Ct. App. Jan. 27, 2012) (unpublished opinion).

C. *Vickers v. Franklin Cty. Bd. of Commissioners*, No. 118,649, 444 P.3d 380 (Kan. Ct. App. July 19, 2019) (unpublished opinion).

D. *Ternes v. Bd. of Cty. Commissioners of Sumner Cty.*, No. 119,073, 464 P.3d 395 (Kan. Ct. App. June 12, 2020) (unpublished opinion), rev. denied (Nov. 24, 2020).

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CERTIFICATE OF SERVICE

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APPENDIX A

81 P.3d 461 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Matt BLESSANT and Mulberry Limestone Quarry Company, Inc., Appellants,
v.
CRAWFORD COUNTY BOARD OF COUNTY COMMISSIONERS; Defendant/appellee,
and
Ray and Sharon JONES, Intervenors/appellees.

No. 89,916.
|
Dec. 24, 2003.

Synopsis
Background: Limestone quarry company appealed form order of the Crawford District Court, Ronald D. Innes, J., affirming County Board of Commissioners' denial of a conditional use permit to establish a rock quarry on agricultural land.

Holding: The Court of Appeals held that: Board's decision to deny conditional use permit was unreasonable.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (1)

[1] **Zoning and Planning**⇨Mining and minerals; sand and gravel

County Board of Commissioners' denial of a conditional use permit to establish a rock quarry on agricultural land was unreasonable, in light of fact that quarry company received approval from Department of Transportation (DOT) to upgrade its entrance to property from highway, grant of permit would result in only 1.5 percent increase in total traffic entering highway, there was no evidence that proximity to railroad crossing would present any danger to motorists or trains, character of neighborhood was consistent with quarrying rock, surrounding areas were zoned for quarrying, two other quarries were operating within one mile of proposed quarry, and board approved application to expand one of existing quarries several months before denying plaintiff's application.

1 Cases that cite this headnote

Appeal from Crawford District Court; Ronald D. Innes, judge. Opinion filed December 24, 2003. Reversed and remanded with directions.

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James L. Emerson, county counselor,, for appellee Crawford County Board of Commissioners.

Richard D. Loffswold, Jr., of Girard, for appellees Ray and Sharon Jones.

Before JOHNSON, P.J., GREEN, J., and ROGG, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Mulberry Limestone Quarry Company (Mulberry) appeals from the trial court's judgment affirming the Crawford County Board of Commissioners' (Board) denial of a conditional use permit to establish a rock quarry on agricultural land. We reverse, remand, and direct the Board to approve Mulberry's application to quarry rock.

In September 2001, Mulberry and its principal, Matt Blessant, applied for permission to quarry rock on agricultural land owned by Mulberry. Mulberry had unsuccessfully filed for the same permit in 1999 and 2000.

Following a public hearing on November 9, 2001, the Crawford County Planning and Zoning Board recommended approval of the permit request by a 6–0 vote. Although the Board voted 2–1 to follow the recommendation, this was insufficient to award the permit based on K.S.A. 12–757(f). This statute required at least 3/4 approval (here a unanimous vote) by all the Board members when sufficient protest petitions have been filed. Here, four parties filed petitions in opposition to the issuance of the permit, triggering the requirements of K.S.A. 12–757(f). Commissioner Bob Kmiec voted against issuing the permit. He cited the density of rock quarries, the lack of economic analysis evidence, and the traffic safety concerns as reasons for voting against the permit request.

Mulberry later appealed the Board's decision to the trial court. The trial court affirmed the resolution denying the permit. Ray and Sharon Jones, whose property abuts the Mulberry property, joined as intervening parties before the hearing.

Mulberry contends that the trial court erred in affirming the Board's decision because Commissioner Kmiec's vote was unreasonable.

"In zoning appeals, the standard of review for district courts as well as for [an appellate] court is set forth in *Combined Investment Co. v. Board of Butler County Comm'rs*, 227 Kan. 17, 28, 605 P.2d 533 (1980):

" '(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.

*2 " '(8) An appellate court must make the same review of the zoning authority's action as did the district court.'

"See ... *M.S.W., Inc. v. Marion County Bd. of Zoning Appeals*, 29 Kan.App.2d 139, 143–46, 24 P.3d 175[, *rev. denied* 272 Kan. 1419] (2001) (applying *Combined Investment* concepts to conditional use decisions)." *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, 304–05, 49 P.3d 522 (2002).

Golden *Factors*

Our Supreme Court enumerated eight factors to assist in analyzing whether a zoning decision is reasonable in *Golden v. City of Overland Park*, 224 Kan. 591, 598, 584 P.2d 130 (1978). "The *Golden* factors have become standard considerations throughout Kansas by those charged with the responsibility of voting on zoning changes." *McPherson Landfill*, 274 Kan. at 306, 49 P.3d 522. The *Golden* factors are:

" '(1) The character of the neighborhood;

" '(2) the zoning and uses of properties nearby;

" '(3) the suitability of the subject property for the uses to which it has been restricted;

" '(4) the extent to which removal of the restrictions will detrimentally affect nearby property;

" '(5) the length of time the subject property has remained vacant as zoned;

" '(6) the gain to the public health, safety, and welfare by the possible diminution in value of the developer's property as compared to the hardship imposed on the individual landowners;

" '(7) The recommendations of a permanent or professional planning staff; and
" '(8) the conformance of the requested change to the city's master or comprehensive plan.' [Citation omitted.]" *McPherson Landfill*, 274 Kan. at 306, 49 P.3d 522 (citing *Golden*, 224 Kan. at 598, 584 P.2d 130).

This court is not free to make findings of fact independent of those found by the Board; instead, it is limited to determining whether the facts could reasonably have been found by the Board, or more specifically Commissioner Kmiec to justify the decision made by the Board. See *McPherson Landfill*, 274 Kan. at 307, 49 P.3d 522.

Mulberry's principal argument is that Commissioner Kmiec's decision contravenes the *Golden* test for reasonableness. Mulberry, however, concedes that because evidence about factors 5 and 8 is absent from the record, these factors are inapplicable to this case.

In its resolution denying the permit, the Board determined that the following factors were applicable:

"(a) The current zoning and uses of nearby properties, and the effect on existing nearby land uses upon such a change in classification.

"(b) The character and condition of the surrounding neighborhood and its effect on the proposed change.

"(c) Whether the relative gain to the public health, safety, and general welfare outweighs the hardship imposed upon the applicant by not upgrading the value of the property by such a classification."

These factors appear to incorporate *Golden* factors 1, 2, 3, 4, and 6. To support its decision, the Board made the following factual findings:

***3** "(a) There are currently two quarries operating in this area and adding an additional quarry will be encroaching on existing houses and expanding on current dust and blasting problems.

"(b) The applicant has failed to present evidence of additional economic benefit which would outweigh potential harm to the public.

"(c) Concerns with traffic safety because of the entrance off of Kansas 126 Highway and the proximity of the railroad crossing."

Factual findings (b) and (c) are not supported by the record in this case. Mulberry did present evidence that an additional quarry in that area would likely result in lower rock prices for the county and general public. Commissioners Anthony Pichler and Tom Moody were apparently satisfied with the evidence presented on this issue, as was the Planning and Zoning Board, because they voted to approve Mulberry's application.

Turning to the traffic safety issue, which is factual finding (c) and factor 6 under *Golden*, Mulberry did receive approval from the Kansas Department of Transportation to upgrade its entrance to the property from K–126 Highway. Evidence was also presented that between 2,500–2,700 vehicles pass the site in question daily, approximately 38 of which are dump trucks. The uncontroverted estimate was a 1.5% increase in total traffic entering the highway. Our Supreme Court has held that "[a] slight increase in traffic on an already busy thoroughfare is not a sufficient objection to prevent rezoning for commercial development" and it is improper for a governing body to rely on general considerations such as "traffic problems" and "traffic congestion" to control zoning decisions. *Taco Bell v. City of Mission*, 234 Kan. 879, Syl. ¶ 6, 891, 678 P.2d 133 (1984). Finally, no evidence exists in the record that the proximity of the railroad crossing would present any danger to motorists or trains.

Mulberry presented formidable evidence on *Golden* factors 1, 2, 3, and 7. The evidence indicated that the character of the neighborhood was consistent with quarrying rock. Moreover, because the surrounding areas were zoned for quarrying, Mulberry's proposed use change was consistent with the area. Although the suitability of the subject property was restricted to agriculture use, this use was low. Finally, factor 7 did not support the Board's disapproval of Mulberry's application because the Planning and Zoning Board had unanimously recommended issuance of the conditional use permit to Mulberry.

As to *Golden* factor 4, Commissioner Kmiec maintained that the proposed Mulberry quarry would "encroach on existing houses and expand on current dust and blasting problems." This assertion was listed as the Board's

factual finding (a).

It is uncontroverted that two other rock quarries existed within 1 mile of the Mulberry property at the time of application. Nevertheless, evidence was also presented that one of the quarries had been inactive for more than 1 year and had not been involved in bidding for rock contracts. At oral argument, the parties indicated that the inactive rock quarry (the Nelson Quarry) had quit the business of crushing rock.

*4 The distance between the Mulberry property and the Jones' home is approximately 1,075 feet. The closest residence to the Midwest Minerals' quarry, which is adjacent to the Mulberry property, is 1,200 feet. Although no evidence was presented regarding the recommended distance between a quarry and residences, the Board unanimously approved Midwest Minerals' application to expand its quarry operation by 140 acres within the same area on September 20, 2001, several months before denying Mulberry's application to quarry rock in that area.

Furthermore, the proposed Mulberry quarry would cover no more than 80 acres, although the Midwest Minerals' expansion would cover at least 140 acres. While voting in favor of the Midwest Minerals' quarry expansion, Commissioner Kniec consistently opposed the proposed Mulberry quarry.

When presenting its application for the conditional use permit, Mulberry presented evidence that its proposed quarry would not encroach on existing houses any more than the Midwest Minerals' expansion and that any dust or blasting problems associated with the proposed Mulberry quarry would be significantly less than those associated with the Midwest Minerals' expansion. Mulberry showed that it would be more than a mile from any neighbor in the direction of the prevailing wind. As for blasting problems, Mulberry presented the testimony of certified blasting experts explaining that any concerns with regard to blasting were unfounded and that the frequency of blasting at the proposed Mulberry quarry would be only one-tenth of the blasting done at the adjacent Midwest Minerals' quarry.

Based on the foregoing, Mulberry has met its burden to show by a preponderance of the evidence that the Board's decision was unreasonable.

Reversed and remanded with directions.

All Citations

81 P.3d 461 (Table), 2003 WL 23018238

End of Document

APPENDIX B

268 P.3d 12 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

RURAL WATER DISTRICT # 2, Miami County, Kansas, Appellant,
v.
MIAMI COUNTY BOARD OF COUNTY COMMISSIONERS, Appellee.

No. 105,632.
|
Jan. 27, 2012.

Appeal from Miami District Court; Amy L. Hartl, Judge.

Attorneys and Law Firms

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David R. Heger, county counselor, for appellee.

Before GREENE, C.J., ATCHESON, J., and BRAZIL, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Rural Water District No. 2, Miami County, Kansas (Water District), appeals the district court's decision affirming the denial by the Board of Miami County Commissioners (BOCC) of a conditional use permit application for a 146–foot tall, 1–million gallon overhead water storage tank. The Water District argues that the district court erred when it remanded the case to the BOCC for further findings and conclusions; when it interpreted K.S.A.2010 Supp. 12–757(f)(1) to require a vote of 3/4 of all members of the governing body to pass a resolution adopting a zoning amendment; when it failed to consider the statutory presumption of reasonableness as required by K.S.A.2010 Supp. 12–757(a); and when it denied the conditional use permit solely on aesthetic considerations. Finding no reversible error, we affirm.

The Water District is a quasi-municipal corporation that provides water to nearly 14,000 Miami County residents. As part of a project to increase water supply to the area and the ability of the Water District to expand its infrastructure in the future, the Water District filed an application with the Miami County Planning Department (Planning Department) for a conditional use permit (CUP) to construct a 146–foot tall, 1–million gallon overhead water storage tank in rural Miami County.

Planning Department Director Charlene Weiss conducted an extensive review and recommended approval of the application. She specifically found that the water tank would not conflict with the character of the neighborhood or the "Countryside" zoning of the area, the water tank would not reduce the values of nearby property, and the hardship to the Water District by denying the request outweighed any benefit to nearby properties. However, at a planning commission meeting on December 1, 2009, the Commission denied the application without any factual findings.

On December 14, 2009, several property owners who lived or owned property within 1,000 feet of the proposed water tank filed a valid protest petition with the Miami County Clerk's Office under K.S.A.2010 Supp. 12–757(f). Consequently, the Miami Board of County Commissioners (BOCC) could not pass a resolution approving a zoning amendment, such as a CUP, unless "at least a 3/4 vote of all of the members of the governing body" voted to pass the resolution. K.S.A.2010 Supp. 12–757(f)(1).

On December 30, 2009, the BOCC held a public hearing to discuss the CUP. At the beginning of the hearing, one of the five county commissioners recused himself because of a conflict of interest. After hearing extensive testimony from the Water District and several concerned citizens, the BOCC took the matter under advisement until January 6, 2010, where the remaining four county commissioners voted three to one to approve the CUP. Because only three commissioners voted in its favor, the CUP did not receive the required "3/4 vote of all of the members of the governing body," and consequently, it was denied. The BOCC memorialized the denial in Resolution No.

R10–01–001.

*2 In the resolution, none of the commissioners who voted for the CUP application's approval stated their reasons. However, the lone commissioner who did not support the CUP application stated "that the proposed water tower would place a burden on the surrounding property owners that was not outweighed by the benefit to the general public and that the water district could find another location that would not prove to be as burdensome."

On January 26, 2010, the Water District filed a petition for judicial review under K.S.A. 12–760(a). In the petition, the Water District argued the BOCC approved the CUP application by a vote of three to one because K.S.A.2010 Supp. 12–757(f)(1) merely required 3/4 vote of "eligible" county commissioners. Additionally, the Water District claimed that the BOCC's denial of the CUP application was unreasonable. The parties filed extensive joint stipulations of facts and agreed on the admission of certain exhibits on April 26, 2010.

The district court filed a pretrial order on April 28, 2010, noting that the joint stipulations and agreed exhibits "constitute all of the evidence to be presented in the trial of this matter." At a hearing on June 28, 2010, the district court determined K.S.A.2010 Supp. 12–757(f)(1) was unambiguous in its mandate that 3/4 of "[a]ll of the members of the governing body" was required to approve the CUP application. Further, the district court cited *City of Haven v. Gregg*, 244 Kan. 117, 766 P.2d 143 (1988), to conclude "[f]our of the five members of the commissioners would need to vote in favor of the [CUP] for the Water District to prevail before the [BOCC] due to the protest petition.

However, the district court reasoned it could not determine the reasonableness of the BOCC's decision because the lone dissenting county commissioner failed to provide sufficient findings of fact to allow the district court to make that determination. The district court noted it "would literally be guessing" concerning the dissenting commissioner's reason for refusing to approve the CUP application. In its journal entry, the district court stated the dissenting commissioner's statement in Resolution No. R10–01–001 lacked "any specificity or reference to any of the recognized criteria cited in *Golden fv. City of Overland Park*, 224 Kan. 591, 598, 584 P.2d 130 (1978),] and is devoid of any basis for the Court to determine the criteria ... used to vote against the approval of [the Water District's] Application." Consequently, the district court remanded the case to the BOCC to make "an appropriate written record of its decision."

In response, the BOCC adopted Resolution No. R10–07–024 on July 21, 2010. In the resolution, the dissenting commissioner stated 17 factors he considered in voting against approval of the CUP application, including the proposed site, the character of the neighborhood, the close proximity to nearby residences, the adverse impact on neighboring property values, and the "definite negative aesthetic impact on the neighboring properties."

*3 The Water District filed a motion to strike the admission of Resolution No. R10–07–024, listed by the Water District as "Exhibit A," from evidence on August 3, 2010, arguing that it was fundamentally unfair to allow the BOCC to supplement its written findings in violation of the parties' joint stipulated facts. Further, the Water District claimed the April 28 pretrial order was binding on the parties and the district court unless modification was required to avoid injustice. Because the district court made no such findings, the pretrial order should not be modified to allow the admission of additional evidence.

The district court held a hearing on October 15, 2010, to discuss the Water District's motion to strike. Although there was no discussion concerning Exhibit A, the district court determined "it had the right and authority to" remand the case for further factual findings and the parties' joint stipulation did not prevent or prohibit the court from requesting additional information from the BOCC.

After the remand on January 7, 2011, the district court filed an order focusing on the reasonableness of the dissenting commissioner's vote. After reviewing the record, the district court rejected all but one of the dissenting commissioner's reasons for denying the CUP application because the reasons were "not supported by the evidence." Citing *Gump Rev. Trust v. City of Wichita*, 38 Kan.App.2d 501, 512, 131 P.3d 1268 (2006), and *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 218 P.3d 400 (2009), the district court determined the dissenting commissioner's aesthetical concerns were reasonable and upheld the BOCC's decision to reject the CUP application. The Water District timely appeals.

THE REMAND

First, the Water District claims this court's standard of review is de novo because "the true issue presented in this

is the binding effect of agreed stipulations when coupled with the final pretrial order, versus the generally recognized ability of the district court to remand a zoning determination for additional facts or amendments to zoning applications."

This issue raises questions of law over which an appellate court has unlimited review. See *State v. Foster*, 290 Kan. 696, 713, 233 P.3d 265 (2010).

The District Court Did Not Err

The Water District quotes *Wentz Equip. Co. v. Missouri Pacific R.R. Co.*, 9 Kan.App.2d 141, 142, 673 P.2d 1193 (1983), *rev. denied* 235 Kan. 1042 (1984) (quoting *Baker v. City of Leoti*, 179 Kan. 122, 126, 292 P.2d 720 [1956]), for the proposition that the district court was bound by the parties' stipulated facts and could only render " 'such judgment as those facts warranted.' " This statement, however, is only partially correct:

> "Trial and appellate courts are not bound by stipulations pertaining to questions of law, or *that have the effect of a stipulation on a question of law*. More specifically, an appellate court is not bound by a stipulation of the parties as to the law that it may address on appeal. Although concessions are often useful to a court, they do not, at least as to questions of law that are likely to affect a number of cases beyond the one in which the concession is made, relieve an appellate court of the duty to make its own resolution of those issues.
>
> *4 ....
>
> "Although the parties may agree to stipulate to certain facts underlying a question of law, the trial court is not bound by the parties' stipulations in its determination of mixed questions of law and fact. Thus, parties cannot bind a court by stipulating to the legal effect of a factual finding. Stipulations that limit the range of legal issues available for a reviewing court's consideration are permissible, however, so long as the parties do not stipulate as to matters affecting the jurisdiction, business or convenience of the courts. Although litigants may stipulate to facts, they may not stipulate to what the law requires, or to the law that will apply to a given state of facts." (Emphasis added.) 83 C.J.S. Stipulations § 28, pp. 34–35.

Similarly, it is well-settled Kansas law that although parties can stipulate to questions of fact, stipulations "cannot be invoked to bind or circumscribe a court in its determination of questions of law." *In re Estate of Maguire*, 204 Kan. 686, 691, 466 P.2d 358 (1970). In zoning matters, determining the reasonableness of the BOCC's approval or denial of a CUP application is a question of law within the scope of review of the district court. See K.S.A. 12–760(a) (any person aggrieved "may maintain an action in the district court to determine the reasonableness of such final decision"); see *Combined Investment Co. v. Board of Butler County Comm'rs*, 227 Kan. 17, 28–29, 605 P.2d 533 (1980).

In *Landau v. City Council of Overland Park*, 244 Kan. 257, 274, 767 P.2d 1290 (1989), our Supreme Court stated:

> "If, in the view of the trial court, the findings of fact and conclusions of law are deficient under *Golden* and inadequate for a 'reasonableness' determination, the trial court may, in exercising its discretion, select the alternative of remanding the case to the local governing authority for further findings and conclusions."

It follows that the parties cannot stipulate to an underlying fact where the stipulation would have the effect of binding the district court, or appellate court, in its determination of questions of law. While parties may certainly stipulate to questions of fact, they cannot stipulate to the underlying sufficiency or adequacy of those facts the district court utilizes in making its reasonableness determination. Consequently, the parties' factual stipulations did not bar the district court from determining the BOCC's findings of fact and conclusions of law were inadequate for a reasonableness determination and remanding the case for further findings.

Interpretation of K.S.A.2010 Supp. 12–757(f)(1)

The Water District suggests K.S.A.2010 Supp. 12–757(f)(1) does not require a unanimous vote when one member of the governing body is subject to recusal or disqualification. Instead, the Water District claims 12–757(f)(1) merely requires an affirmative vote from a supermajority of those present at the meeting. This issue

involves statutory interpretation. Interpretation of a statute is a question of law over which an appellate court has unlimited review. *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010).

*5 " 'The fundamental rule of statutory construction, to which all other rules are subordinate, is that the intent of the legislature governs.'

" 'An appellate court may consider various aspects of a statute in attempting to determine the legislative intent. The court must first look at the intent as expressed in the language of the statute. When the language is plain and unambiguous, an appellate court is bound to implement the expressed intent. Ordinary words are to be given their ordinary meanings without adding something that is not readily found in the statute or eliminating that which is readily found therein.'

" 'An appellate court must consider all of the provisions of a statute *in pari materia* rather than in isolation, and these provisions must be reconciled, if possible, to make them consistent and harmonious. As a general rule, statutes should be interpreted to avoid unreasonable results.' [Citation omitted]." *State v. McElroy*, 281 Kan. 256, Syl. ¶¶ 2, 3, 4, 130 P.3d 100 (2006).

K.S.A.2010 Supp. 12–757(f)(1), which applies when a valid protest petition has been filed against a zoning amendment, states that "the ordinance or resolution adopting such amendment shall not be passed except by at least a 3/4 vote of all of the members of the governing body." Here, no party disputes the validity or sufficiency of the protest petition.

In its appeal brief, the Water District admits the language of the statute "would seem to require four of the five county commissioners vote in favor of the resolution, no matter what occurs," but argues a county commissioner's recusal or disqualification should be treated as a vacancy. It attempts to distinguish *City of Haven v. Gregg*, 244 Kan. 117, because *City of Haven* involved an abstention from voting, not a disqualification or recusal.

In *City of Haven*, Donald Gregg appealed to the district court after the City of Haven chief of police issued a complaint against him for violating an ordinance that prohibited the sale of alcohol without a city license. He claimed the ordinance was invalid because a majority of the elected members of the city council had not voted for the ordinance's passage as required by K.S.A. 12–3002. In order for an ordinance to be valid, the statute required "a majority of all the members-elect of the council of council cities or mayor and other commissioners of commission cities vote in favor thereof." K.S.A. 12–3002. Of the five elected city council members, only four were present during the vote, but one city council member abstained. Of the three remaining members, two voted in favor of the ordinance. The district court agreed with Gregg and held the ordinance invalid.

On appeal, after discussing the common-law rule regarding an abstention as a vote for the majority, our Supreme Court noted that a statute controls over the common law if there is a conflict. It then determined the legislative intent of K.S.A. 12–3002, as determined from its plain language, was to require a majority of the elected city council members to vote in favor of an ordinance in order to validate the ordinance. 244 Kan. at 122–23.

*6 While *City of Haven* involved K.S.A. 12–3002, the reasoning is the same here. Clearly, K.S.A.2010 Supp. 12–757(f)(1) requires "at least a 3/4 vote of all of the members of the governing body" to pass a resolution containing a zoning amendment. Here, only three of the five county commissioners voted for passage of the resolution, less than the 3/4 required. The legislature could have required the affirmative vote of a supermajority of the governing body present at a meeting at which a quorum is present to pass the resolution; however, it did not do so.

Under the plain language of the statute, regardless of the reason of the failure to vote by a member of the governing body, *i.e.*, abstention, recusal, or disqualification, "at least a 3/4 vote of all of the members of the governing body" is required to pass a resolution containing a zoning amendment under K.S.A.2010 Supp. 12–757(f)(1).

K.S.A.2010 Supp. 12–757(a)

The interpretation of a statute is a question of law over which this court has unlimited review. *Arnett*, 290 Kan. at 47.

The Water District contends the district court failed to presume its CUP application was reasonable as required by K.S.A.2010 Supp. 12–757(a). It argues that because the application complied with the Miami County Comprehensive Plan, 12–757(a) mandates a presumption that the CUP application was reasonable and that the BOCC had the burden to prove the application was unreasonable. K.S.A.2010 Supp. 12–757(a) states:

> "The governing body, from time to time, may supplement, change or generally revise the boundaries or regulations contained in zoning regulations by amendment. A proposal for such amendment may be initiated by the governing body or the planning commission. If such proposed amendment is not a general revision of the existing regulations and affects specific property, the amendment may be initiated by application of the owner of property affected. *Any such amendment, if in accordance with the land use plan or the land use element of a comprehensive plan, shall be presumed to be reasonable.*" (Emphasis added.)

While the Water District fails to cite any caselaw to support its position, it cites authority that directly contradicts its argument. See *Nash Special K's LLC v. City of Wichita,* No. 100,235, 2009 WL 2500977, at *7–8 (Kan.App.2009) (unpublished opinion). In *Nash,* a development company, Nash Special K's LLC, filed a zoning change application with the City of Wichita. It was undisputed that the application complied with the comprehensive land use plan in the Wichita Land Use Guide. However, the Wichita City Council denied the zoning request by finding, *inter alia,* that too many questions remained concerning the detrimental impacts on the surrounding properties. Therefore, the Wichita City Council determined the request did not comply with the Wichita Land Use Guide.

On appeal, Nash raised the same issue that the Water District raises here: "K.S.A. 12–757(a) commands that any proposed zoning amendment that complies with the applicable land use plan must be presumed reasonable." 2009 WL 2500977, at *7. The *Nash* panel, however, after quoting the statute, determined "an applicant's unapproved proposed amendment can never be presumed reasonable even if it is in accordance with the Land Use Guide." 2009 WL 2500977, at *8.

*7 K.S.A.2010 Supp. 12–757(a) is plain and unambiguous. As contrasted by the use of "proposed amendment" in 12–757(a), the Kansas Legislature clearly intended the presumption of reasonableness to attach only to adopted amendments that comply with the land use plan or the land use element of a comprehensive plan. The Water District's interpretation is unreasonable and not supported by the plain language of the statute. See *McElroy,* 281 Kan. at 262 (statutes should be interpreted to avoid unreasonable results).

Was BOCC's denial of the conditional use permit based solely on aesthetic considerations lawful and reasonable?

The standard of review, which was stated in *Combined Investment Co.,* 227 Kan. at 28, for the district and appellate courts when reviewing decisions on zoning, special use permits, and conditional use permits, is the same:

> " '(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.' " *Zimmerman,* 289 Kan. at 944–45 (quoting *Combined Investment Co.,* 272 Kan. at 28).

As determined earlier, the BOCC properly followed the voting procedures in K.S.A.2010 Supp. 12–757(f)(1). Thus, the question is whether the BOCC's decision was reasonable.

Reasonableness is a question of law to be determined on the facts. *Rodrock Enterprises, L.P. v. City of Olathe*, 28 Kan.App.2d 860, 863, 21 P.3d 598, *rev. denied* 271 Kan. 1037 (2001). It is presumed that the zoning authority acted reasonably, and an appellate court may not substitute its judgment for that of the administrative body. *Dowling Realty v. City of Shawnee*, 32 Kan.App.2d 536, 545, 85 P.3d 716 (2004).

Finally, the Water District contends the BOCC's use of aesthetics alone is "improper" and not "appropriate" While it acknowledges K.S.A. 12–755(a)(4) expressly allows governing bodies to adopt zoning regulations to "control the aesthetics of redevelopment or new development," the Water District contends this power was meant to grant the authority to create aesthetic standards and "not to establish the concept of some generalized form of aesthetics as a factor to consider in reviews of zoning change requests." The Water District cites no authority for the above proposition.

***8** Further, the Water District admits that Kansas courts have long allowed governing bodies to consider aesthetics in zoning matters, but argues that without intelligible and uniform aesthetic standards, the zoning decision turned on the subjective, vague, arbitrary, and improper aesthetic concerns of one dissenting county commissioner.

To this end, the Water District attempts to distinguish *Gump Rev. Trust*, 35 Kan.App.2d 501, claiming that in *Gump*, the City had objective evidence of its desire to maintain aesthetic standards by creating a comprehensive plan for the placement of disguised communication towers and had attempted beautification efforts in the area. In contrast, the Water District contends Miami County presented no aesthetic standards or evidence of any beautification efforts in the area of the proposed water storage tank.

Similarly, the plaintiff in *Gump* argued the City's decision to deny the CUP application for the stealth communications tower was "pure subjectivity" because the plaintiff complied with every requirement of the City's master plan. Although noting the lack of similar stealth towers in the area and attempts to beautify the area, the *Gump* court concluded: "While aesthetic considerations may not be as precise as more technical measures and must be carefully reviewed to assure that they are not just a vague justification for arbitrary and capricious decisions, they may be considered as a basis for zoning rulings." 35 Kan.App.2d at 512.

The Water District has the burden of proving by a preponderance of the evidence that the BOCC's decision was so wide of the mark that its unreasonableness lies outside the realm of fair debate. Further, this court can only declare a zoning decision unreasonable unless *clearly* compelled to do so by the evidence. See *Zimmerman*, 289 Kan. at 958.

Here, the dissenting county commissioner expressly noted that "there would be some adverse impact on the neighboring property owners that would, in the applicant's opinion, be outweighed by the benefit to the general public." Further, the dissenting county commissioner stated the water storage tank could "serve as a catalyst for higher residential density" and significantly change the character of the neighborhood. Additionally, the dissenting county commissioner expressed concern that other rural water storage tanks in southern Johnson County and Miami County were "not located directly across from residential structures."

This aesthetical concern permeates nearly all of the dissenting county commissioner's reasons for denying the CUP application. Consequently, the Water District has not carried its burden of proving the BOCC acted unreasonably.

Affirmed.

ATCHESON, J., dissenting:

***8** I respectfully dissent. This is a peculiar case. The factual circumstances effectively allowed a single member of the Miami Board of County Commissioners to block a permit for the construction of a water tower in a rural area. The planning commission and the other county commissioners favored issuing the permit. So did the professional planning staff. While that result is peculiar, it is not legally objectionable in and of itself. But the commissioner voted to deny the permit based solely on unexplained "aesthetic" considerations. Despite the tremendous deference the courts must afford zoning and land use decisions, I find the commissioner's stated reason wholly arbitrary and, therefore, legally inadequate. The district court upheld the denial of the permit, and the majority replicates that error. I would reverse and remand with directions that the permit issue, since no valid objection has been lodged.

***9** The majority opinion well sets forth the detailed history of this case, and I see no point in repeating that

account. I extract several facts especially pertinent to my analysis:

• The Miami County Commission consists of five elected members. In this case, one excused himself because he also served on the rural water district seeking the permit. A valid protest petition had been filed regarding the permit, meaning 3/4ths of the commission had to approve. K.S.A.2010 Supp. 12–757(f)(1). As a result, any one of the remaining four commissioners could deny the permit by voting against it. That would yield a 3–1 vote in favor or 60 percent of the commission—short of the required 75 percent super majority. And that's what happened here. The statute governing the tallying of votes hands such control to a lone official in the procedural circumstances presented here. But 12–757 has nothing to do with the substantive sufficiency of the reasons for the commissioners' votes on issuing the permit.

• Commissioner Ronald E. Stiles voted against the permit. In the county resolution submitted to the district court outlining the reasons for denial, Stiles finds: "The proposed tower would have a definite negative aesthetic impact on the neighboring properties." He noted that three homes would be, respectively, 550, 750, and 1,350 feet from the proposed water tower. The record indicates those residents opposed the permit. Stiles also said that no other water tower in *rural* Miami County or south Johnson County was so close to residences. But he failed to note that similar water towers had been built closer to homes inside the city limits of Paola and Louisburg. Stiles did not otherwise explain the "negative aesthetic impact" of the proposed water tower. Because of the super majority requirement, Stiles' vote against the permit effectively became the position of the county commission, and it is the focal point of the water district's court challenge.

• Building the water tower elsewhere would entail additional costs probably measured in the hundreds of thousands of dollars.

The water tower would be quite large, and I presume most people would consider it visually unappealing. But nobody presented evidence that the water tower would diminish land values.

The nub of the issue is the legal sufficiency of the reason for denying the permit. That is, does the recitation of "negative aesthetic impact" without something more suffice to reject a specific zoning or land use request?

When a county commission considers use permits or zoning changes for particular tracts of land, it acts not in a legislative capacity but in a quasi-judicial one. See *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 946–48, 218 P.3d 400 (2009). Quasi-judicial proceedings may be characterized as those entailing the "exercise of discretion" upon "notice and hearing" taken by a body "empowered to investigate facts, weigh evidence, and draw conclusions as a basis for official action." *Brown v. U.S.D. No. 333*, 261 Kan. 134, 156, 928 P.2d 57 (1996). They typically include at least some of "the normal trapping of a judicial inquiry," such as open hearings and argument or other participation by counsel. 261 Kan. at 156. Apart from those procedural attributes, the difference between legislative policy formulation and quasi-judicial decision making becomes significant in fixing the scope of a court's review of the result.

***10** Legislative actions and quasi-judicial decisions both entail reasons and outcomes. That is, the government actors have reasons for the outcomes they reach. When courts review legislative actions, the reasons are essentially unassailable. Elected officials acting in a legislative capacity can vote a certain way for good reasons, bad reasons, or entirely ridiculous reasons—they can flip coins or read tea leaves if they want. And that does not render the outcome vulnerable on judicial review. Voters, of course, might choose to turn out of office coin-flipping legislators. Judicial review of legislative outcomes is also severely constrained. Assuming the legislation—be it a city ordinance, a county resolution, or a state statute—meets all technical requirements for enactment such as proper notice, single subject, and the like, a court typically must uphold the measure even though it reflects monumentally unsound public policy. See *City of Baxter Springs v. Bryant*, 226 Kan. 383, Syl. ¶ 4, 598 P.2d 1051 (1979). If legislation impinges on a fundamental constitutional right or a suspect class, the courts may look at it more closely.

In reviewing quasi-judicial proceedings, however, the courts may consider both reasons and outcomes. And, indeed, an otherwise proper outcome may be set aside if the reasons betray unacceptable methods or grounds for adopting that outcome. Flipping a coin, for example, would be incompatible with weighing of evidence or drawing conclusions necessary to support a quasi-judicial decision. That would be true without regard to the soundness of the outcome, and a court would act within its authority to vacate the result as arbitrary. See *Robinson v. City of Wichita Retirement Bd. of Trustees*, 291 Kan. 266, 271, 241 P.3d 15 (2010) (A decision of a governmental body acting in a quasi-judicial capacity may be said to be arbitrary if it was reached " 'without adequate determining principles [or] not done ... according to reason or judgment.' ").

When a city council or county commission adopts a comprehensive zoning or land use plan, it acts in a legislative capacity. *Golden v. City of Overland Park*, 224 Kan. 591, Syl. ¶ 1, 584 P.2d 130 (1978). But when the same body considers rezoning a particular parcel or issuing a use permit of the sort for the water tower, it engages in quasi-judicial decision making. *Zimmerman*, 289 Kan. at 946 (citing *Golden*, the court characterizes "specific tract rezoning" as a quasi-judicial function.); *Golden*, 224 Kan. at 597. In that instance, the governing body may not rely simply on a yes or no vote on the change but should adopt a written statement of evidence and factors considered in making the decision. 224 Kan. at 597. The purpose is to assist the courts in reviewing that quasi-judicial decision. See 224 Kan. at 597.

When reviewing a quasi-judicial zoning or land use decision, as here, the courts are to look at the reasonableness of the action but, in doing so, must give particular deference to that action. See *Combined Investment Co. v. Board of Butler County Comm'rs*, 227 Kan. 17, 28, 605 P.2d 533 (1980). The court may not substitute its judgment for that of the governmental body. The majority opinion sets forth the eight rules outlined in *Combined Investment Co.* for assessing reasonableness, and I do not repeat them here.

***11** The Kansas appellate courts have recognized that municipal governments may take aesthetics into account in making specific rezoning and land use determinations. *Zimmerman*, 289 Kan. at 951; *Gump Rev. Trust v. City of Wichita*, 35 Kan.App.2d 501, Syl. ¶ 3, 131 P.3d 1268 (2006). But acceptable aesthetic considerations include articulable, objective justifications tied to the particular changes or uses. The *Gump* court pointed out that aesthetic factors often lack the precision of other, more technical zoning standards. 35 Kan.App.2d at 512. Accordingly, they "must be carefully reviewed" to prevent their use as camouflage for "arbitrary and capricious decisions." 35 Kan.App.2d at 512. The Kansas Supreme Court also noted that " '[T]here is an aesthetic and cultural side of municipal development which may be fostered *within reasonable limitations*.' " (Emphasis added.) *Houston v. Board of City Commissioners*, 218 Kan. 323, 329, 543 P.2d 1010 (1975).

For example, Wabaunsee County's zoning decision to ban commercial wind farms, reviewed in *Zimmerman*, could be supported, in part, on aesthetic grounds where that use would have allowed each farm to install upward of a dozen turbines between 260 and 300 feet tall mounted on large concrete pads. The facilities likely would have been constructed on higher elevations within the county. The facilities, therefore, would have been highly visible structures in the middle of the Tallgrass Prairie and the Flint Hills, recognized scenic attractions of the state. And they reasonably could be considered markedly detrimental to the scenic qualities of those areas. In addition, the pads would have had measurably negative effects on flora, fauna, and the overall ecology of the farms and the surrounding land. See *Zimmerman*, 289 Kan. at 952–53.

While less dramatic, the aesthetics at play in *Gump* were similarly anchored in measurable considerations. There, a provider of cell phone services wanted to install a 165–foot transmitting tower, ostensibly disguised as a flagpole, in an area of Wichita that had undergone "extensive beautification efforts." 35 Kan.App.2d at 503–04. This court upheld the city's denial of the request on aesthetic grounds. An existing regulation limited the height of structures of that type to no more than 85 feet in that part of the city without a special use permit. No permits had been granted. The evidence also showed the provider could furnish city-wide phone coverage without a tower of that height. 35 Kan. App.2d at 511–12.

Those cases illustrate acceptable reliance on aesthetic factors in making zoning and land use decisions. But this case typifies the vice the court warned of in *Gump*. Aesthetics has been played as a trump card to thwart construction of a water tower that appears to be in the public interest and under circumstances not appreciably different from those in which water towers already have been built in the same vicinity. The card is without identifiable suit or rank, yet it has prevailed. That's at least partly because aesthetic considerations, by their very nature, are squishy.

***12** Broadly speaking, aesthetics is the study of beauty and refinement and the discernment of the attributes that form those qualities. But what is pleasing in that respect ultimately defies predictive definition. There is truth in the cliches that one person's trash is another's treasure and beauty lies in the eye of the beholder. What distinguishes the beautiful ultimately rests on subjective judgment, rather than objective evaluation. Judicial process eschews that sort of subjectivity precisely because it confounds rational determination and predictable result.

Commissioner Stiles offered no descriptive explanation of the water tower's "negative aesthetics impact." He did not tie it to height requirements or similar objective criteria of

the type involved in *Gump*. Nor did he describe deleterious consequences for a recognized scenic or historic area, as in *Zimmerman*. The closest he came was the proximity of the water tower to residences. That suggests water towers make visually unpleasant neighbors. But the aesthetic impact here would have been no worse than what has already been permitted with water towers in Paola and Louisburg, where those structures are even closer to homes. The proposed water tower apparently would not violate any existing setback or screening requirements. And Stiles muddled his own rationale by suggesting the water tower could prompt construction of more homes in the immediate area—"a catalyst for a higher residential density" in the jargon of the resolution. Thus, he argues simultaneously that the water tower would be unaesthetic, but it would *attract* new homeowners.

What Stiles offered comes across as nothing more than the label "aesthetics" slapped on an I–don't–like–this–and–I'm–not–going–to–vote–for–it position. That would be unobjectionable if he were wearing his legislative-action hat. But he wasn't. He was acting in a quasi-judicial capacity. Stiles' rationale fails the general precepts for acceptable quasi-judicial decision making. It lacks determining principles and, for all appearances, looks to be based on wholly subjective considerations. Quasi-judicial process demands something more. See *Robinson*, 291 Kan. at 271.

Stiles' decision also fails to measure up to the more particularized factors for rezoning decisions outlined in *Combined Investment Co.*, 227 Kan. at 28. Most of those factors really don't apply at all or are otherwise accounted for. Thus, I have acknowledged the deference due the commission's decision and the limited role of the courts in reviewing that decision for reasonableness. And I have noted that the courts cannot substitute their views for those of quasi-judicial bodies. Encompassed in that deference is a presumption of reasonableness (otherwise we wouldn't be deferring and actually *would* substitute our judgment) and a requirement that the rural water district bear the burden of showing unreasonableness (again, that is bound up in deference to the decision). That essentially accounts for all of the *Combined Investment* factors, save one:

> ***13** "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." 227 Kan. at 28.

And it is the crucial factor.

The community benefits of the water tower were well established, and Stiles at least acknowledged them. There apparently was no countervailing harm to the community at large, as there would have been with commercial wind farms atop the Flint Hills in Wabaunsee County. To the contrary, building the water tower on any acceptable alternative site would have been considerably more expensive. Weighed against those considerations, the immediate neighbors of the proposed water tower were unhappy. The *Gump* court noted that although "neighborhood objections" may be considered in rezoning decisions, the ultimate determination rests on " 'the benefit or harm involved to the community at large.' " *Gump*, 35 Kan.App.2d at 511 (quoting *Waterstradt v. Board of Commissioners*, 203 Kan. 317, Syl. ¶ 3, 454 P.2d 445 [1969]). As I have discussed, Stiles' opposition depended upon some undefined, unqualified concern for "negative" aesthetics—the water tower would be unpleasant to look at. But it would be no more unpleasant than those water towers in Paola and Louisburg. And the water tower would not have violated any existing land use regulations. Stiles' position, thus, reflects a level of arbitrariness found unacceptable in *Combined Investment*.

As to the second component of the *Combined Investment* factor, Stiles' position doesn't so much "lie outside the realm of fair debate," as it effectively defies any debate at all. Stiles declared the water tower to be unaesthetic without tying his conclusion to any identifiable standard, past practice, or other even remotely objective measure. In other words, Stiles declared that in his view the water tower would not be aesthetic or pleasing in that location. He offered nothing more than a subjective opinion. A person's subjective opinion on a matter of aesthetics can't really be right or wrong in an objective sense if the person sincerely holds that view. Those opinions are undebatable. It is as if Stiles declared Michelangelo's Pieta to be a beautiful work of art and Beethoven's Ninth Symphony to be a sublime piece of music or, more to the point here, Picasso's Seated Nude and the Beatles' Lucy in the Sky with Diamonds as having "a definite negative aesthetic impact." Nobody can prove otherwise because the propositions, as unadulterated opinion, are unprovable.

It is, however, for that very reason purely subjective reliance on abstract or undefined aesthetics cannot creep into and control quasi-judicial decisions on zoning and land use. Those decisions defy meaningful definition and would thwart judicial review. Because they cannot be proven or disproven, they are inherently arbitrary and essentially impossible to debate as a basis for fashioning

those decisions. For that reason, I would hold Commissioner Stiles' expressed reason for denying the use permit legally insufficient under the *Combined Investment* test and contrary to the valid application of aesthetic considerations for land use decisions as reflected in *Zimmerman* and *Gump*.

***14** I hasten to add, however, that aesthetics reflect a valid component of zoning and land use regulation when tied to demonstrable or objective considerations. Preservation of historic buildings or neighborhoods may be considered aesthetic, just as avoiding the visual degradation of the Flint Hills with wind farms has been. Curtailing especially intrusive noises, smells, or sights certainly may be infused with aesthetics, thus justifying stringent limits or outright bans on livestock operations or quarrying adjacent to residential areas. Aesthetics can be incorporated into objective zoning requirements such as setbacks, height restrictions, and prohibitions on incompatible uses in certain zoning classifications. I do not suggest how best to position the line between acceptably defined aesthetic reasons for land use decisions and impermissibly subjective ones. But this case falls on the subjective side when Stiles pointed to no existing requirements consistent with his reason for denying the permit and when past practices in placing water towers near residences undercut that reasoning. The decision was arbitrary and, thus, legally insufficient.

By upholding Stiles' stated position for the outcome here, the majority invites municipal officials opposing a specific zoning or land use request to bulletproof their stance by relying, at least in part, on its "negative aesthetic impact." This case elevates aesthetics from a fair and appropriate consideration into an unassailable ground for rejection.[1]

All Citations

268 P.3d 12 (Table), 2012 WL 309165

Footnotes

[1] Although not material to my view of the case's disposition, I also disagree with the majority's conclusion that the language in K.S.A.2010 Supp. 12–757(a) imputing a presumption of reasonableness to a zoning amendment conforming to a comprehensive land use plan applies only after the amendment has been approved. That particular sentence speaks of "any such amendment," which plainly refers to the immediately preceding sentence discussing "such proposed amendment." The terms "such amendment" and "such proposed amendment" are used interchangeably throughout the statute. The statute, for example, discusses certain zoning changes proposed by groups of landowners and imposes notice and hearing requirements for "such amendments." K.S.A.2010 Supp. 12–757(c). That couldn't possibly refer to the amendment after it had been approved; giving notice and holding a hearing then wouldn't make sense. In short, if a proposed amendment conforms to a comprehensive plan, it comes to the government body with a presumption of reasonableness.

End of Document

APPENDIX C

444 P.3d 380 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Jerry L. VICKERS, et al., Appellants,
v.
FRANKLIN COUNTY BOARD OF COMMISSIONERS, Mid-States Materials, LLC, and Robert B. Killough, Appellees.

No. 118,649

Opinion filed July 19, 2019.

Appeal from Franklin District Court; ERIC W. GODDERZ, judge.

Attorneys and Law Firms

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Blaine Finch, of Finch, Covington & Boyd, Chartered, of Ottawa, Bradley R. Finkeldei, of Stevens & Brand, LLP, of Lawrence, and Derek L. Brown, county counselor, for appellees.

Before Bruns, P.J., Buser and Schroeder, JJ.

MEMORANDUM OPINION

Buser, J.:

*1 Jerry L. Vickers, et al. (collectively Plaintiffs) are landowners who own real estate near a rock quarry in Franklin County, Kansas. The rock quarry is owned by Robert B. Killough and leased to Mid-States Materials, LLC (Mid-States). Plaintiffs filed a lawsuit against the Franklin County Board of County Commissioners (Board), Mid-States, and Killough (collectively Defendants), seeking to set aside a special use permit granted in 1998 and to enjoin Mid-States from operating the rock quarry. The district court granted the Defendants' motion for summary judgment and upheld the validity of the special use permit. The Plaintiffs' motion for summary judgment was denied.

Plaintiffs appeal the district court's order granting summary judgment to the Defendants. On appeal, the Plaintiffs raise several arguments challenging the validity of the special use permit which allows for quarry operations. Plaintiffs contend: (1) Franklin County failed to follow the required procedures when issuing the 1998 special use permit; (2) the rock quarry was not operating as a legal nonconforming use when the special use permit was issued or thereafter; (3) Franklin County failed to address the factors identified in *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978), when granting the special use permit; and (4) the special use permit lapsed because rock sales did not occur every 365 days.

After reviewing the record on appeal and the parties' briefs, we find the Plaintiffs' argument—that the special use permit is invalid—has merit because Franklin County failed to comply with Kansas statutory requirements when issuing it. Accordingly, we reverse the district court's grant of summary judgment for Defendants which upheld the validity of the Quarry's special use permit. The case is remanded to the district court with directions to grant summary judgment for Plaintiffs on their claim that the Quarry's special use permit is invalid and to vacate the permit. On the other hand, on remand the district court is directed to grant summary judgment for Defendants on their claim that the Quarry was in operation prior to and at the time of the adoption of the zoning regulations and the Quarry's lawful nonconforming use has not been discontinued or abandoned since that time.

FACTUAL AND PROCEDURAL BACKGROUND

Mid-States operates a rock quarry in the Peoria Township of Franklin County, Kansas, on three adjoining tracts of land owned by Killough. The three tracts of land are collectively known as the Hickory Hills Quarry (the Quarry). Before Killough leased the Quarry to Mid-States in 2013, there were other operators.

The Quarry began operation in 1994 and was originally comprised of two tracts of land. By January 1995, the Quarry had a large pit and rock stockpile. On June 1,

1995, Killough leased the Quarry to Killough Quarries, Inc.—a corporation he owned and operated. About three months later, Killough Quarries, Inc. assigned the quarry lease to Hunt Midwest Mining, Inc. (Hunt Midwest). In 1996, Killough purchased the third tract of land which now included the Quarry. Killough and Hunt Midwest amended the assigned quarry lease in July 1997 to include the third tract of land. As of July 22, 1997, all three tracts of land that comprised the Quarry were leased to Hunt Midwest in a single lease.

*2 On January 8, 1998, the Board included the Peoria Township within Franklin County's zoning regulations by adopting Resolution 98-01. Under this resolution, all the unincorporated area of the Peoria Township was zoned as an Agricultural District (A-3).

To address existing businesses operating on previously unzoned property in Franklin County, the Board proposed Resolution 98-13. Resolution 98-13 passed on March 9, 1998, and added Section 116 to Article 4 of Franklin County's zoning regulations. Under Section 4-116, property owners had 180 days from the effective date of the amendment to apply for a special use permit at no charge. The procedure to obtain a special use permit under Section 4-116 is described later in this opinion.

In June 1998, Killough and Hunt Midwest applied for a special use permit for rock quarrying and mining, rock crushing, rock stockpiling, and rock sales on the Quarry. Franklin County did not provide the Quarry's surrounding neighbors with notice of the special use permit application. A special use permit was approved for the Quarry on July 10, 1998.

Killough leased the Quarry to Mid-States in 2013. About three years later, in June 2016, Mid-States began blasting rock at the Quarry. This was the first time since 1994 that rock was blasted or mined from the Quarry. On September 26, 2016, Plaintiffs filed this action and petitioned the district court for an order declaring the Quarry's special use permit invalid and also seeking to enjoin the Defendants from all quarry operations.

Both parties moved for summary judgment. Defendants argued that summary judgment should be granted in their favor because: (1) the Quarry's special use permit was valid, and (2) even if the special use permit was invalid, the Quarry was operating as a legal nonconforming use. Plaintiffs responded that summary judgment should be granted in their favor because the Quarry's special use permit was not valid. Plaintiffs also claimed the Quarry may not operate as a nonconforming use because no quarry operations occurred for more than six months before Franklin County issued the special use permit or thereafter.

The district court granted Defendants' motion for summary judgment based on its determination that the Quarry's special use permit was validly issued by Franklin County.

Plaintiffs appeal.

THE VALIDITY OF THE QUARRY'S SPECIAL USE PERMIT

On appeal, the Plaintiffs contend the Quarry's special use permit is invalid because Franklin County violated the procedural requirements of K.S.A. 12-757 and Franklin County's 1998 zoning regulations (1998 Zoning Regulations) when approving the special use permit. Plaintiffs also assert: (1) the special use permit was invalid because Franklin County failed to consider the so-called *Golden* factors, [1] *Golden*, 224 Kan. at 598-99; (2) Defendants failed to prove the Quarry's special use permit had not lapsed; and (3) the Quarry was not operating as a legal nonconforming use.

We begin the analysis with our standard of review. Our court's standard for reviewing a district court's summary judgment ruling is well established:

> " ' "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and when we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." ' [Citation omitted.]" *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 621, 413 P.3d 432 (2018).

*3 As discussed throughout this opinion, the district court made numerous findings of fact that were set forth in separately numbered paragraphs in its journal entry filed

on November 22, 2017. The parties do not argue that there is any genuine issue as to any material fact found by the district court. Rather, as they did in the district court, the parties strongly dispute the district court's legal conclusions based on those material facts.

Without any factual dispute, our review of a summary judgment order is de novo. *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013). The interpretation of statutes and ordinances also presents questions of law subject to de novo review. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659, 367 P.3d 282 (2016).

Our court applies the same rules in interpreting a municipal ordinance as it does in interpreting a statute. *Robinson v. City of Wichita Employees' Retirement Bd. of Trustees*, 291 Kan. 266, 272, 241 P.3d 15 (2010). The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State ex rel. Schmidt*, 303 Kan. at 659. An appellate court must first attempt to determine legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. 304 Kan. at 409.

Article 11 of the 1998 Zoning Regulations addressed general procedures for amending the zoning regulations. To obtain a special use permit under Article 11, a property owner was required to submit a proposed special use permit to the planning agency. For its part, the planning agency was required to hold a public hearing and provide notice of the hearing to surrounding landowners. After a public hearing, the special use permit could then be approved by a vote of the Board.

Separate and apart from Article 11, however, a few months later the Board adopted Section 4-116 into the 1998 Zoning Regulations by enacting Resolution 98-13. The intent of Section 4-116 was to "protect all property owners that are operating legal existing businesses located within previously unzoned townships." Section 4-116 applied to townships unzoned before May 7, 1997, but that were later included in the Franklin County zoning regulations. Because the Peoria Township was unzoned prior to May 1997 but was included in the Franklin County zoning regulations on January 8, 1998, Section 4-116 clearly applied to the Quarry.

Section 4-116 allowed the Franklin County Planning Department to issue special use permits to legal existing businesses located in previously unzoned townships. Businesses were allowed to expand the legal bounds of the property, but expansion into additional property acquired after the special use permit was issued required compliance with the application and review process provided in Article 11. Of note, special use permits issued under Section 4-116 were continuous "unless the use is abandoned or vacated for longer than 365 days at which time the Special Use Permit will become null and void."

Peoria Township property owners had 180 days from March 9, 1998, to apply for a special use permit authorized by Section 4-116. To apply for a special use permit under Section 4-116, a property owner was required to file certain documents with the Franklin County Planning Department. The planning department was empowered to review the special use permit application and issue a special use permit to valid existing businesses in the previously unzoned townships. Importantly, unlike Article 11 procedures, Section 4-116 did *not* require notice to surrounding landowners, hearings, or a vote of the Board.

*4 In compliance with Section 4-116, Hunt Midwest applied for a special use permit within 180 days of March 9, 1998. Upon review, the Planning Director approved a special use permit for operations involving the Quarry on July 10, 1998. Prior to granting the special use permit, there was no notice to surrounding landowners, no public hearings, no recommendations by the planning agency, and no vote by the Board. As mentioned earlier, no such procedural requirements were required under Section 4-116.

Although Section 4-116 did not require the county to comply with procedural safeguards, a fundamental question was raised by Plaintiffs in the district court and is reprised on appeal: Did procedural failures or omissions render the Quarry's special use permit invalid under Kansas statutes, in particular, K.S.A. 12-757?

A municipality has no inherent power to enact zoning laws. Instead, a municipality's zoning power is derived solely from the authority granted to the municipality by Kansas zoning statutes. *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 884, 69 P.3d 601 (2003). In addition to the zoning statutes in K.S.A. 12-741 et seq., municipalities may enact and enforce additional zoning regulations *which do not conflict* with those statutes. K.S.A. 12-741(a). Our Supreme Court has "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." 275 Kan. at 886.

Under K.S.A. 12-755(a), a county's governing body may adopt zoning regulations that provide for issuing special use permits. But K.S.A. 12-757 demands certain notice and hearing requirements for amending zoning regulations. Importantly, although K.S.A. 12-757 does not explicitly mention special use permits, our Supreme Court has consistently found the procedures in K.S.A. 12-757 apply to special use permits. *Manly v. City of Shawnee*, 287 Kan. 63, 67, 194 P.3d 1 (2008); *Crumbaker*, 275 Kan. at 886.

K.S.A. 1998 Supp. 12-757(b) provides that the planning commission must hold a public hearing on proposed zoning amendments. If the proposed amendment affects specific property, "written notice of such proposed amendment shall be mailed at least 20 days before the hearing ... to all owners of record of real property located within at least 1,000 feet of the area proposed to be altered." K.S.A. 1998 Supp. 12-757(b). After receiving the planning commission's recommendation, the county's governing body may adopt that recommendation by resolution, override the planning commission's recommendation by a two-thirds majority vote, or return the recommendation to the planning commission. K.S.A. 1998 Supp. 12-757(d). But if the adjoining landowners who were required to be notified file a protest petition, the governing body must approve the amendment by a three-fourths vote. K.S.A. 1998 Supp. 12-757(f).

Upon the adoption of Resolution 98-01, the Quarry was zoned as an Agricultural District (A-3). Any zoning change or special use permit issued after this initial zoning of the Quarry required Franklin County to follow the procedures in K.S.A. 12-757. Yet, it is undisputed that the Quarry's special use permit was granted without a public hearing, notice to the surrounding landowners, or a vote by the Board. As a result, the special use permit application process in Section 4-116 of the 1998 Zoning Regulations did not comply with the mandatory statutory procedures set forth in K.S.A. 12-757.

*5 The procedural defects here resemble those in *Crumbaker*. In *Crumbaker*, the defendant operated a quarry under Johnson County zoning designations with a 10-year conditional use permit. Before the conditional use permit expired, the defendant and the City of DeSoto entered into an annexation agreement. Under this agreement, the City allowed the defendant to continue and expand quarry operations without following the procedures for rezoning and obtaining a special use permit under K.S.A. 12-757. Our Supreme Court held that this procedural failure rendered the City's action invalid. 275 Kan. at 887.

In the case on appeal, Defendants argue that the statutory procedures provided in K.S.A. 12-757 are not applicable to the Quarry's special use permit because the quarry was a nonconforming use. In support of their argument, Defendants rely on *M.S.W., Inc. v. Marion County Bd. of Zoning Appeals*, 29 Kan. App. 2d 139, 24 P.3d 175 (2001).

Kansas law recognizes the nonconforming use doctrine. *Zimmerman v. Board of Wabaunsee County Comm'rs*, 293 Kan. 332, 347, 264 P.3d 989 (2011). A nonconforming use is "a lawful use of land or buildings which existed prior to the enactment of a zoning ordinance and which is allowed to continue despite the fact it does not comply with the newly enacted use restrictions." *Johnson County Memorial Gardens, Inc. v. City of Overland Park*, 239 Kan. 221, 224, 718 P.2d 1302 (1986). Kansas courts have recognized that the nonconforming use doctrine has a policy of restriction and eventual elimination of the nonconforming use. *Board of Seward County Comm'rs v. Navarro*, 35 Kan. App. 2d 744, 752, 133 P.3d 1283 (2006). "If a nonconforming use is established, however, the party has a vested right which is protected by due process." *Crumbaker*, 275 Kan. at 882.

The nonconforming use doctrine is codified at K.S.A. 12-758(a), which states that "regulations adopted under authority of this act shall not apply to the existing use of any building or land." Contrary to Defendants' argument, however, the Quarry was not exempt from the requirements of Kansas statutes based on this statutory language. While the *regulations* zoning the area as agricultural land did not apply to the Quarry, Defendants still needed to follow the *statutory* procedures provided in K.S.A. 12-757 to obtain a special use permit for the Quarry property.

Defendants' reliance on *M.S.W.* is not persuasive. In *M.S.W.*, Marion County passed a 1992 resolution that zoned previously unzoned areas of the county and simultaneously granted 116 conditional use permits for existing uses. As part of this resolution, the property at issue was zoned agricultural with a conditional use permit allowing for use as a solid waste landfill. The landfill closed in 1996 and, more than a year later, the plaintiff purchased the property. The Plaintiff's applications for landfill permits, however, were rejected. The Board of Zoning Appeals found that no nonconforming use ever existed and the conditional use permit lapsed because the landfill had been closed for over six months.

The *M.S.W.* court held that the county was not required to follow the procedures in the zoning ordinances for issuing a conditional use permit when the conditional use permit was issued simultaneously with the initial zoning. 29 Kan. App. 2d at 147-55. The court agreed that the conditional use permit had the same effect for the landowner as a landfill zoning classification. 29 Kan. App. 2d at 150. The *M.S.W.* court also noted the "granting of [conditional use permits] *simultaneously* with the initial zoning regulations in order to avoid the creation of nonconforming uses is consistent with the disfavored status of nonconforming uses." (Emphasis added.) 29 Kan. App. 2d at 154.

*6 While in the case on appeal, Section 4-116 similarly sought to eliminate nonconforming uses, the circumstances in *M.S.W.* are different from this case. In *M.S.W.*, the county granted the conditional use permit at the time of the initial zoning. Here, the Quarry was operating as a nonconforming use after the property was zoned agricultural in January 1998. Section 4-116 then provided Killough and Hunt Midwest the opportunity to exchange its nonconforming use status for a special use permit.

By issuing the special use permit, the County granted Killough and Hunt Midwest additional protections and rights they would not have enjoyed as a nonconforming use. For example, the special use permit allowed the current use to expand without restriction, allowed for any structure to be rebuilt, and extended the time the use could be abandoned and then resumed. These additional rights granted through the special use permit required Defendants to abide by the statutory procedures found in K.S.A. 12-757.

Moreover, the parties and court in *M.S.W.* did not consider whether the county's unilateral grant of conditional use permits concurrently with the initial zoning regulations violated K.S.A. 12-757. Instead, the legal arguments in *M.S.W.* focused on whether the simultaneous grant of conditional use permits with the initial zoning regulations violated the nonconforming use doctrine. In *M.S.W.*, the plaintiff's main contention was that the county "converted its vested right of a nonconforming use landfill into a nonvested right of a conditional use of property as a landfill without any due process." 29 Kan. App. 2d at 152. While the plaintiff's argument in *M.S.W.* failed to show that the conditional use permit was void, Plaintiffs' arguments here successfully show that the Quarry's special use permit is invalid.

Although the Quarry's special use permit was issued in compliance with the process outlined in Section 4-116, Defendants may not circumvent Kansas' zoning statutes. The failure to follow the notice and procedure requirements of K.S.A. 12-757 when issuing the special use permit renders the county's action invalid. See *Crumbaker*, 275 Kan. at 887. As a result, the Quarry's special use permit must be invalidated.

Because the Quarry's special use permit is invalid, we reverse the district court's grant of summary judgment for Defendants which upheld the validity of the Quarry's special use permit. The case is remanded to the district court with directions to grant summary judgment for Plaintiffs on their claim that the Quarry's special use permit is invalid and to vacate the permit. Given our holding based on the Board's noncompliance with the notice and procedure requirements of K.S.A. 12-757, we decline to consider Plaintiffs' other grounds also challenging the validity of the special use permit.

In addition to raising the issue of the invalidity of the special use permit, however, the Plaintiffs also appealed the district court's finding that the Quarry was in operation prior to and at the time of the adoption of the zoning regulations and the Quarry's legal nonconforming use has not been discontinued or abandoned since that time.

THE QUARRY'S STATUS AS A NONCONFORMING USE

As part of their motion for summary judgment, Plaintiffs contended that the Quarry was not a legal nonconforming use prior to or after the issuance of the special use permit. Plaintiffs acknowledged that under K.S.A. 12-758, land use which existed prior to the enactment of a zoning ordinance may continue despite the fact it does not comply with newly enacted zoning restrictions. As Plaintiffs described it: "The non-conforming use is thereby allowed to continue, or '*grandfathered in*' and the landowner is allowed to continue the use even if it is a violation of the zoning modification." But Plaintiffs cited Article 8 of the 1998 Zoning Regulations, which provided that any nonconforming use that is "voluntarily discontinued" for a period of six consecutive calendar months shall not thereafter be resumed.

*7 On appeal, Plaintiffs contend that Defendants

> "cannot now claim a non-conforming use for a quarry when the evidence is uncontroverted that the

> non-conforming use has been discontinued and lapsed since no rock sales, rock crushing, mining or blasting had occurred for six (6) months after Peoria Township was zoned, and prior to the issuance of [the special use permit] on July 10, 1998."

A nonconforming use is a use which lawfully existed before the enactment of a zoning ordinance. A nonconforming use is allowed to be maintained after the effective date of the ordinance even though it does not comply with newly enacted use restrictions. The party claiming the nonconforming use has the burden to prove such use exists. *Crumbaker*, 275 Kan. at 881; but see *Kuhl v. Zoning Hearing Bd. of Greene Tp.*, 52 Pa. Commw. 249, 251, 415 A.2d 954 (1980) ("Abandonment is a question of fact which depends upon all the factors present in a case, and the burden of proving an abandonment of a non-conforming use is on those who assert the abandonment.").

Article 8 of the 1998 Zoning Regulations addressed nonconforming uses. Under Section 8-130(I), when a nonconforming use of land is discontinued or abandoned for six consecutive months, the nonconforming use may not be reestablished or resumed, and any subsequent use must conform to the zoning regulations. In granting summary judgment to Defendants, the district court determined that (1) the Quarry operated as a nonconforming use when Peoria Township was zoned, and (2) the nonconforming use was never discontinued or abandoned.

In this case the uncontroverted facts showed no mining, crushing, or blasting of rock occurred at the Quarry from 1994 until 2016. There were no rock sales from October 1997 until November 1998. As a result, no rock sales from the Quarry occurred during the six months after the Peoria Township was zoned. However, the Quarry was leased by Killough each year since 1997 and the district court specifically found that "rock was sold from the Quarry every year since 1997."

The district court specifically applied the law from *Union Quarries, Inc. v. Board of County Commissioners*, 206 Kan. 268, 275, 478 P.2d 181 (1970), which, in the words of the district court, meant that "the legal, non-conforming use existed, continued, and was not abandoned as long as rock from the quarry was sold each year and the quarry use was not otherwise abandoned." In this regard, the district court made two key findings. First,

> "[r]ock sales occurred in October 1997 from the Quarry, which was within a year before the zoning resolution was passed on January 8, 1998, and thus the Quarry was in operation prior to the adoption of the zoning regulations, and was a non-conforming use at the time of the adoption of the zoning regulations."

Second, "the Quarry use has not been discontinued or abandoned since January 8, 1998."

Was the use of the Quarry discontinued or abandoned prior to or after enactment of the 1998 Zoning Regulations? The word discontinuance, as used in a zoning ordinance, is equivalent to abandonment. *Union Quarries*, 206 Kan. at 275. "Abandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (1) An intention to abandon; and (2) an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the nonconforming use." 206 Kan. 268, Syl. ¶ 3. Importantly: "Mere cessation of use does not of itself amount to abandonment although the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned." 206 Kan. 268, Syl. ¶ 4.

***8** While abandoning a nonconforming use typically requires an intent to abandon the use, the 1998 Zoning Regulations eliminate the intent requirement. Section 8-130(I) provides that when a nonconforming use is discontinued or abandoned for six consecutive months "(regardless [of] any reservation of an intent not to abandon or to resume such use), such use shall not thereafter be re-established or resumed."

Our Supreme Court has addressed whether a nonconforming quarry use was abandoned in *Union Quarries*. The quarry operator in *Union Quarries* had removed its quarrying and crushing equipment from the land. Then, for a period of two years, there was no rock drilling, blasting, or crushing on the quarry land. And, similar to the present case, the regulations at issue in *Union Quarries* provided that a nonconforming use that has been abandoned for six months may not be resumed.

Our Supreme Court in *Union Quarries* held that the evidence supported a finding that the nonconforming quarry use was not abandoned. 206 Kan. at 276. The court found that the quarry operator's actions of using portable quarrying equipment as needed to maintain rock stockpiles was in line with common quarrying practices. The court then noted that, during the two years of no blasting, the quarry operator made royalty payments, small quantities of rock were sold, and a salesperson quoted rock prices to construction companies. The court concluded: "The property was initially purchased for a

rock quarry. There was little in the evidence to suggest abandonment—to the contrary, it indicated the property has continually been held for the same purpose." 206 Kan. at 276.

A review of law from other jurisdictions also supports the view that a nonconforming quarry use is not abandoned simply because there is no rock mining, crushing, or blasting. See *Bither v. Baker Rock Crushing Co.*, 249 Or. 640, 649, 438 P.2d 988, modified 440 P.2d 368 (1968). Indeed, courts typically find that a nonconforming quarry use is not abandoned when there is storage and sale of rock. *River Springs, Ltd. Liability Co. v. Board of Teton County Comm'rs*, 899 P.2d 1329, 1335 (Wyo. 1995) (holding that a nonconforming quarry was not abandoned, even though the quarry was substantially dormant for six years, when small quantities of previously quarried limestone were removed). See *Hinkle v. Board of Zoning Adjustment and Appeals of Shelby County.*, 415 S.W.2d 97, 100 (Ky. 1967) (noting that "although the only activities at the quarry were the storage and sale of stone, the quarry was never abandoned").

Two Oregon cases provide additional guidance on whether a nonconforming quarry use has been abandoned. In *Polk County. v. Martin*, 292 Or. 69, 78, 636 P.2d 952 (1981), the court held that a nonconforming quarry use had not been abandoned even though the use was intermittent and fluctuated. In the four years before the quarry in *Martin* was zoned, only 6,000 cubic yards of rock were removed with less than $1,000 of sales. However, this low production and sales were consistent with the quarry's previous 30 years.

The *Martin* court determined that there was no interruption in use either before or after the zoning ordinance became effective. Although the sporadic and intermittent use was relevant to the scope of the permitted nonconforming use, it did not negate the existence of an ongoing quarry business. 292 Or. at 76. The *Martin* court found:

> *9 "The land had been used in the same manner for over 30 years. There was continuous use in the sense that stockpiling existed and the owner had committed the property to that use. Even though the sales were not substantial, rock was available for sale and sales were periodically made. The same is true of the quarrying. There was no interruption of the use ...." 292 Or. at 78.

In the other Oregon case, *Tigard Sand and Gravel, Inc. v. Clackamas County*, 149 Or. App. 417, 423-24, 943 P.2d 1106 (1997), the court distinguished *Martin* and found that a nonconforming quarry use had been abandoned for more than 12 consecutive months. After the quarry in *Tigard Sand* was zoned, there was no crushing or quarrying activity from 1984 until 1991. Although there was a rock stockpile on the property, the site did not remain open for sales during the seven-year period. And, from 1989 to 1991, the property was converted into a firewood processing and wood sorting business while the quarry site was not utilized.

In holding that the nonconforming quarry use was abandoned, the *Tigard Sand* court found:

> "In this case ... petitioner's quarry use was not simply fluctuating, intermittent or sporadic. For a period of seven years, it virtually had stopped, and, for the last two of those seven years, the site on which it had been conducted was used principally, if not exclusively, for a business activity that was totally unrelated to quarry operations. Under the findings, the nonconforming quarry use was both interrupted and abandoned as a matter of law, and the resumption of the use was foreclosed ...." 149 Or. App. at 424.

Returning to the present case, both before and after enactment of the 1998 Zoning Regulations, the land was continually under lease to quarry operators, rock was continuously stockpiled at the Quarry, and there were yearly rock sales. The Quarry was created by blasting and quarrying about 30,000 tons of rock. This rock was stockpiled and periodically sold over the next 20 years. The evidence shows that, from at least 1996 to 2000, Hunt Midwest sold rock from the Quarry each year. During this time—both before and after the Peoria Township was zoned—rock sales occurred several months apart and the amount sold per year varied from 3,283 tons in 1996, 662 tons in 1997, 112 tons in 1998, 2,246 tons in 1999, and 1912 tons in 2000. No other use—other than operating and maintaining the Quarry—occurred on the land from the date the Quarry was established until this litigation.

As in *Martin*, the Quarry land had been in use as a quarry for many years. There was continuous use in the sense that stockpiling occurred and the owner had committed to this particular use and no other. Rock was available for sale and sales were periodically transacted at least once per year. There was no interruption in this use of the Quarry. The intermittent sales that occurred after the quarry was zoned resembled its previous use. Even though there were no rock sales in the six months after the Peoria Township was zoned, the quarry was not abandoned.

We decline to adopt Plaintiffs' suggestion that a nonconforming quarry use is invariably abandoned between rock sales. A quarry is a unique business. Although intent to abandon is not relevant to the 1998 Zoning Regulations, courts widely recognize that quarry operations are inherently sporadic and abandonment may not be inferred from the mere fact that blasting or crushing stopped or rock sales fluctuated. As the court in *Tigard Sand* observed: "[Q]uarry uses are generally more likely than some other types of uses to be characterized by variations in activity levels and, when that is so, that their 'continuity' should be gauged accordingly." [redacted] 149 Or. App. at 423-24.

***10** The Quarry was continuously used as a rock quarry prior to and at the time of the adoption of the zoning regulations. The Quarry was leased by Hunt Midwest and there is no evidence that the land was used for another purpose. Although rock sales were sporadic, rock was stockpiled, available for sale, and sales were periodically made at least once a year. The district court did not err in its legal conclusion that the Quarry has been operating continually and without abandonment as a lawful, nonconforming use since prior to and at the time of the adoption of the zoning regulations.

Although the district court made sufficient findings of fact and legal conclusions favoring Defendants' nonconforming use claim, it did not specifically order summary judgment for Defendants on that basis, undoubtedly because it granted summary judgment for Defendants based on the special use permit claim. Accordingly, on remand, the district court is directed to grant summary judgment for Defendants on the claim that the Quarry was in operation prior to and at the time of the adoption of the zoning regulations and the Quarry's lawful nonconforming use has not been discontinued or abandoned since that time.

Reversed and remanded with directions.

All Citations

444 P.3d 380 (Table), 2019 WL 3242274

End of Document

APPENDIX D

464 P.3d 395 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Martin TERNES, et al.,
Appellees/Cross-appellants,
v.
BOARD OF COUNTY COMMISSIONERS OF SUMNER COUNTY, Kansas,
Appellant/Cross-appellee.

No. 119,073

Opinion filed June 12, 2020

Review Denied November 24, 2020

Appeal from Sumner District Court; WILLIAM R. MOTT, judge.

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Before Buser, P.J., Green and Malone, JJ.

MEMORANDUM OPINION

Buser, J.:

*1 This appeal and cross-appeal arise from Invenergy, LLC's (Invenergy) applications for a zoning change and conditional use permit to allow the construction and operation of the Argyle Creek Wind Project in Sumner County. After a planning commission recommended denying Invenergy's applications, the Sumner County Board of County Commissioners (Board) voted to approve both applications. Plaintiffs, who include several Sumner County landowners, challenged the Board's decisions in district court. The district court struck the zoning change and conditional use permit, finding the zoning change was unreasonable and the Board lacked jurisdiction to approve the conditional use permit.

On appeal, the Board first contends the district court erred by striking the conditional use permit because the Board could approve the permit against the planning commission's recommendation. The Board next argues the zoning change was reasonable even though the evidence presented at the hearings supported only a wind energy project and no other permitted use in an Agricultural Commercial District. Plaintiffs cross-appeal arguing that imperfect notice on the applications rendered the Board's zoning decisions invalid.

Upon review, we hold that the district court erred by striking the zoning change and conditional use permit. Contrary to the district court's findings, the Board could approve the conditional use permit despite the planning commission's recommendation to deny the permit, and the zoning change was reasonable. We also find the district court did not err by ruling that imperfect notice by Sumner County did not render the zoning decisions invalid. Accordingly, we affirm in part, reverse in part, and remand with directions to uphold the resolutions approving the zoning change and Invenergy's conditional use permit.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2015, Invenergy began obtaining lease agreements from Sumner County landowners in anticipation of developing a wind farm. Under the Sumner County Zoning Regulations (Zoning Regulations), commercial wind energy projects are allowed on Agricultural Commercial District property through a conditional use permit. But the land Invenergy wished to develop was zoned Rural District, which did not permit wind energy projects. As a result, Invenergy needed to satisfy two requirements to lawfully operate the wind farm: (1) obtain a zoning change from Rural District to Agricultural Commercial District and (2) obtain a conditional use permit to operate a commercial wind farm.

In 2016, Invenergy filed applications for a zoning change

and for a conditional use permit. The proposed zoning change and conditional use permit impacted about 14,000 acres of land in northern Sumner County. Invenergy planned to include between 60 and 65 commercial wind turbines in the Argyle Creek Wind Project.

Notice of Invenergy's Applications

On November 10, 2016, the County published an official notice in the *Belle Plaine News* for Invenergy's zoning change application and conditional use application. The notice identified the applicant as Invenergy, correctly stated the legal description of the property, and included a map prominently labeled "Argyle Creek Wind Project." But the notice incorrectly used the name of a previously approved wind energy project—"Wild Plains Wind Project"—when describing Invenergy's request for a conditional use permit. The Wild Plains Wind Project is unrelated to Invenergy's Argyle Creek Wind Project. The notice explained that a public hearing before the Sumner County Planning Commission (Planning Commission) would occur on December 7, 2016.

*2 On November 17, 2016, the County mailed certified letters to all persons and entities owning property within 1,000 feet of the Argyle Creek Wind Project, except for Jeffery and Brooke Potucek. The letter contained the published notice, a map of the project's boundary, and notice that Invenergy's applications would be presented to the Planning Commission on December 7, 2016. The notice in this letter also incorrectly used the name "Wild Plains Wind Project" when describing Invenergy's request for a conditional use permit. But again, the map was labeled "Argyle Creek Wind Project" and the legal description correctly described the proposed project's boundaries.

Before the Planning Commission's December 7, 2016 meeting, the County discovered the error in the published notice and the certified letters. The County determined the error did not require republication or continuing the Planning Commission's meeting to a later date. However, on December 1, 2016, the County mailed another certified letter to landowners owning property within 1,000 feet of the project. Once again, the County failed to address a letter to Jeffery and Brooke Potucek. The newly mailed letter contained a revised official notice with the project name corrected to "Argyle Creek Wind Project."

Sumner County never published a corrected notice in the *Belle Plaine News*. The only notice mailed 20 days before the Planning Commission's meeting contained the incorrect name of "Wild Plains Wind Project" when describing the requested conditional use permit.

The Planning Commission's Public Hearing

On December 7, 2016, the Planning Commission met and held a public hearing on Invenergy's applications for a zoning change and a conditional use permit. The Planning Commission first considered Invenergy's zoning change application. An Invenergy representative explained that the company wished to construct a commercial wind project and gave a presentation. Thirteen citizens commented on Invenergy's zoning change application. Many citizens spoke against the zoning change application, raising concerns about health issues, diminished property values, noise problems, and undesirable scenery. Invenergy representatives addressed some of the public's concerns.

After hearing the comments, the Planning Commission voted to recommend denying the zoning change application by a vote of five to three. The members who voted to recommend denial reasoned that the area contained too many current and future residential properties, the zoning change would adversely affect surrounding land use, and the change did not follow the comprehensive plan.

The Planning Commission next considered Invenergy's conditional use application. Again, Invenergy representatives and public citizens commented on this application. The Planning Commission then voted to recommend denying the conditional use application by a vote of five to three. During the public hearing, County staff announced that the Board would make a final decision on December 27, 2016. The Planning Commission submitted a written report of its findings to the Board.

On December 21, 2016, Sumner County mailed Jeffery and Brooke Potucek a letter about Invenergy's applications and informed them of the Board's meeting scheduled for December 27, 2016. That same day, Invenergy amended its applications by revising the project's boundaries. The revised boundaries eliminated about 700 acres of the project to address concerns over the project's proximity to an area with higher housing density. As a result of the reduced footprint, the land belonging to the Potuceks—along with several other individuals—was no longer within 1,000 feet of the project boundary.

The Board's Hearing

*3 On December 27, 2016, the Board met to consider Invenergy's applications. The Board first took up Invenergy's zoning change application, which sought the zoning change from Rural District to Agricultural Commercial District. After Invenergy representatives spoke, 29 citizens commented on the zoning change application. While most of the citizens spoke in opposition, some spoke in favor of the application. The Board voted two to one to approve the zoning change application containing the reduced footprint.

The Board next considered Invenergy's application for a conditional use permit. Jerry Hawkins, an attorney who represented some landowners at the time, argued the conditional use issue was in the Planning Commission's exclusive jurisdiction. Hawkins recited a portion of the Zoning Regulations at issue in this appeal and argued that the Planning Commission needed to approve the conditional use application before the Board could grant the permit. Nine citizens then commented on the conditional use application. After Invenergy representatives responded to the citizens' concerns, the Board approved the conditional use permit by a vote of two to one.

The District Court Strikes the Zoning Change and Conditional Use Permit

Plaintiffs challenged the Board's decisions under K.S.A. 12-760 by filing an action in the district court. In their petition, Plaintiffs argued: (1) the Board lacked jurisdiction to grant the conditional use permit; (2) the Board's decision to grant Invenergy's applications was unreasonable; (3) the published and mailed notices of the Planning Commission's public hearing were defective; and (4) the County failed to provide due process to Plaintiffs.

After the parties filed cross-motions for summary judgment, the district court granted Plaintiffs' motion to bifurcate the reasonableness issue from the other issues. As a result, the district court deferred addressing whether the Board's approval of Invenergy's applications was reasonable until it decided the other issues.

The district court first granted Plaintiffs' motion for summary judgment on Invenergy's conditional use permit and determined the permit was void. In this ruling, the district court found that the Zoning Regulations require both a positive recommendation from the Planning Commission and approval by the Board before a conditional use permit for a wind farm may be issued. Because the Planning Commission recommended against the conditional use permit, the district court determined the Board lacked jurisdiction to approve the permit. However, the district court ruled that no notice defects or due process concerns rendered the zoning change invalid on procedural grounds. Accordingly, the district court ordered a hearing on the bifurcated question of whether the Board's approval of the zoning change was reasonable.

After hearing the parties' arguments on the reasonableness of the zoning change, the district court granted Plaintiffs' motion for summary judgment and struck the resolution approving the zoning change. In this ruling, the district court found that the zoning change was unreasonable because no evidence was presented which supported any permissible Agricultural Commercial District use other than a wind energy project.

The Board appeals and Plaintiffs cross-appeal.

BOARD'S APPROVAL OF THE CONDITIONAL USE PERMIT AGAINST THE PLANNING COMMISSION'S RECOMMENDATION

The Board first contends the district court erred by finding the Zoning Regulations required approval from both the Planning Commission and the Board to grant Invenergy's conditional use permit. The Board argues that the Planning Commission issues only recommendations, and the Board retains the ultimate authority to approve a conditional use permit. The Board suggests a contrary interpretation requiring approval of both bodies would violate state law and be unenforceable.

*4 Because the material facts are uncontroverted, we review the district court's summary judgment order de novo. *Wagner Interior Supply of Wichita, Inc. v. Dynamic Drywall, Inc.*, 305 Kan. 828, 831, 389 P.3d 205 (2017). Similarly, the interpretation of statutes and ordinances presents questions of law subject to unlimited review. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659, 367 P.3d 282 (2016).

The district court found that Article VII, Section 3, Paragraph 12 of the Zoning Regulations required a positive recommendation from the Planning Commission

before Invenergy's conditional use permit could be granted. Article VII of the Zoning Regulations establishes the Agricultural Commercial District zoning designation. Section 3 of Article VII contains the uses allowed in areas zoned as an Agricultural Commercial District. And paragraph 12 of Section 3 lists certain uses—such as wind energy projects—permitted in an Agricultural Commercial District if a conditional use permit is obtained. Specifically, Article VII, Section 3, Paragraph 12 provides:

> "The following uses may be allowed by conditional use permit when submitted, reviewed, and approved by the Planning Commission and Governing Body and subject to conditions as the Commission and Governing Body may impose:
>
> ...
>
> "e. Solar or Wind Energy Projects ...."

Plaintiffs reason that, under the plain language of Article VII, Section 3, Paragraph 12, a conditional use permit requires approval by the Planning Commission *and* the Board as the governing body. The Board responds that, when the Zoning Regulations are read as a whole, conditional use permits do not require approval by the Planning Commission.

Our court applies the same rules to interpreting a municipal ordinance as we would when interpreting a statute. *Robinson v. City of Wichita Employees' Retirement Bd. of Trustees*, 291 Kan. 266, 272, 241 P.3d 15 (2010). The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be determined. *State ex rel. Schmidt*, 303 Kan. at 659. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016). When a statute is plain and unambiguous, we do not speculate about the legislative intent behind that clear language, and we refrain from reading something into the statute not readily found in its words. 304 Kan. at 409.

Even when various statutory provisions are unambiguous, we consider various provisions of an act in pari materia with a view towards reconciling and bringing the provisions into workable harmony if possible. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 919, 349 P.3d 469 (2015). We also construe statutes to avoid unreasonable or absurd results and presume the Legislature does not intend to enact meaningless legislation. *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014).

Utilizing these rules of construction, we begin by considering the language and overall design of the Zoning Regulations to interpret the meaning of Article VII, Section 3, Paragraph 12. See *Miller v. Board of Wabaunsee County Comm'rs*, 305 Kan. 1056, 1064, 390 P.3d 504 (2017).

Zoning Regulations Governing Conditional Use Permits

***5** The Zoning Regulations define a conditional use permit as "[t]he documentable evidence of authority granted by the Governing Body to locate a Conditional Use at a particular location." Article XXX of the Zoning Regulations governs conditional uses. Article XXX, Section 1 begins by recognizing that certain conditional uses are "enumerated in the use regulations of the various zones" and may be permitted in any district where the conditional uses are listed. This section then establishes the procedure for approving a conditional use.

Article XXX, Section 1 first provides that an applicant must submit site plans and a statement of the proposed use to the Planning Commission. The Planning Commission must then hold a public hearing, review the applicant's site plans and statement, and submit a recommendation to the Board. After receiving the Planning Commission's recommendation, the Board may permit the use to occur where requested. The Board may also impose reasonable restrictions on the approval of a conditional use permit.

As contemplated by Article XXX, Section 1, many of Sumner County's zoning classifications allow certain uses if a conditional use permit is obtained. Each time a zoning classification allows conditional uses, the regulations use similar language: "The following uses [of land] may be allowed in this district by conditional use permits when submitted, reviewed, and approved by the Planning Commission and Governing Body." This phrase tracts the language at issue in Article VII, Section 3, Paragraph 12.

The Zoning Regulations Do Not Require Planning Commission Approval Before Granting a Conditional Use Permit

When read in isolation, Plaintiffs are correct that Article VII, Section 3, Paragraph 12 seemingly requires that a conditional use permit be approved by the Planning

Commission and the Board. But when the Zoning Regulations' conditional use provisions are considered together, the phrase "submitted, reviewed, and approved by the Planning Commission and Governing Body" refers to the process outlined in Article XXX, Section 1 where an applicant submits plans, the Planning Commission reviews the plans, and the governing body approves the conditional use permit. Under this process, approval by the Planning Commission is not required to obtain a conditional use permit.

Section 1 of Article XXX—the article governing conditional uses—details the procedure to obtain a conditional use permit to operate those conditional uses allowed in various zonings districts. Under this procedure, the Planning Commission submits a recommendation and the Board has sole authority to approve a conditional use permit. The literal language in Article VII, Section 3, Paragraph 12 conflicts with this procedure by also requiring approval by the Planning Commission.

Plaintiffs' interpretation could have merit if the phrase "submitted, reviewed, and approved by the Planning Commission and Governing Body" were used to describe the permitted conditional uses in only Agricultural Commercial Districts or a few zoning classifications. But since the Zoning Regulations use this language in every zoning classification, reading the language literally would render the procedure in Article XXX, Section 1 to obtain a conditional use permit meaningless. It is the duty of our court, as far as practicable, to reconcile these provisions to make them consistent, harmonious, and sensible. *Herrell v. National Beef Packing Co.*, 292 Kan. 730, 745, 259 P.3d 663 (2011).

Requiring Article XXX, Section 1's procedure for conditional use permits where the Planning Commission is tasked with an advisory function in submitting recommendations to the Board best harmonizes the regulations' language and operation in a way that effectuates the drafters' intent. " 'It is a cardinal rule of law that statutes complete in themselves, relating to a specific thing, take precedence over ... other statutes which deal only incidentally with the same question.' " *In re Tax Exemption Application of Mental Health Ass'n of Heartland*, 289 Kan. 1209, 1215, 221 P.3d 580 (2009) (quoting *Chelsea Plaza Homes, Inc. v. Moore*, 226 Kan. 430, 432, 601 P.2d 1100 [1979]).

*6 As a result, the detailed procedure to obtain a conditional use permit established in the article governing conditional use permits controls over the phrase "submitted, reviewed, and approved by the Planning Commission and Governing Body" used incidentally in the article on Agricultural Commercial Districts. Additionally, the definition of a conditional use permit recognizes only that the Board grants a conditional use.

The language at issue in Article VII, Section 3, Paragraph 12 also supports that it is a placeholder for the procedure in Article XXX, Section 1. A literal reading of Article VII, Section 3, Paragraph 12 produces an absurd result because conditional use permits would need to be "submitted ... by" the Planning Commission and Board to themselves for their review. Rather than force this nonsensical result, a more reasonable interpretation is that this language incorporates the detailed Article XXX procedure as the terms used in Article VII, Section 3, Paragraph 12 track those used in Article XXX. The Article XXX procedure provides that the applicant submits plans, the Planning Commission reviews the plans, and the governing body approves the plans.

Plaintiffs argue that the language requiring Planning Commission and Board approval controls under the County's rules of interpretation. The Zoning Regulations contain specific rules for interpreting its provisions. Article IV, Section 1, Paragraph 2 provides:

> "*Overlapping or Contradictory Regulations*. Where the conditions imposed by the provisions of these Regulations upon the use of land or structures are either more restrictive or less restrictive than comparable conditions imposed by any other provision of any other applicable law, ordinance, resolution, rule, or regulation of any kind, the regulations which are more restrictive and impose higher standards or requirements shall govern."

Relying on this provision, Plaintiffs claim the more restrictive language in Article VII, Section 3, Paragraph 12 governs over the Article XXX procedure requiring only the Board's approval. But Plaintiffs fail to appreciate that this rule of interpretation applies only to "conditions imposed ... upon the use of land or structures." Because the issue on appeal involves procedural provisions—not conditions on land use—Article IV, Section 1, Paragraph 2 does not apply. Additionally, this provision does not apply to internal conflicts within the Zoning Regulations. Instead, the rule is used when comparing the Zoning Regulations' conditions to the provisions of "any *other* applicable law, ordinance, resolution, rule, or regulation of any kind." (Emphasis added.)

Plaintiffs also contend the Zoning Regulations do not suggest that the Planning Commission provides only an advisory function when considering conditional use permits. But contrary to Plaintiffs' argument, Article XXX, Section 1 limits the Planning Commission's

function to making a "recommendation to the Governing Body" and gives the Board the authority to grant a conditional use permit. Moreover, as we next explain, the Planning Commission is considered an advisor to the Board on zoning matters.

The Zoning Regulations were adopted in accordance with the Sumner County Comprehensive Plan. The Comprehensive Plan outlines the Planning Commission's functions in areas of land use and commercial/industrial development. When discussing land use, the Comprehensive Plan states:

> "Continuing implementation of the land use plan will be dependent upon proper administration of zoning and subdivision regulations .... In this sense, the Planning Commission acting in its official capacity *as advisor to the governing body* can play an especially important role in maintenance of a quality living environment." (Emphasis added.)

*7 And the Comprehensive Plan also notes the Planning Commission's function as an advisor on zoning matters in commercial/industrial development:

> "*Within* [*its*] *role as technical adviser to the Governing Body*, the Planning Commission should continue to play a pivotal role in the process of delineation and direction of emerging patterns of commercial and industrial development through application of the adopted guidelines and policies in concert with zoning and subdivision regulations." (Emphasis added.)

Adding to our interpretive analysis, we recognize that the Zoning Regulations would violate Kansas law if they required Planning Commission approval for conditional use permits. In this regard, we presume the drafters acted with full knowledge of Kansas law when implementing the Zoning Regulations. *Ed DeWitte Ins. Agency v. Financial Assocs. Midwest*, 308 Kan. 1065, 1071, 427 P.3d 25 (2018). As a result, we also presume the drafters intended the Zoning Regulations to be effective and not in violation of Kansas law. See *Executive Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 424, 845 P.2d 57 (1993) (noting that a municipal ordinance "is entitled to a presumption of validity and should not be stricken unless its infringement upon a statute is clear beyond substantial doubt").

A municipality has no inherent power to enact zoning laws. Instead, a municipality's zoning power is derived solely from the grant in zoning statutes. *143rd Street Investors v. Board of Johnson County Comm'rs*, 292 Kan. 690, 707, 259 P.3d 644 (2011). Along with the zoning laws in K.S.A. 12-741 et seq., municipalities may enact and enforce additional zoning regulations which do not conflict with those statutes. K.S.A. 12-741(a). But a county's power to change the zoning of property—which includes issuing conditional use permits—may be exercised only in conformity with the statutes that authorize zoning. *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 939, 218 P.3d 400 (2009). A county's failure to follow the zoning procedures in state law renders its action invalid. 289 Kan. at 939.

Under K.S.A. 12-755(a)(5), a county's governing body may adopt zoning regulations that provide for issuing conditional use permits. But K.S.A. 2019 Supp. 12-757 demands certain notice and hearing requirements for amending zoning regulations. Although the statute does not explicitly mention conditional use permits, Kansas courts have consistently found that the procedures in K.S.A. 2019 Supp. 12-757 apply to conditional use and special use permits. See *Manly v. City of Shawnee*, 287 Kan. 63, 67, 194 P.3d 1 (2008); *Rural Water District No. 2 v. Board of Miami County Comm'rs*, No. 105,632, 2012 WL 309165, at *4-7 (Kan. App. 2012) (unpublished opinion).

K.S.A. 2019 Supp. 12-757(b) provides that proposed zoning amendments must be "submitted to the planning commission for recommendation." The planning commission must hold a public hearing on proposed zoning amendments and create a written summary of the proceedings. K.S.A. 2019 Supp. 12-757(b). After receiving the planning commission's recommendation, the county's governing body may approve the zoning amendment regardless of the planning commission's recommendation. The governing body may adopt the recommendation by resolution, override the planning commission's recommendation by a two-thirds majority vote, or return the recommendation to the planning commission. K.S.A. 2019 Supp. 12-757(d).

*8 Under K.S.A. 2019 Supp. 12-757, the planning commission fulfills only an advisory function. *Manly*, 287 Kan. at 70-71. The planning commission's authority is limited to studying facts and submitting recommendations to the governing body which takes final action. *Houston v. Board of City Commissioners*, 218 Kan. 323, 330, 543 P.2d 1010 (1975). To assign the planning commission with the ultimate authority to deny a zoning amendment would impermissibly shift the County's governance from the elected Board to an appointed advisory commission. See *Manly*, 287 Kan. at 71. The Kansas Legislature did not intend "for the tail to wag the dog, i.e., an advisory body should not have the authority to trump the decision

of the governing body that appointed it." 287 Kan. at 71.

If the Zoning Regulations were interpreted to require Planning Commission approval for conditional use permits, then the regulations would conflict with state law and be invalid. " 'The primary method for determining whether an ordinance or resolution of a county is inconsistent with a state statute is to see whether the local law prohibits what the state law permits or the state law prohibits what the local law permits.' " *David v. Board of Norton County Comm'rs*, 277 Kan. 753, 757, 89 P.3d 893 (2004). Requiring Planning Commission approval prohibits the Board from overriding the Planning Commission's recommendation as permitted in K.S.A. 2019 Supp. 12-757. Thus, when considering the Zoning Regulations' possible meanings, we presume the drafters did not intend to violate Kansas law by requiring Planning Commission approval for conditional use permits.

In sum, when reading the Zoning Regulations together, the most harmonious and sensible interpretation is that the detailed process in Article XXX, Section 1—where only approval by the Board is needed—governs the procedure to obtain conditional use permits. And the phrase "submitted, reviewed, and approved by the Planning Commission and Governing Body" as used in various zoning classifications refers to this process where an applicant submits plans, the Planning Commission reviews the plans, and the Board approves the conditional use permit. Under this procedure, the Board may grant a conditional use permit even if the Planning Commission recommends against approval.

In summary, we hold that Invenergy's conditional use permit is valid despite the Planning Commission's recommendation against approval. The district court erred by finding the Planning Commission's negative recommendation rendered Invenergy's conditional use permit invalid.

REASONABLENESS OF THE BOARD'S DECISION TO APPROVE THE ZONING CHANGE

The Board next contends the district court erred by invalidating the zoning change from Rural District to Agricultural Commercial District. The Board argues that the zoning change was reasonable because it considered the perceived harms and benefits of a wind energy project—a use allowed in an Agricultural Commercial District.

This issue also involves Article VII of the Zoning Regulations, which governs Agricultural Commercial Districts. Section 3 of Article VII contains 12 numbered paragraphs specifying the permitted uses in Agricultural Commercial Districts. These enumerated uses are:

> 1. "All uses permitted in the [Rural District]";
>
> 2. "Roadside stands for sale of agricultural products by an operator other than the producer of the agricultural product";
>
> 3. "Livestock sale barns";
>
> 4. "Grain elevators and storage bins, including the sale of related items, such as seed, feed, fertilizer, and insecticides";
>
> ***9** 5. "Campgrounds on a minimum of five (5) acres";
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> 6. "Drive-in theaters";
>
> 7. "Feed manufacturers, such as alfalfa products";
>
> 8. "Fertilizer plants";
>
> 9. "Fraternal and/or service clubs";
>
> 10. "Hunting clubs and shooting preserves";
>
> 11. "Private clubs"; and
>
> 12. Certain uses that may be allowed by conditional use permit, which includes wind energy projects.

After the district court determined Invenergy's conditional use permit was invalid, it next considered whether the zoning change was reasonable. The district court found that "[t]he only *Golden* factor evidence and information presented at the hearings concerned the wind farm." And the district court noted that the Board approved the zoning change without considering any evidence for a permissible use which did not require a conditional use permit. The district court then struck the zoning change, finding:

> "The [Board] asks this court to hold that consideration of *Golden* factor evidence for one use—wind farms—is sufficient. The problem with this is that it eviscerates the first step in the process—the zone change—as a discrete step in the regulations clearly aimed at the broader implications that come with any zone change, beyond that which come with any individual use. Since no evidence was presented supporting any of the permitted uses under Article VII, Section 3, ¶¶ 1-11, the Board's zone change which now permits those uses

is unreasonable."

Under K.S.A. 12-760, a district court reviews a governing body's zoning decision to determine the reasonableness of that decision. The reasonableness of a governing body's decision implicates fact and policy determinations that are not the province of the courts. *Leffel v. City of Mission Hills*, 47 Kan. App. 2d 8, 14, 270 P.3d 1 (2011). Our Supreme Court concisely stated the standards when reviewing the reasonableness of zoning decisions in *Zimmerman*, 289 Kan. at 944-45 (quoting *Combined Investment Co. v Board of Butler County Comm'rs*, 227 Kan. 17, 28, 605 P.2d 533 [1980]):

" '(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.' "

***10** In *Golden v. City of Overland Park*, 224 Kan. 591, 598, 584 P.2d 130 (1978), the court set forth eight suggested factors which a zoning body should consider when making a zoning decision. These eight factors—called the *Golden* factors—also help courts review whether a zoning authority's final decision was reasonable:

" '1. The character of the neighborhood;

" '2. the zoning and uses of properties nearby;

" '3. the suitability of the subject property for the uses to which it has been restricted;

" '4. the extent to which removal of the restrictions will detrimentally affect nearby property;

" '5. the length of time the subject property has remained vacant as zoned;

" '6. the relative gain to the public health, safety, and welfare by the destruction of the value of plaintiff's property as compared to the hardship imposed upon the individual landowner;

" '7. the recommendations of a permanent or professional planning staff; and

" '8. The conformance of the requested change to the city's master or comprehensive plan.' [Citations omitted.]" *Zimmerman*, 289 Kan. at 945-46.

Both parties agree on the nature of the evidence presented to the Board on the zoning change. The Board considered evidence on the benefits and harms of allowing a wind energy project in the area. And there was no discussion of any other permitted use allowed in Agricultural Commercial Districts.

Plaintiffs' argument on appeal is that, since the conditional use permit is invalid, the zoning change was unreasonable because the Board considered no permitted use that Invenergy could perform in an Agricultural Commercial District. But as discussed in the previous issue, Invenergy's conditional use permit is valid despite the Planning Commission's negative recommendation. As a result, contrary to Plaintiffs' arguments, the Board heard and considered evidence of a permitted use that Invenergy could perform through its conditional use permit. During oral argument, Plaintiffs acknowledged that their argument about the unreasonableness of the zoning change would fail upon our finding that the conditional use permit is valid.

While Plaintiffs' argument rests on the validity of the conditional use permit, the district court also reasoned that the zoning change was unreasonable because the Board considered only the single use of wind farms without receiving any evidence on the other uses

permitted by Article VII, Section 3. But exercising unlimited review, we find the zoning change is reasonable even though the Board did not consider the first 11 uses listed in Article VII, Section 3.

The district court is correct that the zoning change allowed landowners to engage in any of the permitted Agricultural Commercial District uses—such as fertilizer plants or drive-in theaters—on the land. And the proponents of the zoning change never discussed the benefits of the uses recognized in Article VII, Section 3, Paragraphs 1-11. But the district court identified no rule requiring the Board to consider multiple permitted uses in a zoning district when considering a zoning change.

Contrary to the district court's reasoning, when considering the reasonableness of a zoning change, Kansas courts should focus on the anticipated use of the property, not all the permitted uses. See, e.g., *Combined Investment Co.*, 227 Kan. at 30-31 (analyzing the harms and benefits of an anticipated quarry use); *Arkenberg v. City of Topeka*, 197 Kan. 731, 739, 421 P.2d 213 (1966) (finding that the rezoning of property to permit construction of a high-rise apartment complex for senior citizens was reasonable when the city considered a "detailed and comprehensive study of the use to be made of the property").

*11 The Kansas Supreme Court in *Golden* explained the importance of focusing on the planned use of property—and not the theoretical uses allowed by the new zoning classification—when considering a zoning change. 224 Kan. at 600. In *Golden* the plaintiff sought to rezone his property as planned retail to build a small shopping center for retail shops. But the planned retail classification also allowed the property to be used for convenience stores and fast-food shops, which the community opposed. The *Golden* court dismissed the public concern noting:

> "Such broad classifications are not the fault of the landowner. The protests of neighborhood residents, voiced at planning commission and council meetings, were for the most part against the establishment of convenience stores or fast-food shops neither of which were proposed by the plaintiff. Protests, of course, may be considered; but protests against uses not proposed are not entitled to great weight." 224 Kan. at 600.

Like the zoning classification in *Golden*, the broad scope of permitted uses in an Agricultural Commercial District is not the fault of Invenergy. Invenergy is a wind energy developer which sought a zoning change to construct a wind energy project. Even though a wind energy project is a permitted conditional use in an Agricultural Commercial District, the district court's reasoning would require Invenergy to present evidence on other permitted uses which will not occur. Like the community opposition in *Golden*, any evidence on non-proposed uses allowed by the zoning district would be entitled to little weight. Moreover, no community opposition was raised against these other uses allowed by an Agricultural Commercial District. As a result, the zoning change is reasonable even though the Board considered only the proposed use of a wind energy project and not the other uses permitted in an Agricultural Commercial District.

We hold the district court erred by ruling that the Board's decision to approve the zoning change was not reasonable.

FAILURE TO MAIL PROPERTY OWNERS WRITTEN NOTICE OF THE PLANNING COMMISSION'S MEETING

Plaintiffs first cross-appeal the district court's finding that the defective notice to Jeffery and Brooke Potucek did not render Invenergy's conditional use permit and zoning change invalid. Plaintiffs suggest the Board's zoning decisions are invalid because the County failed to satisfy the necessary notice requirements by neglecting to mail the Potuceks written notice of Invenergy's proposal at least 20 days before the Planning Commission's hearing. The Board responds that its zoning decisions are valid because the County substantially complied with the notice requirements of K.S.A. 2019 Supp. 12-757.

We review the district court's summary judgment order de novo. *Peters v. Deseret Cattle Feeders*, 309 Kan. 462, 469, 437 P.3d 976 (2019). And this issue involves statutory interpretation which presents a question of law subject to unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

The parties do not dispute the facts material to this issue. On November 17, 2016, the County mailed certified letters to all persons and entities owning property within 1,000 feet of the proposed boundaries of the Argyle Creek Wind Project, except for the Potuceks. This notice informed the property owners that the Planning Commission would hold a meeting on Invenergy's applications on December 7, 2016, at 7:30 p.m.

On December 7, 2016, another landowner informed Mr. Potucek that a wind project was proposed. Mr. Potucek

also received verbal notice of the Planning Commission's meeting on the proposals scheduled for 7:30 p.m. that evening. Before the meeting, Mr. Potucek went to the office of the Sumner County Planning, Zoning, and Environmental Health Department to request information on the Planning Commission's meeting scheduled later that day. Jon Bristor—the Director of the Planning, Zoning, and Environmental Health Department—provided Mr. Potucek with information about the Planning Commission's meeting and invited him to attend the meeting. But Mr. Potucek did not attend the Planning Commission's meeting.

*12 Sometime between December 7, 2016, and December 21, 2016, Mr. Potucek called the Planning, Zoning, and Environmental Health Department and talked to Bristor. During this conversation, Bristor informed Mr. Potucek of the Board's meeting scheduled for December 27, 2016. After this phone conversation, the County mailed the Potuceks a copy of the certified letter which it previously mailed to the other property owners. And on December 21, 2016, the County mailed another letter about Invenergy's proposals to the Potuceks which informed them of the Board's meeting scheduled for December 27, 2016. The Potuceks received the December 21, 2016 letter before the Board's meeting. As a result, the Potuceks had actual notice of the Board's meeting before the meeting occurred.

Before the Board's meeting, Invenergy amended its applications to revise the project's boundaries and reduce the project's footprint. As a result of the reduced footprint, the Potuceks' property was no longer within 1,000 feet of the project boundary. That said, Mr. Potucek attended the Board's meeting on December 27, 2016, and spoke during the public comment portion of the meeting.

Under K.S.A. 2019 Supp. 12-757(b), a planning commission must hold a public hearing on proposed zoning amendments. When a proposed amendment affects specific property, "written notice of such proposed amendment shall be mailed at least 20 days before the hearing ... to all owners of record of real property located within at least 1,000 feet of the area proposed to be altered." K.S.A. 2019 Supp. 12-757(b). "Proper notice is mandatory and must be complied with to give the planning commission authority to recommend action, and the [governing body] jurisdiction to act." *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 886, 69 P.3d 601 (2003).

Since there was not strict compliance with statutory notice requirements, we must determine (1) whether the notice provision in K.S.A. 2019 Supp. 12-757(b) may be satisfied through substantial compliance and, if so, (2) whether the County substantially complied with the notice provision.

Notice Under K.S.A. 2019 Supp. 12-757(b) is Satisfied Through Substantial Compliance

Kansas courts have applied the substantial compliance standard to a municipality's actions during annexation. See, e.g., *Stueckemann v. City of Basehor*, 301 Kan. 718, 726, 348 P.3d 526 (2015); *City of Lenexa v. City of Olathe*, 233 Kan. 159, 163-64, 660 P.2d 1368 (1983). The law of annexation is similar to zoning laws. *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, 1033, 181 P.3d 549 (2008). "[I]t is generally recognized that substantial compliance with statutory notice provisions will usually be sufficient." *Barnhart v. Kansas Dept. of Revenue*, 243 Kan. 209, 213, 755 P.2d 1337 (1988). And nothing within K.S.A. 2019 Supp. 12-757(b) prohibits applying the substantial compliance doctrine.

Plaintiffs claim the substantial compliance doctrine does not apply because (1) K.S.A. 2019 Supp. 12-757 does not mention substantial compliance and (2) K.S.A. 2019 Supp. 12-757(b) describes the consequences of noncompliance. Plaintiffs' arguments are not persuasive.

Citing *Claus v. Kansas Dept. of Revenue*, 16 Kan. App. 2d 12, 825 P.2d 172 (1991), Plaintiffs first suggest the substantial compliance standard does not apply because K.S.A. 2019 Supp. 12-757 does not mention the standard. In *Claus*, the court determined that substantial compliance did not apply to the Kansas Judicial Review Act's requirement that the petitioner serve a copy of the petition to the agency head. See 16 Kan. App. 2d at 13-14. The court reasoned that, unlike the service of process provisions in the Rules of Civil Procedure, the service provisions in K.S.A. 77-615(a) did not mention substantial compliance. 16 Kan. App. 2d at 13-14.

*13 Contrary to Plaintiffs' arguments, the reasoning in *Claus* does not apply because that case involved service of process, while the issue here involves mailed notice of county action. Kansas courts recognize that substantial compliance applies differently in service provisions than in notice provisions. See *Byrd v. Kansas Dept. of Revenue*, 43 Kan. App. 2d 145, 152, 221 P.3d 1168 (2010), *aff'd* 295 Kan. 900, 287 P.3d 232 (2012). Unlike service provisions, substantial compliance with statutory notice provisions is typically sufficient. *Barnhart*, 243

Kan. at 213. Additionally, unlike the statute in *Claus* requiring service on one individual, K.S.A. 2019 Supp. 12-757(b) requires the County to ascertain and mail notices to all property owners within a certain geographical area. The greater risk of error provides additional support to treat *Claus* differently and require only substantial compliance with the notice requirements in K.S.A. 2019 Supp. 12-757(b).

Plaintiffs next argue the substantial compliance standard does not apply because K.S.A. 2019 Supp. 12-757(b) describes the consequences of noncompliance. This court has relied on the lack of a provision describing the consequences of noncompliance as support for applying substantial compliance. *Mendenhall v. Roberts*, 17 Kan. App. 2d 34, 43, 831 P.2d 568 (1992).

Plaintiffs allege the following sentence in K.S.A. 2019 Supp. 12-757(b) embodies the consequences of noncompliance: "When the notice has been properly addressed and deposited in the mail, failure of a party to receive such notice shall not invalidate any subsequent action taken by the planning commission or the governing body." But this language states no consequence of a municipality's failure to mail notice to every required party. Instead, the language merely provides that the landowner's failure to receive properly mailed notice does not invalidate later action. As in *Mendenhall*, the absence of a provision in K.S.A. 2019 Supp. 12-757 describing the consequences of noncompliance "invites application of the theory of substantial compliance." 17 Kan. App. 2d at 43. As a result, we find that the notice provision in K.S.A. 2019 Supp. 12-757(b) may be satisfied with substantial compliance.

The County Substantially Complied with K.S.A. 2019 Supp. 12-757(b)

Substantial compliance requires less than strict compliance and means "compliance in respect to the essential matters necessary to assure every reasonable objective of the statute." *Sleeth v. Sedan City Hospital*, 298 Kan. 853, 865, 317 P.3d 782 (2014). Stated another way, substantial compliance is satisfied when one complies with the spirit and intent of the statute, but not with its absolute terms. *A & S Rental Solutions, Inc. v. Kopet*, 31 Kan. App. 2d 979, 982, 76 P.3d 1057 (2003).

The objective of the mailing requirement is to provide surrounding landowners with notice and the opportunity to be heard on a proposed zoning amendment. The notice is for the benefit of the neighboring landowners, informing them of the public hearing where they may voice their opinions on the proposed zoning amendment and discuss whether the amendment would promote public health, safety, and welfare. The County complied with the spirit and intent of the mailing requirements in K.S.A. 2019 Supp. 12-757(b) despite providing late notice to the Potuceks about Invenergy's proposals.

Under similar circumstances, this court has found that a municipality substantially complied with statutory notice requirements. In *Pishny v. Board of Johnson County Comm'rs*, 47 Kan. App. 2d 547, 277 P.3d 1170 (2012), the City of Overland Park failed to give proper notice of a public hearing on an annexation petition to the owners of an 11.33 percent interest in a certain tract in the area proposed to be annexed. Noting the city later sent notice of the public hearing and the required materials to the landowners before the public hearing, this court held "[t]he statutory notice requirement was substantially complied with." 47 Kan. App. 2d at 580.

***14** Another case with similar facts is *Hawthorne v. City of Santa Fe*, 88 N.M. 123, 124, 537 P.2d 1385 (1975), where the Supreme Court of New Mexico found substantial compliance with the statutory notice requirements when the city sent rezoning notices to all property owners within 100 feet of the rezoned property except one—Fred Martinez. The court reasoned:

> "Martinez was fully aware of the proposed zone changes. Obviously, the reason for such notice is to apprise interested parties of the hearing so that they may attend and state their views on the proposed zoning amendment, pro or con. It is our view that Martinez, having had knowledge of the hearing, was properly notified and this constitutes substantial compliance with the statute in question. The purpose of the statute has been met and that is all that is required in this instance." 88 N.M. at 124.

As in *Pishny*, after the County discovered its mistake, it took corrective actions and mailed the notice to Jeffery and Brooke Potucek. The County mailed the official notice and another letter informing the Potuceks of the Board's meeting. Although the County mailed these notices after the Planning Commission's hearing, it informed the Potuceks of the public hearing before the Board—an additional hearing not required by K.S.A. 2019 Supp. 12-757. The notices informed the Potuceks of their ability to voice their opinions on the proposed zoning amendments before the governing body, who has the authority to grant or deny the proposals. The County satisfied the spirit and intent of the mailing requirements in K.S.A. 2019 Supp. 12-757(b).

Additionally, as the district court noted, Mr. Potucek received actual notice before the Planning Commission's meeting and Plaintiffs sustained no prejudice because the Planning Commission recommended denial of the proposals. Plaintiffs respond that actual notice and lack of prejudice are not relevant considerations when determining whether the County substantially complied with the notice provisions.

In the context of service, Kansas courts typically find that actual notice by a party does not affect whether another substantially complied with statutory service requirements. *Myers v. Board of Jackson County Comm'rs*, 280 Kan. 869, 874-77, 127 P.3d 319 (2006); *Cook v. Cook*, 32 Kan. App. 2d 214, 222, 83 P.3d 1243 (2003) ("The fact that Michael had actual knowledge of the suit and did not suffer prejudice does not mean there was substantial compliance under K.S.A. 60-204"); but see *City of Hoisington v. $2,044 in U.S. Currency*, 27 Kan. App. 2d 825, Syl. ¶ 5, 8 P.3d 58 (2000) (noting that since the City had actual notice of the claim, service by first class mail substantially complied with K.S.A. 60-4111.) The underlying rationale in these cases is that substantial compliance standards do not allow the courts to create new methods of serving process. *Fisher v. DeCarvalho*, 298 Kan. 482, 491, 314 P.3d 214 (2013).

Turning to the relevance of prejudice, Kansas courts often treat substantial compliance separately from prejudice. *Meigs v. Kansas Dept. of Revenue*, 251 Kan. 677, 682, 840 P.2d 448 (1992). But see *Stueckemann*, 301 Kan. at 731-32 (noting an inaccurate legal description did not affect landowners' opportunity or ability to oppose annexation because landowners voiced opposition at a public hearing). And lack of prejudice does not amount to substantial compliance. *Cook*, 32 Kan. App. 2d at 222. For example, in *Carson v. McDowell*, 203 Kan. 40, 43, 452 P.2d 828 (1969), the appellees argued that, without any prejudice, the landowner could not complain of defective notice on a zoning change. The Kansas Supreme Court rejected this argument, holding the statutory notice was mandatory and needed to be complied with to pass the ordinance. 203 Kan. at 43-44.

***15** Even assuming these limits on considering actual notice and prejudice apply, the County still substantially complied with the notice provisions in K.S.A. 2019 Supp. 12-757(b).

The statutory provisions in K.S.A. 2019 Supp. 12-757(b) require mailed notice to the surrounding landowners. While verbal notice is not an approved method of providing notice, the fact that a fellow landowner told Mr. Potucek about the proposed wind project and the Planning Commission's meeting showed that the local community was informed of the project and the public hearing. At the Planning Commission's meeting, 13 citizens opined on the proposed zoning amendments and provided various arguments for why the proposal should be denied. And at the Board's public hearing, 29 citizens—including Mr. Potucek—commented on whether the amendments would promote public welfare. Although the County failed to strictly comply with the statute, it complied with the essential matters necessary to ensure that every reasonable objective of the statute was satisfied.

As a result, we hold the County substantially complied with the notice provisions in K.S.A. 2019 Supp. 12-757(b) when it properly mailed certified letters to all persons and entities owning property within 1,000 feet of the proposed wind farm, except for the Potuceks. Accordingly, the conditional use permit and zoning change are valid despite the County's failure to mail the Potuceks proper notice.

MISIDENTIFICATION OF WIND PROJECT NAME

Plaintiffs next cross-appeal the district court's finding that the misidentified project name in the notice did not render Invenergy's conditional use permit invalid. Plaintiffs suggest the conditional use permit is invalid because, by using the wrong project name, the notice failed to describe the proposal in general terms as K.S.A. 2019 Supp. 12-757 and K.S.A. 12-756 required.

Once again, this court reviews a district court's summary judgment order de novo. *Peters*, 309 Kan. at 469. And this issue also involves statutory interpretation which presents a question of law subject to unlimited review. *Nauheim*, 309 Kan. at 149.

Under K.S.A. 2019 Supp. 12-757(b), a planning commission must give notice of proposed amendments in the manner provided in K.S.A. 12-756. This statute provides that the published notice of a zoning proposal must "describe such proposal in general terms." K.S.A. 12-756(b). In addition to the publication notice, written notice of the proposed amendment must be mailed to surrounding landowners at least 20 days before the planning commission's public hearing. K.S.A. 2019 Supp. 12-757(b).

In the published notice, the County described Invenergy's proposal as a request for a "Conditional Use for the development, construction, operation and decommissioning of Wild Plains Wind Project." While the published notice incorrectly used the name "Wild Plains Wind Project" to describe Invenergy's request, the notice included a map correctly labeled "Argyle Creek Wind Project." The words "Argyle Creek Wind Project" are prominently displayed in much larger font than the misnomer in the body of the notice.

The first mailed notice to the surrounding landowners also incorrectly used the name "Wild Plains Wind Project" when describing Invenergy's request for a conditional use permit. But this notice also included the map labeled "Argyle Creek Wind Project." The County discovered the error in the published notice and the certified letters before the Planning Commission's meeting. Although the County did not publish a corrected notice in the newspaper, the County mailed another certified letter to landowners with the corrected project name before the Planning Commission's meeting.

***16** Plaintiffs reprise their claim that substantial compliance is inapplicable to notice provisions in Kansas zoning statutes. But for the reasons addressed in the previous issue, we find the notice requirements at issue in K.S.A. 12-756(b) and K.S.A. 2019 Supp. 12-757(b) are satisfied through substantial compliance. As a result, we consider whether the County substantially complied with the statutory requirement to describe Invenergy's proposal for a conditional use permit in general terms.

The Kansas Supreme Court in *Stueckemann* addressed a similar situation in the context of annexation and determined the city substantially complied with notice provisions. In *Stueckemann*, property owners disputed annexation arguing the resolution proposing annexation contained an inadequate description of the land to be annexed because the resolution incorrectly included a parcel not being annexed. The court held that the notice substantially complied with the statute despite the error because the included documents sufficiently informed the landowners of the land the city proposed to annex and did not affect the landowners' ability to be heard. 301 Kan. at 728-32. In its reasoning, the court found that the mistaken inclusion was an ordinary typographical error and the public could determine the city's intent because the erroneously included parcel could not be legally annexed. 301 Kan. at 730.

Like the error in *Stueckemann*, the misidentified project name did not affect the community's opportunity to appear and be heard before the Planning Commission and the Board. The name "Wild Plains Wind Project" still notified the citizens that Invenergy proposed to build and operate a wind farm. Thus, the notice satisfied the purpose of informing the public of the applicant's proposed use. And once the County discovered the error, it sent corrected notices to those most likely to be affected by the proposed use—the surrounding landowners.

Additionally, the public could determine the name of Invenergy's proposed project from the published notice. The notice included an accurate legal description of the project area and a map of the project's boundaries. The "Wild Plains Wind Project" was a previously approved wind energy project and therefore could be easily recognized as a mere typographical error. And the correct name of the project is the most conspicuous language in the notice—in large font above the map. The County substantially complied with the requirement to describe Invenergy's proposal for a conditional use permit in general terms.

The conditional use permit is valid even though the notice misidentified the wind project name when describing Invenergy's proposal. Accordingly, the district court did not err by ruling that the zoning decisions were not invalid because the County provided imperfect notice.

Having found that the zoning change and conditional use permit are valid despite Plaintiffs' contentions and that the district court erred by striking these zoning decisions, we reverse the district court's grant of summary judgment to Plaintiffs and order the district court to grant summary judgment in favor of the Board.

Affirmed in part, reversed in part, and remanded with directions to grant summary judgment for the Board and uphold the resolutions approving the zoning change and Invenergy's conditional use permit.

All Citations

464 P.3d 395 (Table), 2020 WL 3116814

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