Case No. 22-124,998-A

IN THE SUPREME COURT
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,

Proposed Appeal from the Kansas Court of Appeals'
Published Opinion Dated February 10, 2023
Appeal from the District Court of Finney County, Kansas
Honorable District Court Judge Wendel W. Wurst
District Court Case No. 2021-CV-0095

RESPONSE IN OPPOSITION TO APPELLEES' JOINT PETITION FOR REVIEW

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INTRODUCTION

Pursuant to Supreme Court Rule 8.03(d), Plaintiffs/Appellants American Warrior, Inc. ("AWI") and Brian F. Price ("Price") (collectively "Appellants") respectfully submit this Response in Opposition to the Joint Petition for Review filed on March 10, 2023 by Defendants/Appellees Huber Sand, Inc. ("Huber Sand") and Board of County Commissioners of Finney County, Kansas ("County Commission") (collectively "Appellees"). For the reasons stated herein, and also set out in the majority opinion of the Kansas Court of Appeals issued on February 10, 2023, in the Brief of Appellants filed on May 31, 2022, and in the Reply Brief of Appellants filed on September 9, 2022, all of which are incorporated by reference herein, Appellants respectfully request that this Court deny the Joint Petition for Review.

RESPONSE TO PRAYER FOR REVIEW SECTION[1]

Appellees assert three separate grounds for why review of this case is appropriate: (1) that the Court of Appeals improperly held that K.S.A. § 12-757 applies to the issuance of conditional use permits ("CUPs") when the Finney County zoning regulations delegate the issuance of CUPs to the Board of Zoning Appeals ("BZA"); (2) that the Court of Appeals' interpretation of the *Crumbaker* and *Manly* cases causes K.S.A. § 12-755(a)(5) to be meaningless; and (3) that the interpretation and meaning of K.S.A. § 12-755 and K.S.A. § 12-757 is of state-wide import because the BZA in other cities and counties in Kansas

[1] Supreme Court Rule 8.03(b)(6)(C)(i) states that "[t]he Supreme Court will not consider . . . issues not presented or fairly included in the petition for review . . . ."

are allowed to issue CUPs (without providing any evidence of any such other cities and counties).

This case need not and should not be reviewed by this Court because, as further explained herein below, the issue in this case has already been decided by this Court on not one, but two prior occasions. *See Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 886-887, 69 P.3d 601, 611-612 (2003) and *Manly v. City of Shawnee*, 287 Kan. 63, 67-74, 194 P.3d 1, 6-9 (2008). Moreover, in *Zimmerman v. Bd. of Cnty. Comm'rs*, 289 Kan. 926, 940-944, 218 P.3d 400, 411-413 (2009), the Kansas Supreme Court conducted an in-depth analysis of the *Manly* case and its application of K.S.A. § 12-757 to special use permits ("SUPs"), and confirmed the rationale and validity of the *Manly* decision (even though *Zimmerman* specifically dealt with proposed amendments to zoning ordinances).

Additionally, over the last 11 years, the following five Kansas Court of Appeals opinions have specifically applied K.S.A. § 12-757 to CUP and SUP applications, including several cases doing so in direct reliance upon *Crumbaker* and *Manly*:

1. *Rural Water Dist. #2 v. Miami Cnty. Bd. of Cnty. Comm'rs*, No. 105,632, 2012 WL 309165, at *1-7 (Kan. Ct. App. Jan. 27, 2012) (unpublished opinion);

2. *Vickers v. Franklin Cnty. Bd. of Comm'rs*, No. 118,649, 2019 WL 3242274, at *1-6 (Kan. Ct. App. July 19, 2019) (unpublished opinion);

3. *Ternes v. Bd. of Cnty. Comm'rs of Sumner Cnty.*, No. 119,073, 2020 WL 3116814, at *1-8 and *11-16 (Kan. Ct. App. June 12, 2020) (unpublished opinion);

4. *Pretty Prairie Wind LLC v. Reno Cnty.*, 62 Kan. App. 2d 429, 429-433, 437-442, 517 P.3d 135, 136-138, 140-143 (2022);

5. *Kaw Valley Companies, Inc. v. Bd. of Leavenworth Cnty. Comm'rs*, No. 124,525, 2022 WL 3693619, at *1-8 (Kan. Ct. App. Aug 26, 2022) (unpublished opinion).

Thus, construing K.S.A. § 12-757 as Appellees' urge, would not only have an impact on this case, but would also unwind the rulings from all of the cases cited above which have been relied upon by cities, counties, residents, and private companies in Kansas for the past 20 years. In fact, the Court of Appeals in *Vickers* and *Ternes* relied on the prior Supreme Court precedent so much that they stated:

- "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." *Vickers*, 2019 WL 3242274, *4 (citing *Manly*, 287 Kan. at 67 and *Crumbaker*, 275 Kan. at 886).

- "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." *Ternes*, 2020 WL 3116814, at *7 (citing *Manly*, 287 Kan. at 67 and *RWD #2*, 2012 WL 309165, at *4-7).

Appellees attempt to frame the issue in this case as one that is either undecided, unclear, or incorrectly decided, essentially ignoring established precedential case law. As demonstrated in the cases cited above, Kansas appellate courts have repeatedly held over the last 20 years that cities and counties must comply with the processes and procedures set out in K.S.A. § 12-757 when evaluating and issuing CUPs and SUPs. The Kansas Legislature is presumably aware of these holdings and has not amended K.S.A. § 12-757 to exclude CUPs and SUPs.[2] As the majority opinion of the Court of Appeals rightly held,

[2] The Kansas Legislature amended K.S.A. § 12-757 in 2009 to add a new subsection (g). If the Kansas Legislature disagreed with the prior *Crumbaker* and *Manly* decisions, it could

Finney County's failure to do so here renders the CUP issued to Huber Sand void and unenforceable. This Court should not take this case up on review when the Court of Appeals' ruling is based on 20 years' worth of clearly established and binding Kansas case law.

RESPONSE TO DATE OF DECISION, STATEMENT OF ISSUES, AND STATEMENT OF FACTS SECTIONS

Appellants do not dispute or disagree with the Date of Decision and Statement of Facts sections from the Joint Petition for Review. Also, although Appellants disagree with the conclusions stated in the Statement of Issues section in the Joint Petition for Review, those matters are discussed in detail in the Arguments and Authorities section below.

RESPONSE TO ARGUMENTS AND AUTHORITIES SECTION

I. The Court of Appeals properly found that K.S.A. § 12-757 applies to the issuance of conditional use permits.

Appellees argue that K.S.A. § 12-757 does not cover CUPs or SUPs[3] because the statute never uses either phrase, and instead only references zoning amendments, re-zoning requests, or changes to zoning boundaries, classifications, or regulations. However, the Court of Appeals analyzed the statutory definition of "zoning" from K.S.A. § 12-742(a)(10) and the definition of CUPs and SUPs from a zoning treatise, and concluded that CUPs and SUPs do in fact regulate land use and result in a change in zoning by the allowance of an otherwise prohibited use with potential special conditions or safeguards.

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have amended the statute to exclude CUPs and SUPs, but it did not do so. Any change in the law at this point should come from the Kansas Legislature, not the appellate courts.

[3] The dissenting opinion correctly acknowledged that "[t]he terms conditional use and special use are often used interchangeably[.]" Memorandum Opinion, p. 16.

(Memorandum Decision, pp. 8-9). Thus, even though K.S.A. § 12-757 does not specifically reference CUPs or SUPs, the Kansas Court of Appeals explained why CUPs and SUPs are covered under the statute's reference to amendments or other changes in zoning.

Appellees also improperly focus on K.S.A. § 12-755(a)(5) while ignoring K.S.A. § 12-741. By focusing only on a governing body's authority to adopt zoning regulations under K.S.A. § 12-755(a)(5), including provisions for the issuance of CUPs and SUPs, Appellees essentially argue that counties can adopt whatever regulations they want with respect to CUPs. But, this ignores how K.S.A. § 12-741 (the "enabling legislation for the enactment of planning and zoning laws and regulations by cities and counties") specifically limits cities and counties to enacting "additional laws and regulations on the same subject which **are not in conflict** with the provisions of this act." (emphasis added). And Finney County's procedure directly conflicts with the procedure outlined in K.S.A. § 12-757.

As discussed above, over the last 20 years, eight cases (*Crumbaker*, *Manly*, *Zimmerman*, *RWD #2*, *Vickers*, *Ternes*, *Pretty Prairie Wind*, and *Kaw Valley Companies*) have held that K.S.A. § 12-757 applies to CUPs and SUPs. Based on these binding and precedential holdings related to "this act", Finney County cannot enact zoning regulations that delegate all responsibility for CUPs to the Board of Zoning Appeals ("BZA"), because doing so conflicts with the required processes and procedures in K.S.A. § 12-757, which is not allowed under K.S.A. § 12-741. The *Crumbaker* and *Manly* cases certainly do not "make K.S.A. § 12-755(a)(5) meaningless" as Appellees summarily argue.

Appellees repeatedly reference K.S.A. § 12-759, including how it gives the BZA the authority to issue "permits", to suggest it also gives the BZA broad enough authority to issue CUPs. But Appellees omit that K.S.A. § 12-759 only uses the word "permit" in subsection (d) relating to permits on appeals to the BZA and in subsection (e)(1) relating to permits for variances. None of those situations is present in this case relating to the issuance of a CUP to Huber Sand. Additionally, K.S.A. § 12-759 never uses the phrases "conditional use permit" or "special use permit" (which Appellees contend is why K.S.A. § 12-757 does not apply to CUPs). Moreover, K.S.A. § 12-759 cannot be interpreted so broadly to provide the BZA responsibility and authority to issue CUPs because doing so would directly conflict with the rulings in *Crumbaker*, *Manly*, *Zimmerman*, *RWD #2*, *Vickers*, *Ternes*, *Pretty Prairie Wind*, and *Kaw Valley Companies* regarding the procedure required under K.S.A. § 12-757.

Appellees further point out how K.S.A. § 19-2654, § 19-2956, § 19-2958(b), and § 19-2960(b), which only apply to the urban counties of Johnson County and Sedgwick County, permit the issuance of CUPs using the same notice, hearing, and voting requirements as required for re-zoning. Appellees speculate that because the Legislature did not include any other counties in those statutes (which adopt a procedure that is nearly identical to the procedure in K.S.A. § 12-757), the Legislature must have intended that such procedures do not apply to all of the other counties. However, *Crumbaker* and *Manly* both involved SUPs for property located in Johnson County, but neither of these cases made any reference to K.S.A. § 19-2654, § 19-2956, § 19-2958(b), or § 19-2960(b) and instead

analyzed the SUPs in those cases solely under K.S.A. § 12-757. Thus, *Crumbaker* and *Manly* determined that SUPs generally are governed by K.S.A. § 12-757.

II. Case law interpreting K.S.A. § 12-757 holds that the statute applies to conditional use permits.

Appellees next attempt to distinguish the *Crumbaker* case, arguing that the zoning ordinances in *Crumbaker* explicitly required the municipality to follow the procedures set forth in K.S.A. § 12-757 so the *Crumbaker* case is not applicable to the Finney County's zoning ordinances. The municipal zoning ordinances in *Crumbaker* stated: "The City shall regulate land use as provided by K.S.A. 12–741, *et seq.*"[4] *Crumbaker*, 275 Kan. at 885, 69 P.3d at 610. Notably, the ruling in *Crumbaker* is not limited to ordinances that specifically reference "K.S.A. 12–741, *et seq.*", as the Syllabus in that case holds:

> "Once a city elects to conduct community planning or zoning, it must follow the procedures mandated by statute. K.S.A. 12–741 *et seq*. The statutory procedures to zone or change current zoning are uniformly applicable across the state of Kansas and are therefore mandatory for all cities. Zoning procedure may not be avoided by reference to a city's home rule power."

Crumbaker, 275 Kan. at 872, 69 P.3d at 603, Syl. ¶ 2. Thus, *Crumbaker* extended the requirements from K.S.A. § 12-741, *et seq.*, to any time a municipality "elects to conduct community planning or zoning" across the board, regardless of what language is specifically referenced in the local zoning ordinances.

In this case, the Finney County Zoning Regulations include the following provisions:

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[4] The municipal zoning ordinances in *Crumbaker* did not "explicitly require[] the municipality to follow the procedures set forth in K.S.A. § 12-757" like the Appellees argue, as the ordinances instead referenced "K.S.A. 12–741, *et seq.*" generally.

- "These Regulations are intended to serve the following purposes: . . . I. . . . to carry out the goals and objectives *as set forth in applicable laws of the State of Kansas* and the Finney County, Kansas, Comprehensive Plan." *See* Section 1.020, Brief of Appellants, p. 3. (emphasis added)

- "A Board of Zoning Appeals is hereby created by the Governing Body of the City *as prescribed by law*." *See* Section 28.010, Brief of Appellants, p. 3. (emphasis added)

So although the Finney County Zoning Regulations do not specifically reference "K.S.A. § 12-741, *et seq.*," they do incorporate Kansas law generally which includes K.S.A. § 12-741, *et seq.*, and K.S.A. § 12-757 in particular. Moreover, the *Manly* case, which Appellees fail to distinguish, does not indicate whether the municipal zoning ordinances in that case specifically incorporated K.S.A. § 12-741, *et seq.*, or K.S.A. § 12-757, but the *Manly* Court applied K.S.A. § 12-757's requirements to the SUP at issue anyway. So even if *Crumbaker* is distinguishable like Appellees argue (for which Appellants disagree), *Manly* is not.

Appellees also reference how Finney County's zoning ordinances delegate the issuance of CUPs to the BZA, vaguely suggesting that this distinguishes the facts in our case from those in the cases cited above. This argument ignores that several of those cases expressly state that that the procedures in K.S.A. § 12-757 are mandatory and must be applied to CUPs and SUPs. For example, the *Vickers* case invalidated a SUP because it followed the process set forth in the Franklin County Zoning Regulations that "did not comply with the mandatory statutory procedures set forth in K.S.A. 12-757." *Vickers*, 2019 WL 3242274, at *4. Moreover, the *Ternes* case held that an arguably ambiguous Sumner County zoning regulation could not be interpreted as requiring planning commission approval as a condition precedent to the county board approving the CUP, as doing so

would violate the mandatory two-part process in K.S.A. § 12-757(b) and (d) and the separation of powers between the planning commission and county commission. *Ternes*, 2020 WL 3116814, at *7-8. The *Manly* case analyzed the separation of powers for SUP decisions under K.S.A. § 12-757 between (i) the advisory appointed planning commission and (ii) the elected county commission, which would make no sense if the county could delegate all authority for CUPs to the BZA (a non-elected board). *Manly*, 287 Kan. at 70-71, 194 P.3d at 7-8.

Furthermore, Appellees' attempt to distinguish *Crumbaker* conflicts with their position on K.S.A. § 12-755(a)(5), and Appellees cannot have it both ways. As discussed above, Appellees attempt to distinguish *Crumbaker* by arguing that it only analyzed K.S.A. § 12-757 because the applicable city zoning ordinances incorporated that statute by referencing "K.S.A. § 12-741, et seq." Appellees argue that our facts are different because the Finney County Zoning Ordinances do not incorporate these statutes. But if K.S.A. § 12-757 is not incorporated in the Finney County Zoning Ordinances, then neither is K.S.A. § 12-755(a)(5) - which is the statute that Appellees rely on for their unfettered authority to enact whatever procedures they want to evaluate and issue CUPs. And if that is true, then Finney County has no authority to issue CUPs at all. Obviously, such a result does not hold true, so the only viable option is that *Crumbaker* is not distinguishable and both K.S.A. § 12-757 and K.S.A. § 12-755(a)(5) apply to the Finney County Zoning Ordinances. As a result, although Finney County may adopt zoning regulations for the issuance of CUPs under K.S.A. § 12-755(a)(5), under *Crumbaker* and its progeny, those

zoning ordinances must comply with the required two-part procedure for issuing CUPs from K.S.A. § 12-757.

Finally, accepting Appellees' argument that (i) K.S.A. 12-755(a)(5) allows Finney County to enact *whatever* procedures it wants to evaluate and issue CUPs, and (ii) Finney County is not required to follow the processes and procedures set out in K.S.A. § 12-757 when evaluating and issuing CUPs, would lead to absurd results. Appellees' argument would allow a county to legally enact zoning regulations that either grant or deny a CUP based on a game of rock-paper-scissors or a coin flip. Or they could assign all authority on CUPs to a single specified individual or a for-profit company that could use this power for personal profit. *Crumbaker* spoke about the importance of consistency throughout all jurisdictions that decide to enact zoning ordinances. *Crumbaker*, 275 Kan. at 885-886, 69 P.3d at 610-611 (quoting *Moore v. City of Lawrence*, 232 Kan. 353, 357, 654 P.2d 445 (1982)). *Manly* discussed the importance of separation of powers in key zoning decisions like SUPs. *Manly*, 287 Kan. at 70-71, 194 P.3d at 7-8. Neither of these two important principals are satisfied by Appellees' arguments in this case.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny the Joint Petition for Review.

APPENDIX OF UNPUBLISHED CASES

1. *Rural Water Dist. #2 v. Miami Cnty. Bd. of Cnty. Comm'rs*, No. 105,632, 2012 WL 309165, *1-7 (Kan. Ct. App. Jan. 27, 2012) (unpublished opinion);
2. *Vickers v. Franklin Cnty. Bd. of Comm'rs*, No. 118,649, 2019 WL 3242274, *1-6 (Kan. Ct. App. July 19, 2019) (unpublished opinion);
3. *Ternes v. Bd. of Cnty. Comm'rs of Sumner Cnty.*, No. 119,073, 2020 WL 3116814, *1-8 and *11-16 (Kan. Ct. App. June 12, 2020) (unpublished opinion);
4. *Kaw Valley Companies, Inc. v. Bd. of Leavenworth Cnty. Comm'rs*, No. 124,525, 2022 WL 3693619, at *1-8 (Kan. Ct. App. Aug 26, 2022) (unpublished opinion).

Date: April 7, 2023

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CERTIFICATE OF SERVICE

I certify that the foregoing Response in Opposition was filed electronically with the Court and served via U.S. Mail, postage prepaid, and email, on April 7, 2023, to:

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APPENDIX OF UNPUBLISHED CASES

APPENDIX #1

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. Harth, Judge.

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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 [v. 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*, 35 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 #2

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.

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.

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

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, *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." 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 #3

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.

Attorneys and Law Firms

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Jerry D. Hawkins and Stephen H. Netherton, of Hite, Fanning & Honeyman L.L.P., of Wichita, for appellees/cross-appellants.

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 t within 30 business days," this exception never

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";

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

End of Document

APPENDIX #4

515 P.3d 299 (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.

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

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

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

Attorneys and Law Firms

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

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

MEMORANDUM OPINION

Per Curiam:

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

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

FACTS

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

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

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

Edwardsville processing site ...." In addition to Kaw Valley, other companies could also send trucks to the quarry to load sand and send it to construction sites or concrete mixing plants.

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

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

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

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

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

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

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

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

In addition, Kaw Valley Engineering opined:

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

traffic for at least 10 years.

....

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

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

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

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

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

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

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

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

On June 22, 2020, engineers retained by Kaw Valley submitted an appendix to the Pavement Exploration Report. The appendix consisted of more formal responses to the 13 questions previously asked by the County seeking clarification of the report. The following day, the County Engineer submitted a letter to the Board of

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

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

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

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

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

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

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

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

members of the public expressed concerns regarding harmful effects to wildlife as well as to their habitats and detrimental effects to nearby farm animals. Some members of the public were also concerned with potential pollution, water contamination, increased noise levels, and a decrease in the property values in the area.

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

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

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

*7 The conditions expressly identified in the proposed Resolution included—among other things—that Kaw Valley "bring the specified route/roadway up to County standards prior to hauling" and that "[d]esign and

construction of the roadway shall be funded by the applicant ... prior to design." In addition, the conditions in the proposed Resolution included a provision that "[a] formal executed agreement between the County and the applicant dealing with all requirements and responsibilities of such improvement will be required." Likewise, the proposed Resolution provided that "the conditions listed shall be complied with and supporting documentation for such shall be provided to the Planning and Zoning Department within 30 business days."

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

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

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

Thereafter, Kaw Valley filed a timely notice of appeal.

ANALYSIS

Issues Presented

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

Special Use Permits and Conditions

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

As the Kansas Supreme Court has recognized, "[c]onditions are commonly imposed on special use permits." *Johnson County Water Dist. No. 1 v. City Council of Kansas City*, 255 Kan. 183, 190, 871 P.2d 1256 (1994) (citing 3 Anderson, American Law of Zoning, § 21.30 [3d ed. 1986]). So long as these conditions are reasonable, a reviewing court should uphold the conditions. *McPherson Landfill, Inc. v.*

Board of Shawnee County Comm'rs, 274 Kan. 303, 305, 49 P.3d 522 (2002). This is because cities and counties have the authority to promote public health, safety, and welfare. Hence, conditions may be imposed on a SUP that are "rationally related to those objectives and [are] not unreasonable or oppressive." *Johnson County Water Dist. No. 1*, 255 Kan. at 191.

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

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

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

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

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

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

Standard of Review

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

The *Combined Investment* standard provides:

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

zoning authority's action as did the district court." 227 Kan. at 28.

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

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

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

Reasonableness of Conditions Imposed

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

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

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

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

The Board also cites *K-S Center Co.*, 238 Kan. 482, for the proposition "that preliminary approval of a special use permit is a well-recognized concept in Kansas." In *K-S Center Co.*, a governing body expressly voted "to grant preliminary approval of the special use permit, subject to the drafting of suggested Findings of Fact and Conclusions of Law by the City Planning and Legal Departments for later submission to the Council." 238 Kan. at 484. But in this case, a review of the minutes of the meeting held on July 15, 2020, reveals that there was

no motion to grant preliminary approval to Kaw Valley's SUP application. Rather, the minutes state that the Board passed a motion "to approve ... the application for a special use permit submitted by Kaw Valley Companies, LLC" and to adopt Resolution 2020-23 as amended.

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

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

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

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

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

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

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

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

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

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

required prior to the commencement of design.

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

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

Constitutionality of Conditions

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

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

CONCLUSION

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

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

All Citations

515 P.3d 299 (Table), 2022 WL 3693619

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