

Appeal No. 2010AP2398

Cir. Ct. No. 2009CV738

**WISCONSIN COURT OF APPEALS
DISTRICT III**

**LORAN B. ZWIEFELHOFER, WILLIAM J. SCHINDLER,
GLENN R. SARAUER AND SAMUEL R. LA GESSE,**

PLAINTIFFS-RESPONDENTS,

v.

**TOWN OF COOKS VALLEY, A WISCONSIN QUASI-
MUNICIPAL CORPORATION,**

DEFENDANT-APPELLANT.

FILED

Jun 28, 2011

A. John Voelker
Acting Clerk of
Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Hoover, P.J., Peterson and Brunner, JJ.

We certify this appeal to the Wisconsin Supreme Court to clarify the factors that distinguish a zoning ordinance from an ordinance enacted under the Town's general police powers.

Four plaintiffs (collectively Zwiefelhofer) brought this declaratory judgment action challenging the Town of Cooks Valley's ordinance that requires an application for a nonmetallic mining permit. The circuit court invalidated the ordinance, concluding it is actually a zoning regulation that is invalid because it was not approved by the Chippewa County Board as required by WIS. STAT. § 60.62(3).¹

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

The preamble to the ordinance recites its purpose as “to promote the health, safety, prosperity, aesthetics and general welfare of the people and communities within the town.” It states its general intent “to regulate the location, construction, installation, alteration, design, operation and use of all nonmetallic mines so as to protect the health of residents and transients ... [and] further the appropriate use and conservation of land and water resources.”

The ordinance requires a permit for any new or expanded sand or gravel pit. The procedure for applying for a permit includes payment of a fee, a public hearing before the Town Plan Commission after written notice to adjoining landowners, recommendation by the Plan Commission to the Town Board, and a public hearing by the board with public commentary. The board may grant the permit with or without conditions if it “will be consistent with the protection of public health, safety and general welfare.” The conditions the board may attach include proof of financial security for reclamation; restrictive provisions proof of financial security for road maintenance and repair; restrictions on the hours of operation, truck routes, truck volume; restrictions to protect groundwater quality and control air emissions and dust. The permit is referred to as a “conditional use permit.”

The circuit court accepted Zwiefelhofer’s argument that the regulations imposed by the ordinance can only be imposed by a zoning ordinance because they constitute a substantial interference with land use. *See* Arden H. Rathkopf, et. al. 1 *Rathkopf’s*, The Law of Zoning and Planning § 1:10 (West 2005). The Town argues that zoning involves advanced determination of where future types of structures and their associated activities may be located, as opposed to regulatory ordinances requiring licenses that apply across a broad geographical

area and are invoked only on a case-by-case basis when someone proposes to undertake that activity.

Zwiefelhofer contends the primary distinguishing characteristic of a zoning ordinance is that it regulates *where* activities can take place, *see David L. Ulrich Inc. v. Saukville*, 7 Wis. 2d 173, 177, 96 N.W.2d 612 (1959), and this ordinance only regulates the areas where nonmetallic mines are located. The Town argues that its ordinance does not create any zones or districts, but applies to any location in the township. It views the ordinance as one regulating an activity anywhere in the township, not a location, district or zone. Citing *Hobart v. Collier*, 3 Wis. 2d 182, 185-86, 87 N.W.2d 868 (1958), Zwiefelhofer contends that the absence of multiple zones is one indicator of a zoning ordinance, but is not a controlling factor.

The Town cites several cases that indicate a zoning ordinance and a nonzoning regulatory ordinance can overlap in subject matter. That an ordinance regulates certain activities does not mean it is a zoning ordinance merely because the activities generally take place at specific sites. Zwiefelhofer counters that any overlap of empowerment is narrow and must involve application of another authorizing statute.

Zwiefelhofer notes that the permit authorized by the ordinance is referred to as a “conditional use permit,” which is a term of art used in zoning regulation. The Town concedes that is a common term in zoning, but contends there is nothing to prevent a regulatory ordinance from using that verbiage.

Although the parties identify various factors that might distinguish a zoning ordinance from any other licensing ordinance, the existing case law does not provide any clear test for distinguishing them. In *Gordie Boucher Lincoln-*

Mercury Madison, Inc. v. City of Madison Plan Commission, 178 Wis. 2d 74, 101-02, 503 N.W.2d 265 (Ct. App. 1993), this court created a test for distinguishing zoning ordinances, and the circuit court in this case substantially relied on that test. *Gordie Boucher* held that land use control is a function of zoning, and that “control over the use to which property may be devoted is a zoning control that can be imposed only by a comprehensive zoning ordinance....” *Id.* This court recognized a potential overlap between zoning and platting, and determined that a platting ordinance may be used when the plat imposed “quality” requirements. *Id.* at 96.

However, *Gordie Boucher* was overruled in *Wood v. City of Madison*, 2003 WI 24, ¶33, 260 Wis. 2d 71, 659 N.W.2d 31. A court of appeals decision that is overruled by the supreme court loses all precedential value. *Blum v. 1st Auto & Cas. Ins. Co.* 2010 WI 78, ¶56, 326 Wis. 2d 729, 786 N.W.2d 78. The three concurring justices in *Wood* wanted to preserve the tests set forth in *Gordie Boucher*, but the majority of the court expressly overruled *Gordie Boucher*, leaving courts with no clear precedent that distinguishes zoning ordinances from licensing ordinances. *Wood* did not establish a test for determining whether an ordinance purporting to exercise the Town’s general police powers is actually a zoning ordinance.

We submit that it is appropriate for the supreme court to establish the test for determining whether an ordinance constitutes a zoning ordinance that must be approved by the county board before it becomes valid under WIS. STAT. § 60.62(3).

