

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1137

Cir. Ct. No. 2004CV199

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

HARMONY GROVE TRUCKING & REPAIR, INC.,

PLAINTIFF-APPELLANT,

V.

COLUMBIA COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
JOHN R. STORCK, Judge. *Affirmed in part; reversed in part.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Harmony Grove Trucking and Repair, Inc. appeals from an order denying its statutory certiorari appeal of a zoning determination made by the Columbia County Board of Adjustment. For the reasons discussed below, we affirm most of the Board's decisions with respect to its interpretation of

certain existing conditional use permits, but set aside its determination that it may now impose additional conditions for those permits.

BACKGROUND

¶2 Harmony Grove has owned and operated a truck repair and freight transportation business adjacent to two highways in Columbia County since 1982. In 1986, it submitted two applications “for site approval”¹ to the Board. The first application proposed use of the property for “a trucking contractor, truck repair and tire service operation, storage of trucks and trailers in the open, employee overnight parking lot.” At the Board’s hearing to consider the application, Harmony Grove submitted a site map showing an area designated for “future loading + transfer set up, + storage of freight.” The Board granted the initial conditional use permit with a list of six conditions, including requirements that Harmony Grove erect fences in certain locations and plant a row of spruce trees. In a letter informing Harmony Grove of the approval of its permit application, an assistant zoning administrator added a seventh condition, stating that “[t]he Board maintains jurisdiction to order other conditions as the need therefore arises.”

¶3 The second conditional use application proposed use of the property for “cement storage and transfer facilities, loading docks, and freight storage facilities.” At the hearing to consider this application, Harmony’s owner Jeff

¹ The Board characterizes the applications as requests for conditional use permits, perhaps based on the section of the ordinances cited therein, while Harmony Grove characterizes the applications as requests for variances based upon the use of the word variance on the Board’s preprinted approval form. Although there are some significant differences between variances and conditional use permits, we are not persuaded that any of those differences would affect the outcome of the issues presented on this appeal. Since we are reviewing the Board’s determination, we will use its nomenclature of conditional use permits without deciding the issue.

Wendt told the Board he “[w]ould like to construct a cement storage facility. Transfer and storage. 70 feet tall and 40 x 70 with platform scale.” Shortly after the hearing, the Board issued a written decision with a checkmark indicating that the application was granted, listing conditions of a ten foot setback, dust control meeting D.N.R. and E.P.A. standards, and a chain link fence. The zoning department then sent Harmony Grove a letter indicating that its “request to operate a cement storage and transfer facility” had been approved, and that “[a] building permit may now be issued for the silo you plan to construct.”

¶4 Harmony Grove stored various freight in the silo and in the open on its property over the ensuing years, including cement, concrete pipe, lumber, landscaping boulders, and, beginning in 1987, landscaping mulch. It also planted trees, but most of them died due to what Wendt believed was a combination of poor topsoil, truck fumes and salt runoff from the highway. Those trees that survived only grew about eight feet tall in seventeen years despite being near a pond that should have supplied adequate water.

¶5 In 2003, the zoning department notified Harmony Grove that its storage of large quantities of mulch and landscaping materials was in violation of zoning ordinances and outside the scope of its second conditional use permit. The department subsequently informed Harmony Grove that it was also in violation of the conditions of its first conditional use permit due to a lack of spruce trees along its fences; a lack of proper signage regarding truck entrances; the display of trucks, cars, boats, trailers and vehicle parts in areas not designated for such purposes on the site map initially presented to the Board; and the sale of such vehicles and parts on consignment. The department further informed Harmony Grove that, as a result of its noncompliance, it would be required to seek a new conditional use permit or obtain modifications of the existing one in accordance with the seventh

condition of the original permit; and that it would also need to comply with a local ordinance requiring stored equipment and materials to be completely screened by either fencing or evergreens.

¶6 Harmony Grove challenged the department's determinations that the second conditional use permit did not authorize freight storage and transfer of materials such as mulch; that the "current uses and expansion of area committed to such uses" required Harmony Grove to obtain a new conditional use permit and/or authorized the modification of the original permit or addition of conditions thereto; and that the local screening ordinance could be applied to its property. The Board upheld the department's determinations and the circuit court in turn upheld the Board's decision on certiorari review.

DISCUSSION

¶7 Our statutory certiorari review is limited to considering: (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable, representing its will rather than its judgment; and (4) whether it could reasonably have made the determination in question based upon the evidence before it. *State v. Waushara County Board of Adjustment*, 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514. We presume the Board's decision to be correct and valid and will not set aside its factual findings if they are supported by any reasonable view of the evidence or substitute our discretion for that of the Board. *Id.*, ¶13.

Freight Storage

¶8 Harmony Grove first contends that the Board erred in determining that its second conditional use permit did not authorize general freight storage

which would include materials such as mulch. It argues that its permit application plainly requested to use the property for freight storage and that the Board's decision granting the application did not state that it was granting only part of the application. Harmony Grove further contends that the Board erred in considering minutes from the hearing at which the application was considered and language of the letter advising Harmony Grove that its application had been granted.

¶9 Addressing the last contention first, we agree that the relevant document is not the letter advising Harmony Grove of the Board's decision but rather the actual written decision signed by the Board members. However, that document is a standardized form which does not specifically mention freight storage. It merely states that Harmony Grove's "appeal is granted." It is necessary, then, to look beyond the written decision itself to determine the scope of the conditional use permit granted.

¶10 In assessing the scope of the granted permit, we do not agree that the Board was limited to looking at Harmony Grove's application. By analogy, litigants often file motions which are verbally clarified or modified in open court before a decision is rendered. We see no reason why the procedure before an administrative body acting on an application should be any different. We are therefore persuaded that all information that was before the Board when it issued its decision on the second permit application is relevant, and that the Board properly looked back at the minutes from the hearing at which the application was considered to evaluate whether the issued permit encompassed general freight storage.

¶11 Taking the hearing minutes into account, we are satisfied that the Board could reasonably determine that the only freight storage contemplated when

the permit was issued was directly related to cement. The minutes show that Wendt told the Board he “[w]ould like to construct a cement storage facility. Transfer and storage. 70 feet tall and 40 x 70 with platform scale. The Department of Natural Resources have strict regulations.” Although Wendt contends that the hearing minutes are not a verbatim transcript and may not be complete, he has not provided any offer of proof regarding any additional testimony he believes was presented at the permit hearing regarding the storage of any other materials. Furthermore, the permit’s condition that “dust control meet D.N.R. + E.P.A. standards” supports the contention that the only material the Board contemplated being stored on the property (aside from trucks and truck parts) was cement. We therefore uphold the Board’s determination that Harmony Grove’s storage of mulch was outside the scope of the second conditional use permit.

Areas of Current Use & New Conditions

¶12 Harmony Grove next challenges two distinct aspects of the second part of the Board’s decision that “[t]he current uses and expansion of area committed to such uses requires a new Conditional Use Permit to be approved or the [first conditional use permit] to be modified. Specifically, it claims that the first conditional use permit did not limit Harmony Grove to placing materials only in areas designated for such placement on a site map it submitted at the permit hearing, and that the permit did not authorize the Board to add new conditions in the future. We agree on both counts.

¶13 Again, we look first at the Board’s actual written decision. It does not include any reference to the site map or to the Board’s continuing jurisdiction to add later conditions. Nor does the decision set any conditions relating to where

Harmony Grove could place items such as truck parts on vehicles it was repairing, and there is nothing in the record showing that the Board had any such concerns before issuing the permit. To the contrary, Wendt informed the Board at the hearing that he expected to double his operation over the ensuing five years, from which it could be inferred that certain areas designated for conditional uses would naturally expand over time. The Zoning Department could not add an extra condition of continuing jurisdiction merely by including it in a letter informing Harmony Grove of the Board's decision to grant the permit. We therefore conclude the Board could not have reasonably upheld the zoning department's attempt to modify the existing conditional use permit either to better conform with the size or location of various uses as depicted on the original site map or add other new conditions, and we reverse that portion of the Board's decision.

¶14 We emphasize that our decision that the first conditional use permit does not limit *where* on its property Harmony Grove may conduct permitted uses such as truck repair and cement storage and transfer and does not affect the zoning department's ability to determine that certain *types* of activities such as storing mulch or displaying or selling vehicles on consignment may be outside the scope of permitted uses no matter where on the property they may occur. Therefore, Harmony Grove may indeed be required to obtain an additional conditional use permit if it wishes to conduct such activities.

Compliance with Screening Ordinance

¶15 Section 16-1-10(a)(2)g.2 of the Columbia County Code of Ordinances provides:

All storage of equipment and materials in the open shall be completely screened from all points along the exterior boundaries of the premises by a solid wall or fence of

evergreen planting of equivalent opacity to such wall or fence, built to or maintained at a minimum height of eight (8) feet. No equipment or material shall be piled against such screen, or project above it, and such equipment or material storage shall, in addition, be so located and screened as not to be visible from any part of the intersecting highways.

Harmony Grove contends that it is entirely exempt from this ordinance by virtue of the conditional use permits it was granted. We disagree.

¶16 First of all, we reject Harmony Grove's assertion that the issue turns on whether it was actually granted variances rather than conditional use permits. Either permits or variances could be used to exempt Harmony Grove from ordinance requirements that would otherwise apply. In our view, the real focus of the issue is on the actual terms of the conditional use permits with regard to fencing and screening.

¶17 The first permit required 200 feet of eight-foot-high fencing along each of two sides of the property. To the extent that the required fencing was considerably less than the total length of the property's frontage, we agree that the permit excused Harmony Grove from erecting additional fencing. We further agree that the fact that eight foot fences would never have shielded thirteen-and-one-half-foot-high trucks from view from an elevated highway leads to the conclusion that the conditional use permits do allow Harmony Grove to store trucks and trailers on its property that project above the fence line and may be visible, notwithstanding the ordinance.

¶18 We do not agree, however, that the permits excuse Harmony Grove from all of the shielding requirements of the ordinance. The permits expressly require Harmony Grove to plant rows of trees in several places. The obvious purpose of those conditions is to shield items stored outside on the property from

view where eight-foot fencing may be inadequate to do so. Therefore, the Board reasonably determined that the permits did not excuse Harmony Grove from keeping material and equipment other than trucks which are stored outside on its property from projecting above the fence line and from being visible from the highways. If it is true that the soil conditions will not support trees as envisioned, Harmony Grove must develop some other method of complying with that portion of the ordinance's screening requirements, or seek an additional conditional use permit or variance.

Revocation of Conditional Use Permits

¶19 Finally, Harmony Grove contends that the Board and department should be equitably estopped from "revoking" its permission to use its property for freight storage and to store equipment and material that projects above the required screening or is visible from the highways. As we have determined, however, the conditional use permits did not grant Harmony Grove such permission in the first place, except with regard to the storage of cement and visibility of trucks and trailers, neither of which was revoked by the Board decision before us.

CONCLUSION

¶20 In sum, we uphold the Board's determinations that general freight storage of materials other than cement is outside the scope of Harmony Grove's conditional use permit and that Harmony Grove is still subject to the requirements of Ordinance 16-1-10(a)(2)g.2 with respect to the screening of materials or equipment other than trucks and trailers. However, we set aside the Board's determinations that Harmony Grove's conditional use permits are subject to site map restrictions or continuing jurisdiction to impose additional conditions.

By the Court.—Order affirmed in part; reversed in part.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (2003-04).

