

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2001

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. 01-1829-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-6

**IN COURT OF APPEALS
DISTRICT IV**

OLSEN'S MILL, INC.,

PLAINTIFF-APPELLANT,

v.

**PORTAGE COUNTY WISCONSIN BOARD OF ADJUSTMENT
AND TOWN OF STOCKTON,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Portage County:
FREDERIC W. FLEISHAUER, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Olsen's Mill appeals a circuit court order affirming a decision by the Portage County Board of Adjustment on certiorari review. The issue is whether the board exceeded its authority when it modified a condition attached to a special exception permit to allow the Town of Stockton to use a letter

of credit provided by Olsen's Mill for the construction of a different road than had been contemplated when the letter of credit was issued. We conclude the board acted within its authority and affirm.

¶2 The Portage County Board of Adjustment granted Olsen's Mill a conditional special exception permit to build a feed mill in the Town of Stockton. One of the conditions specified by the board was that Olsen's Mill would construct an access road from its site to County Highway J, and dedicate the road to the town.

¶3 Olsen's Mill built its facility, but was unable to acquire the land necessary to construct the access road. It then asked the town to condemn the land needed for the road, but the town refused. Olsen's Mill next petitioned the board to either eliminate or modify the condition that it construct an access road. The board modified the condition of the special exception permit to provide that Olsen's Mill would provide a \$100,000 letter of credit "for the construction of a road from Olsen's Mill as set forth by the Board," with the understanding that the Town of Stockton would enter a written agreement for the construction of the road within a year's time.

¶4 The town eventually submitted a "Road Right-of-Way Dedication Agreement" proposing to construct a road from Olsen's Mill to Stockton Road rather than to County Highway J. Stockton Road is on the opposite side of the Olsen's Mill site from County Highway J. The board approved the proposal over Olsen's Mill's objection, and Olsen's Mill sought certiorari review.

¶5 On certiorari, we will consider only whether: (1) the board stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and

(4) the evidence was such that the board might reasonably make the order or determination in question. *State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990).

¶6 Olsen’s Mill asserts that “the Board put the obligation on the Town” to build an access road to County Highway J when it first modified the condition of the special exception permit. We disagree. Olsen’s Mill cites no statute or precedent which would have given the board the authority to obligate or compel the town to build any road, much less any particular road. The modification merely conditioned the validity of the special exception permit on the “construction of a road from Olsen’s Mill as set forth by the Board” and funded by Olsen’s Mill. If the town had refused to use the funds to build an access road, or if Olsen’s Mill had refused to extend its letter of credit rather than have it applied to the Stockton Road project, the board could have revoked the permit.

¶7 Thus, the issue before the board was whether the modified condition of the special exception permit had been satisfied by the town’s proposal to build a different access road than that contemplated at the time of the modification to the permit. There was evidence in the record before the board to show that the owners of the land over which the original road had been proposed objected to the project, and that the town was willing to proceed on an alternate route which would alleviate many of the traffic concerns of the board. Therefore, the board’s decision to accept the alternate proposal and extend the term of the letter of credit was a rational judgment based upon evidence before it and well within its authority.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5
(1999-2000).

