No. 124,998

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

AMERICAN WARRIOR, INC., and BRIAN F. PRICE,
Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF FINNEY COUNTY, KANSAS,
and HUBER SAND, INC.,
Appellees.

SYLLABUS BY THE COURT

Since our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 when issuing conditional-use permits, conditional-use permits which were not issued in compliance with this statute are void and unenforceable.

Appeal from Finney District Court; WENDEL W. WURST, judge. Opinion filed February 10, 2023. Reversed and remanded with directions.

Patrick A. Edwards and *David E. Bengtson*, of Stinson LLP, of Wichita, and *Benjamin C. Jackson*, of Jackson Legal Group, LLC, of Scott City, for appellants.

Linda J. Lobmeyer and *Shane Luedke*, of Calihan Law Firm, P.A., of Garden City, for appellees.

Before ARNOLD-BURGER, C.J., GARDNER and CLINE, JJ.

CLINE, J.: This case involves an appeal from a decision of the district court of Finney County affirming the validity of a conditional-use permit issued by the Board of Zoning Appeals (BZA) of Finney County to Huber Sand, Inc. to operate a sand and gravel quarry. The Appellants argue the procedures for reviewing and issuing a

conditional-use permit adopted by Finney County—in which the BZA, rather than the planning commission and board of county commissioners, can issue conditional-use permits—impermissibly varies from the procedures mandated by the Legislature. As a result, they claim the permit issued here is void and unenforceable.

Because our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 in issuing conditional-use permits, we find that Finney County has impermissibly delegated authority to issue conditional-use permits to its BZA. Accordingly, we reverse the district court and find that the conditional-use permit granted to Huber Sand is void and unenforceable.

FACTS

Shortly after purchasing land in Finney County (the Tract), Huber Sand applied to the BZA for a conditional-use permit to operate a sand and gravel quarry on the Tract. Under Finney County Zoning Regulations (the Zoning Regulations), a property owner must apply to the BZA for a conditional-use permit. The Zoning Regulations provide a nonexclusive list of factors for the BZA to consider in deciding whether to grant the permit and require the BZA to impose such restrictions, terms, time limitations, landscaping, and other appropriate safeguards as are necessary to protect adjoining property.

Huber Sand applied to the BZA for a conditional-use permit on May 12, 2021. Several weeks later, the BZA published notice of Huber Sand's application, stating that it would be heard at a public meeting on June 16, 2021. Neighborhood and Development Services, a joint department of Finney County and the cities of Garden City and Holcomb, staffed by Garden City employees, prepared a staff report which recommended approval of the permit. At the meeting, the BZA received public comment on the permit and voted to table the application until its next meeting. Five days later, the BZA met

again and, after receiving additional public comment, approved the conditional-use permit, subject to several restrictions on the operation of the quarry.

After the permit was approved, American Warrior, Inc., the owner of an oil and gas lease covering the Tract, sent a letter to Finney County officials contending that the permit violated state law and was thus void, as the County had not followed the procedures required under K.S.A. 2021 Supp. 12-757 in issuing the permit. It asked the Finney County Commission to vote at their next meeting to revoke Huber Sand's invalid permit and order Huber Sand to halt all sand and gravel mining operations on the Tract. The County Commission declined to act on Huber Sand's conditional-use permit.

American Warrior, Inc. and Brian Price, a Finney County resident who owns land next to the Tract, (the Appellants) then sued in Finney County District Court, challenging the validity of Huber Sand's conditional-use permit. The parties submitted competing motions for summary judgment on stipulated facts.

The Appellants argued that K.S.A. 2021 Supp. 12-757 provides mandatory procedures for issuing a conditional-use permit in Kansas and requires that a permit application first be reviewed by a county's planning commission before going to the board of county commissioners for final approval. In support, the Appellants noted that the Kansas Supreme Court has held this statute applies to the issuance of conditional- and special-use permits, citing *Manly v. City of Shawnee*, 287 Kan. 63, 67-74, 194 P.3d 1 (2008), and *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 886-87, 69 P.3d 601 (2003). The Appellants also cited several unpublished cases from this court applying K.S.A. 2021 Supp. 12-757 to review the issuance of conditional- and special-use permits. See *Ternes v. Board of Sumner County Comm'rs*, No. 119,073, 2020 WL 3116814, at *7-8 (Kan. App. 2020) (unpublished opinion); *Vickers v. Board of Franklin County Comm'rs*, No. 118,649, 2019 WL 3242274, at *4-6 (Kan. App. 2019) (unpublished opinion); *Rural Water District #2 v. Board of Miami County Comm'rs*, No. 105,632, 2012

WL 309165, at *4-6 (Kan. App. 2012) (unpublished opinion). Because Finney County did not follow this procedure and instead allowed the BZA to review and approve Huber Sand's conditional-use permit application, the Appellants argued the permit was void and unenforceable.

Huber Sand and the Finney County Board of County Commissioners (the Appellees) responded that the zoning statutes gave Finney County broad authority to adopt regulations for the issuance of conditional-use permits, including the authority to allow the BZA to issue conditional-use permits. The Appellees argued the requirements of K.S.A. 2021 Supp. 12-757 do not apply "to the consideration of and decision on [conditional-use permit] applications," noting that it does not mention conditional-use permits and by its text only applies to changes in zoning or amendments to zoning regulations. Thus, the Appellees claimed, K.S.A. 2021 Supp. 12-757 did not limit counties from adopting their own procedures for the issuance of conditional-use permits.

The district court disagreed with the Appellants' interpretation of *Manly* and determined *Crumbaker* was wrongly decided. It similarly distinguished the unpublished Court of Appeals cases cited by the Appellants, noting they were not binding precedent as unpublished opinions and finding they did not address the specific question of whether K.S.A. 2021 Supp. 12-757 precluded counties from delegating the authority to issue conditional-use permits to a BZA. It found Huber Sand's permit was validly issued and granted Appellees summary judgment.

ANALYSIS

On appeal, the Appellants claim the district court erred in finding the procedures outlined in K.S.A. 2021 Supp. 12-757 do not apply to the issuance of conditional-use permits. They ask us to find Huber Sand's permit is void because Finney County failed to follow these procedures.

When, as it did here, a district court has granted summary judgment based on stipulated facts, our review is de novo. *Crumbaker*, 275 Kan. at 877.

Whether K.S.A. 2021 Supp. 12-757 applies to conditional-use permits

A county has no inherent power to enact zoning laws. Rather, a county's zoning power is derived solely from the grant of authority in the zoning statutes. *Crumbaker*, 275 Kan. at 884. The zoning statutes, K.S.A. 12-741 et seq., grant counties the authority to enact and enforce other zoning regulations which do not conflict with the zoning statutes. K.S.A. 12-741(a). But a county's power 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. A county's failure to follow the zoning procedures required by state law renders its action invalid. *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 939, 218 P.3d 400 (2009).

Under K.S.A. 12-755(a)(5), counties may adopt zoning regulations which provide for the issuance of "special use or conditional use permits." K.S.A. 2021 Supp. 12-757, in turn, provides the procedures governing bodies must follow when amending zoning regulations or the zoning of a specific property. While K.S.A. 2021 Supp. 12-757 only explicitly applies to zoning "amendments," the Kansas Supreme Court has determined the procedures laid out in that statute also apply to the issuance of special-use permits. *Manly*, 287 Kan. at 67; *Crumbaker*, 275 Kan. at 886.

The Appellants contend *Crumbaker* and *Manly* control and require counties to comply with K.S.A. 2021 Supp. 12-757 when issuing a conditional-use permit. In support, they note that other panels of this court have consistently found that K.S.A. 2021 Supp. 12-757 provides mandatory procedures for the issuance of special- or conditional-use permits. See *Pretty Prairie Wind v. Reno County*, 62 Kan. App. 2d 429, 437-42, 517 P.3d 135 (2022); *Kaw Valley Companies, Inc. v. Board of Leavenworth County Comm'rs*,

No. 124,525, 2022 WL 3693619, at *8 (Kan. App. 2022) (unpublished opinion); *Ternes*, 2020 WL 3116814, at *7-8; *Vickers*, 2019 WL 3242274, at *4-6; *Rural Water District #2*, 2012 WL 309165, at *4-6; *Blessant v. Board of Crawford County Comm'rs*, No. 89,916, 2003 WL 23018238, at *1 (Kan. App. 2003) (unpublished opinion).

The Appellees, on the other hand, disagree that *Crumbaker* and *Manly* control and ask us to independently interpret K.S.A. 2021 Supp. 12-757 to determine, as a matter of first impression, whether that statute's procedures govern the issuance of conditional-use permits.

The Appellees first claim our Supreme Court incorrectly equated a governing body changing the zoning of property to the issuance of a special-use permit in *Crumbaker*, mirroring the district court's discussion of the case. Alternatively, they argue the most logical reading of *Crumbaker* is that when a special-use permit changes the zoning of a parcel, the governing body must follow the procedures laid out in K.S.A. 2021 Supp. 12-757. They note the conditional-use permit here did not change the property's zoning classification, so they argue *Crumbaker* does not apply.

As for *Manly*, the Appellees claim it merely held that K.S.A. 2021 Supp. 12-757 controls the limited question of whether, under the circumstances of that case, the city could grant the special-use permit at issue with a simple majority vote. And they claim the court in *Manly* invalidated the special-use permit because it was issued in violation of the governing body's own zoning regulations, not K.S.A. 2021 Supp. 12-757.

To begin with, insofar as the Appellees claim *Crumbaker* was wrongly decided, their argument is inconsequential. We are duty-bound to follow controlling Supreme Court precedent absent an indication that the court is departing from its previously stated position. *Tillman v. Goodpasture*, 56 Kan. App. 2d 65, 77, 424 P.3d 540 (2018), *aff'd* 313

Kan. 278, 485 P.3d 656 (2021). The Appellees make no argument that the Supreme Court is departing from its position in *Crumbaker*.

While we cannot accept the Appellees' invitation to depart from controlling precedent, we can look at whether that precedent is distinguishable from this case and thus determine whether it is controlling. But we do not find merit in their efforts to distinguish *Crumbaker* and *Manly.* As a result, we find those cases control the outcome here.

Crumbaker involved the City of De Soto's annexation of a quarry. The central issue on appeal was whether the City could change land use via an annexation agreement and bypass the procedures laid out in K.S.A. 2021 Supp. 12-757. Before annexation, the quarry had been operating under a conditional-use permit issued by the Johnson County Board of County Commissioners. Under the annexation agreement, the City allowed the quarry owners to continue and expand their operations. Following annexation, a group of adjoining landowners filed suit, alleging that the City, through the annexation agreement, had effectively issued a conditional-use permit to the quarry owners without following the procedures required by law and its own zoning regulations. Their claim presumed that the annexation agreement represented a change in land use from that previously allowed under the conditional-use permit granted by Johnson County. The quarry owners argued, as relevant here, that the procedures set forth in the zoning statutes were not mandatory and could be bypassed under the City's home rule powers.

Our Supreme Court rejected the quarry owner's argument that the procedures laid out in the zoning statutes were open to modification. As the court explained, once a governing body chooses to wield the authority granted to it by the Legislature in the zoning statutes, it must follow the procedures laid out in those statutes. If a city were allowed to adopt alternative procedures by charter ordinance, the entire purpose of the zoning statutes—to provide a comprehensive method of governance for zoning

regulation—would be seriously impaired. *Crumbaker*, 275 Kan. at 885. As a result, the court explained, the power of a city government to change the zoning of property—which it held includes issuing special-use permits—can be exercised only in conformity with the statute that grants this power. And because the City did not follow the procedures required by K.S.A. 2021 Supp. 12-757 in adopting the portions of the annexation agreement dealing with land use, e.g., the continuation and expansion of the quarrying operations, the court found those portions were invalid. 275 Kan. at 886-87.

In other words, the court held that because the portions of the annexation agreement dealing with land use were the functional equivalent of a conditional- or special-use permit, they had to be enacted in conformity with the procedures required by K.S.A. 2021 Supp. 12-757. This analysis suggests the Supreme Court views the procedures provided in K.S.A. 2021 Supp. 12-757 as mandatory for the issuance of all conditional-use permits.

Although the court did not explicitly explain its logic in equating the issuance of a special-use permit with a change in zoning, it apparently relied on the definition of "zoning" provided in the zoning statutes. K.S.A. 12-742(a)(10) defines the term as "the regulation or restriction of the . . . uses of land." Thus, the court noted, to change zoning is "to regulate or restrict land use." *Crumbaker*, 275 Kan. at 885. While the court in *Crumbaker* did not identify the definition for "special use permit" used by the City in that case, that term generally has the same meaning in American zoning law as the definition for conditional-use permit used by Finney County here. See 2 Salkin, Am. Law. Zoning, Special use permits, generally, § 14:1 (5th ed. 2022). A special- or conditional-use permit allows for land to be put to an otherwise prohibited use. And in granting the permit, county officials can impose special conditions and safeguards on the use in the name of the public interest. In deciding whether to allow land to be put to a new, otherwise prohibited use, potentially with special conditions and safeguards, the court found a governing body is regulating land use. As a result, under *Crumbaker*, when a governing

body issues a special- or conditional-use permit, the statutory procedures required to change the zoning of land must be followed.

The dissent dismisses *Crumbaker*'s statement requiring the issuance of special-use permits to conform "with the statute which authorizes the zoning" as obiter dictum. But "even dicta or obiter dictum 'should not be lightly disregarded' by lower courts." *In re Estate of Lentz*, 312 Kan. 490, 506, 476 P.3d 1151 (2020) (Luckert, C.J., concurring). And while the dissent does not read *Crumbaker* to require application of K.S.A. 2021 Supp. 12-757 to conditional-use permits, that is just what the Supreme Court did five years later in *Manly*. In *Manly*, the court reviewed the City of Shawnee's issuance of a special-use permit to the Shawnee Mission School District for the construction of a softball complex. The district court invalidated the permit, finding that the city council had approved the permit with a simple majority over the recommendation of the planning commission, in violation of K.S.A. 2021 Supp. 12-757(d). The question on appeal was whether the City could grant the special-use permit with a simple majority vote, after the planning commission reconsidered the proposal and reaffirmed its initial recommendation to deny the permit. The court identified the controlling statutory provision on this question as K.S.A. 2021 Supp. 12-757(d). *Manly*, 287 Kan. at 67. Interpreting that provision, the court upheld the validity of the permit, as a majority vote was all that the statute required for the City to overrule the recommendation of the planning commission after reconsideration. 287 Kan. at 74.

Contrary to the Appellees' (and the dissent's) claims, the court in *Manly* did not attempt to limit its discussion of K.S.A. 2021 Supp. 12-757 to the specific circumstances of that case or the governing body's zoning regulations. Instead, it gave a comprehensive description of the statute's procedural requirements, explaining that they apply any time a governing body "wants to take action upon a proposed zoning amendment." 287 Kan. at 68. And implicit in this discussion of the statute is the court's determination that the issuance of a special-use permit constitutes a "zoning amendment."

Similarly, the Appellees' claim that the *Manly* court invalidated the permit based on noncompliance with the City's zoning regulations reflects a fundamental misunderstanding of the case; the court *upheld* the permit because the procedure used complied with the *statutory* requirements of K.S.A. 2021 Supp. 12-757.

Furthermore, while the Appellees and the dissent are correct that the court in *Manly* did not address the specific question of whether a governing body may delegate authority to issue conditional-use permits to a BZA, its discussion of the zoning statutes and the role of the separation of powers in zoning shows that this sort of delegation is impermissible under *Manly*'s interpretation of K.S.A. 2021 Supp. 12-757.

To begin with, the court's conclusion in *Manly* that K.S.A. 2021 Supp. 12-757(d) was the controlling statutory provision signifies that the procedures in that statute govern the issuance of any special- or conditional-use permit. 287 Kan. at 67. The Appellees' and the dissent's suggestion that *Manly* is silent on the applicability of K.S.A. 2021 Supp. 12-757 to conditional- or special-use permits is misplaced. And as the Appellants note, *Manly* explains that the procedures employed by Finney County not only violate K.S.A. 2021 Supp. 12-757, but also violate separation of powers principles, as they place final authority for a zoning decision in the hands of an unelected advisory body. 287 Kan. at 70-71.

In its analysis, the *Manly* court also discussed how the doctrine of separation of powers supported its interpretation of K.S.A. 2021 Supp. 12-757. It observed that requiring a two-thirds vote on the commission's resubmitted recommendation to the City Council unacceptably "would permit a simple majority of the planning commission to govern over a simple majority of the City Council." 287 Kan. at 71. And while a planning commission is an unelected advisory body, "'[t]he final authority in zoning matters rests with the governing body possessing legislative power.'" 287 Kan. at 71. Accordingly, "[i]f the legislature intended to allocate the ultimate authority to grant or deny a zoning

amendment to the planning commission, it would be impermissibly shifting the City's governance from the elected City Council to an appointed advisory commission." 287 Kan. at 71. As the Appellants note, like a planning commission, a BZA is an unelected body and is thus prohibited under separation of powers principles from exercising final authority on decisions to change zoning—including the issuance of special- or conditional-use permits.

The Kansas Supreme Court has since reaffirmed the analysis of K.S.A. 2021 Supp. 12-757 and the limits separation of powers principles place on zoning decisions given in *Manly*. See *Zimmerman*, 289 Kan. at 940-44. While the dissent correctly notes that the question of whether K.S.A. 2021 Supp. 12-757 applies to the issuance of a special-use permit was not at issue in *Zimmerman*, the *Zimmerman* decision still provides insight into the Supreme Court's view on the matter. The Supreme Court discussed *Manly* in detail in *Zimmerman*, describing its resolution of the application of requirements under K.S.A. 2021 Supp. 12-757(d) to the special-use permit at issue in *Manly.* And it characterized the decision in *Manly* as upholding the validity of the special-use permit for its compliance with K.S.A. 12-757(d). 289 Kan. at 944.

Appellants aptly note that *Crumbaker*, *Manly*, and *Zimmerman* all apply K.S.A. 2021 Supp. 12-757 to different aspects of the two-part process required for conditional- and special-use permits. If that statute did not apply to conditional- or special-use permits, there would be no need to analyze the process followed in each case in light of that statute's requirements or even mention it.

We believe a fair reading of *Crumbaker* and *Manly* requires application of K.S.A. 2021 Supp. 12-757 to conditional-use permits and, indeed, several panels of this court have so held. See *Pretty Prairie Wind*, 62 Kan. App. 2d at 437-42; *Kaw Valley Companies, Inc.*, 2022 WL 3693619, at *8; *Ternes*, 2020 WL 3116814, at *7-8; *Vickers*, 2019 WL 3242274, at *4-6; *Rural Water District #2*, 2012 WL 309165, at *4-6; *Blessant*,

2003 WL 23018238, at *1. We thus see no indication that our Supreme Court is departing from its interpretation of that statute, so we cannot weigh in on whether *Crumbaker* and *Manly* were wrongly decided. *Tillman*, 56 Kan. App. 2d at 77. Even if we agreed with the Appellees' and the dissent's points that K.S.A. 2021 Supp. 12-757, by its text, does not apply to the evaluation or issuance of a conditional-use permit and instead only applies when a governing body is supplementing, changing, or revising the boundaries or regulations in its zoning regulations by amendment, our hands are tied.

But while we cannot depart from controlling precedent, we can urge the court to revisit its interpretation of K.S.A. 2021 Supp. 12-757, just like it revisited its interpretation of workers compensation statutes in *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, Syl. ¶ 2, 214 P.3d 676 (2009) (noting "[a] history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect [statutory] analysis"). As Justice Johnson aptly noted in his dissenting opinion in *In re N.A.C.*, 299 Kan. 1100, 1124, 329 P.3d 458 (2014), the Kansas Supreme Court has moved away from "court-made policy interpretations" in favor of "plain-language statutory interpretations." (Citing *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 527, 154 P.3d 494 [2007], [overruling over 70-year-old caselaw that was contrary to plain statutory language].) Perhaps a fresh look at K.S.A. 2021 Supp. 12-757 will generate a similar shift in Kansas zoning law.

CONCLUSION

The district court's finding that K.S.A. 2021 Supp. 12-757 does not apply to applications for conditional-use permits contradicts controlling Kansas Supreme Court precedent. And the parties concede that the procedure for addressing such applications enacted by Finney County conflicts with K.S.A. 2021 Supp. 12-757's requirement that conditional-use permits be first reviewed by a governing body's planning commission and then voted upon by the governing body itself. See K.S.A. 2021 Supp. 12-757.

Because Finney County did not follow the procedures required under K.S.A. 2021 Supp. 12-757 and instead allowed its BZA to independently review and issue the conditional-use permit to Huber Sand, the permit is void and unenforceable. Accordingly, we must reverse the district court's grant of summary judgment to the Appellees and remand with instructions to grant summary judgment to the Appellants.

Reversed and remanded with directions.

* * *

ARNOLD-BURGER, C.J., dissenting: I respectfully dissent. The majority holds that "[b]ecause our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 in issuing conditional-use permits, we find that Finney County has impermissibly delegated authority to issue conditional-use permits to its BZA." The central problem with this conclusion is that our Supreme Court has never so held and in fact such a finding conflicts with the clear language of K.S.A. 2021 Supp. 12-757. I would affirm the district court's grant of summary judgment for the reasons below.

UNDISPUTED RELEVANT FACTS

Huber Sand Company (Huber) owns the surface rights to a piece of land in Finney County referred to simply as the Tract. American Warrior, Inc. (AWI) has an oil and gas lease covering the Tract. It operates one active gas well on the Tract. AWI also owns and maintains underground pipe on the Tract to transport natural gas. And Brian Price, a Finney County resident, owns land next to the Tract.

Huber sought to operate a sand and gravel quarry on the Tract. The land is zoned by Finney County as agricultural. Finney County Zoning Regulations provide that a sand and gravel quarry is allowed on land zoned as agricultural after the use is reviewed and

approved as a permitted conditional use by the Board of Zoning Appeals (BZA). See Finney County, Kansas, Zoning Regulations, §§ 4.010, 4.030(6), and 28.030(6); 29.040 (2021).

Huber filed the necessary application for a conditional-use permit with the BZA as required by the Finney County, Kansas, Zoning Regulations. The BZA issued Huber a conditional-use permit. It is critical to note that on appeal neither AWI or Smith challenge the fact that Huber properly followed the procedure set out in the Finney County, Kansas, Zoning Regulations, and the conditional-use permit was issued by the BZA in compliance with that procedure. Their claim rests solely on their position that the Finney County Zoning Regulations violate K.S.A. 2021 Supp. 12-757 and thus render the BZA's grant of a conditional-use permit to Huber "invalid, void, and unenforceable." The only issue before us is whether K.S.A. 2021 Supp. 12-757 applies to the grant of a conditional-use permit in Finney County. The district court granted summary judgment for Huber, finding that the process and procedures used by Finney County for Huber's conditional-use permit complied with Kansas law. This appeal followed. AWI and Smith, the Appellants, will be collectively referred to as AWI.

ANALYSIS

The review of the grant or denial of a motion for summary judgment is de novo. *First Security Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362 (2021). And appellate courts interpret statutes de novo, giving effect to the express language used when it is plain and unambiguous. *State v. Moler*, 316 Kan. 565, 571, 519 P.3d 794 (2022).

With the standard of review clearly in mind, I will first examine the statute, K.S.A. 2021 Supp. 12-757, and then the cases interpreting the statute.

I. K.S.A. 2021 SUPP. 12-757 DOES NOT APPLY TO THE ISSUANCE OF CONDITIONAL-USE PERMITS

A. *K.S.A. 2021 Supp. 12-757 is clear and unambiguous in its application to changes in zoning regulations by amendment.*

K.S.A. 2021 Supp. 12-757(a) begins with a clear grant of authority to governing bodies to "supplement, change or generally revise the boundaries or regulations contained in zoning regulations by *amendment*." (Emphasis added.) It then explains who may request such an amendment. If the amendment aligns with the land use plan adopted by the governmental entity it is presumed reasonable.

At subsection (b), the statute outlines how a zoning change or regulation must be amended. It requires action by the planning commission with notice to property owners affected by the amendment. Subsection (d) provides that a majority of the members of the planning commission must approve or deny the request for the zoning amendment and then forward its recommendation to the governing body, which is required to act on it.

There is no question that the procedure Finney County has in place for the approval of conditional-use permits does not follow the procedure outlined in K.S.A. 2021 Supp. 12-757. But that does not end the analysis.

B. *The grant of a conditional-use permit is not an amendment to a zoning regulation under state law.*

Because the term conditional-use permit is not used in the statute at all, the first question we must examine is whether the granting of a conditional-use permit is an amendment to zoning regulations. If it is not, then on its face K.S.A. 2021 Supp. 12-757 has no application to conditional-use permits.

I begin with the definition of a zoning regulation. State law defines it as "the lawfully adopted zoning ordinances of a city and the lawfully adopted zoning resolutions of a county." K.S.A. 12-742(a)(11).

A conditional-use permit does not change the existing zoning of a tract of land. The Tract here is zoned agricultural and remains zoned agricultural. Under the Finney County, Kansas, Zoning Regulations sand and gravel quarries are allowed on land zoned as agricultural. So anyone purchasing property around agriculturally zoned property is on notice that sand and gravel quarries are permitted. But the county may place conditions on the use of the land. The placement of these conditions does not constitute an amendment to the zoning regulations or the zoning of the tract. It is and remains agricultural. The zoning regulations of the county remained the same both before and after the issuance of the conditional-use permit here. That accords with both the county definition of a conditional-use permit and the generally accepted definition of a conditional use.

The Finney County, Kansas, Zoning Regulations section 2.030 (36) defines a conditional use as the

> "use of any building, structure or parcel of land that, by its nature, is perceived to require special care and attention in siting so as to assure compatibility with surrounding properties and uses. Conditional uses are allowed only after public notice, hearing and approval as prescribed in these Regulations and may have special conditions and safeguards attached to assure that the public interest is served."

The terms conditional use and special use are often used interchangeably—although sometimes they are separate processes set out in city ordinance or county regulation. Finney County, Kansas, Zoning Regulations do not have any permit titled a "special-use permit." State law does not specifically define a conditional use or special use. But these terms are common in the area of land use planning.

> "Special use permits are intended to provide flexibility in the siting of uses that may have adverse effects on neighboring properties under some circumstances but which may be harmonious with the neighborhood in other cases. Instead of being permitted as of right, property owners seeking to establish special uses must apply for a permit and demonstrate compliance with standards and criteria enumerated in the ordinance. The process allows local land use officials to consider aspects of proposed special uses such as their size, location, and design, as well as concerns from the public, before deciding whether the use would be appropriate and consistent with the intent of the zoning regulations." 2 Salkin, Am. Law. Zoning, Special use permits, generally § 14:1 (5th ed. 2022).

In other words, special- and conditional-use permits "allow the establishment of uses that are generally permitted in the zoning district subject [to] administrative approval." 2 Am. Law. Zoning § 14:1.

C. *Kansas statutes explicitly allow governing bodies to adopt their own procedures related to conditional-use permits.*

Counties may enact laws and regulations related to planning and zoning as long as they do not conflict with state law. K.S.A. 12-741(a). And at least since 1992, concurrent with the adoption of K.S.A. 12-757, governing bodies have been statutorily granted the authority to adopt zoning regulations which provide for the issuance of special-use or conditional-use permits. K.S.A. 12-755(a)(5). No specific procedure is mandated as it is for a zoning amendment. Governing bodies are given authority to adopt the procedures they see fit. BZAs are given broad authority to issue permits. K.S.A. 12-759(d). This variance in statutory treatment is a recognition that conditional-use and special-use permits are different than zoning amendments. Finney County adopted its own procedure for the approval of conditional-use permits and that procedure does not conflict with any applicable state law.

Support for this conclusion can be found at K.S.A. 19-2956 et seq. These provisions apply to urban counties, which have been defined as Johnson and Sedgwick counties. K.S.A. 2021 Supp. 19-2654. In these two urban counties,

> "[t]he issuance of any conditional use permit [in unincorporated portions of the county] shall be considered a change or revision to the zoning map and shall be subject to the same notice, hearing and voting requirements prescribed herein for rezonings." K.S.A. 2021 Supp. 19-2960(b).

It then requires that all conditional-use permits first must be submitted to either the planning commission or the appropriate zoning board. If first submitted to the zoning board, it must be referred to the planning commission and then the board of county commissioners just as a rezoning or change in the comprehensive plan must be. K.S.A. 19-2958(b); K.S.A. 2021 Supp. 19-2960(b). These provisions have been in effect at least since 1984. Knowing that, the Legislature did not place such requirements on conditional-use permits in non-urban counties. Instead, it left the procedures for the issuance of conditional-use permits up to the county and did not equate it with a change in the zoning regulations.

For these reasons, I believe it is clear under the plain language of K.S.A. 2021 Supp. 12-757 it does not apply to the issuance of conditional-use permits in Finney County.

II. THE CASELAW INTERPRETING K.S.A. 2021 SUPP. 12-757 DOES NOT HOLD THE STATUTE APPLICABLE TO CONDITIONAL-USE PERMITS

AWI argues that any interpretation of K.S.A. 2021 Supp. 12-757 other than the one it proposes—that the issuance of a conditional-use permit is a rezoning requiring adherence to the procedure outlined in K.S.A. 2021 Supp. 12-757—strays from Kansas

caselaw. Because the Court of Appeals is duty bound to follow Supreme Court precedent, the next step is to determine whether AWI is correct. See *Johnson v. Westhoff Sand Co., Inc.*, 281 Kan. 930, 952, 135 P.3d 1127 (2006) (The Court of Appeals has no authority to overrule decisions of the Kansas Supreme Court and is duty bound to follow Kansas Supreme Court precedent.).

A. *For stare decisis to compel a particular result, the cases relied on must be* indistinguishable.

To assert that this court is duty bound to follow the decisions of the Kansas Supreme Court is another way to say that the doctrine of stare decisis compels a particular result. The doctrine of stare decisis "'compels adherence to a prior factually indistinguishable decision of a controlling court.'" *Nippon Shinyaku Co., Ltd. v. Iancu*, 369 F. Supp. 3d 226, 237 (D.D.C. 2019), *aff'd* 796 Fed. Appx. 1032 (Fed. Cir. 2020) (unpublished opinion). So a review of the facts and actual holdings of each case is important. "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" 369 F. Supp. 3d at 237. It requires the issues raised be identical to those raised in the prior case to apply. See *In re Equalization Appeal of Walmart Stores, Inc.*, 316 Kan. 32, 62, 513 P.3d 457 (2022). To consider a prior case to be binding precedent, the holding relied on must relate to the same issue presented and argued in the current case. The holding of a court is defined as "[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision." Black's Law Dictionary 879 (11th ed. 2019). Also described as the *ratio decidendi* or reason for deciding, it is "a general rule without which a case must have been decided otherwise." Black's Law Dictionary 1514 (11th ed. 2019).

B. *If the statements in the opinion were not essential to the holding in the case, they are considered dicta and not binding.*

The holding of a case should not be confused with judicial dictum within an opinion. Black's Law Dictionary 569 (11th ed. 2019) defines judicial dictum as "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is *not* essential to the decision." (Emphasis added.). Nobody is bound by dictum, not even the court itself. Our Supreme Court has appreciated the fact that after further consideration and briefing of the parties the court's opinion may mature when the question is squarely presented for decision. *Law v. Law Company Building Assocs.*, 295 Kan. 551, 564, 289 P.3d 1066 (2012). Our Supreme Court has further defined a subset of dictum called obiter dictum. Obiter dictum is defined as "'[w]ords of a prior opinion entirely unnecessary for the decision of the case.'" *State v. Fortune*, 236 Kan. 248, 251, 689 P.2d 1196 (1984). It is a statement in an opinion where courts indulged in generalities that have no actual bearing on issues involved. 236 Kan. at 251. In fact, its Latin translation means "'something said in passing'" or "'by the way.'" Black's Law Dictionary 569 (11th ed. 2019). It is entitled to even less weight than judicial dictum which involves a question directly involved and argued in the case, but not essential to its decision. *Jamerson v. Heimgartner*, 304 Kan. 678, 686, 372 P.3d 1236 (2016). Obiter dictum involves issues that have no direct bearing on the issues in the case and may not have even been argued by the parties.

I will start with a review of the cases relied on by AWI that could be binding on this court as precedent, those from the Kansas Supreme Court. Our rules are clear that unpublished opinions are not binding precedent and are not favored for citation. Supreme Court Rule 7.04(g)(2) (2022 Kan. S. Ct. R. at 47). And the fact that the Supreme Court may have denied a petition for review on an unpublished case, "imports no opinion on the merits of the case." Supreme Court Rule 8.03(h) (2022 Kan. S. Ct. R. at 59). Moreover,

one Kansas Court of Appeals panel is not bound by another panel's decision. See *State v. Fleming*, 308 Kan. 689, 706, 423 P.3d 506 (2018).

With that foundation laid, I turn to the card on which the majority's house is built, "[b]ecause our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 in issuing conditional-use permits, we find that Finney County has impermissibly delegated authority to issue conditional-use permits to its BZA." Slip op. at 2. Such a statement has never been part of any *holding* by the Kansas Supreme Court. Granted it does appear in one Supreme Court decision, which will be discussed below, but its appearance in that case—which is then cited in other cases—is nothing more that obiter dictum. A review of the cases follows.

C. *Decisions of the Kansas Supreme Court do not conflict with a finding that the procedures required for rezoning under K.S.A. 2021 Supp. 12-757 do not apply to the grant or denial of a conditional-use permit.*

The first case AWI cites in its brief on appeal is *Johnson County Water Dist. No. 1 v. City of Kansas City*, 255 Kan. 183, 186, 871 P.2d 1256 (1994). AWI admits that there is but one fleeting reference in the case to K.S.A. 12-757. This probably explains why this case was not presented to the district court as supporting AWI's position in its motion for partial summary judgment. The citation has absolutely nothing to do with whether the city council had to follow K.S.A. 2021 Supp. 12-757 before granting a special-use permit or a conditional-use permit and it is not essential to the holding in the case. The crux of the case was whether the governing body's actions setting conditions on the granting of a special-use permit were reasonable and whether the Water District was entitled to immunity from local zoning regulations. This case does not hold, nor even remotely suggest, that governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 in issuing conditional-use or special-use permits.

Next, AWI cites *Crumbaker v. Hunt Midwest Mining, Inc*., 275 Kan. 872, 69 P.3d 601 (2003). Again, the actual holding has nothing to do with the mandatory application of the procedures set out in K.S.A. 12-757 to the issuance of a conditional-use permit.

The City of DeSoto sought to address a land use issue through an Annexation Agreement without following its own rezoning procedures and issuing a special-use permit. Neighboring property owners sued alleging that the legal effect of the Annexation Agreement was to change the land use previously restricted by the county under a conditional-use permit. The City's ordinances required it to regulate land use as provided by K.S.A. 12-741 et seq. So the application of the provisions of the statutes was never in question. Moreover, DeSoto is located in Johnson County, and as already noted K.S.A. 2021 Supp. 19-2960(b) defines conditional-use permits as zoning changes in Johnson County.

Instead, the Supreme Court held that when a county property is annexed by a city, "the property retains its county zoning classification and any accompanying land use restrictions until the annexing city *changes the zoning*." (Emphasis added.) 275 Kan. 872, Syl. ¶ 1. As noted, DeSoto ordinances required public hearings for rezonings *and* special-use permits, and it was trying to avoid that process by incorporating the changes in the Annexation Agreement. There is no discussion of the legality of procedures established under K.S.A. 12-755(a)(5) or any procedure similar to the one used by Finney County. The parties agreed that the City failed to follow its own zoning procedures in passing the resolution authorizing the mayor to execute the Agreement and failed to follow its own zoning procedures when it enacted the annexation ordinance authorized by that Agreement.

Granted *Crumbaker* does state that "we have long held that the power of a city government to change the zoning of property—which includes issuing special-use permits—can only be exercised in conformity with the statute which authorizes the

zoning." 275 Kan. at 886. Up until *Crumbaker*, it is the *only* Supreme Court case in which this statement appears. But the case it cites for this proposition, *Ford v. City of Hutchinson*, 140 Kan. 307, 311, 37 P.2d 39 (1934), does not support this statement. *Ford* was a zoning change from a residential district to a commercial zone and did not involve conditional-use permits or special-use permits. The terms are nowhere in the opinion. The *Ford* opinion does not equate the issuance of a conditional-use permit or a special-use permit with a change in zoning. And finding that a special-use permit was a change in zoning was not essential to the holding in *Crumbaker*. Given the city regulations and the fact that it was not argued by the parties, the broad statement with the inclusion of the clause "which includes issuing special-use permits" is no more than *obiter dictum* and binds no one.

Five years after *Crumbaker*, the Kansas Supreme Court decided *Manly v. City of Shawnee*, 287 Kan. 63, 194 P.3d 1 (2008), the third case on which AWI relies. It also involved a special-use permit. And, similar to *Johnson County Water District No. 1*, the sole issue was whether the City could grant the special-use permit with a simple majority vote after the planning commission had recommended denial. The court found the answer in K.S.A. 12-757(d). There was no dispute among the parties related to the application of K.S.A. 12-757 and the court proceeded with the assumption that it did apply. As already noted, K.S.A. 2021 Supp. 19-2960(b) defines conditional-use permits as changes to zoning in Johnson and Sedgwick counties and requires the same notice, hearing, and voting requirements as a rezoning. To surmise from *Manly* that conditional-use permits issued in counties other than Johnson or Sedgwick *must* follow the procedure in K.S.A. 12-757(d) or be void when that was not an issue raised in the case would be foolhardy. Context matters. Facts matter. The Supreme Court does not repeat the dictum from *Crumbaker* in *Manly*.

Finally, a year later, the Supreme Court decided *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 218 P.3d 400 (2009). In 2002, the Board of

Wabaunsee County Commissioners (Board) was met with inquiry from a company desiring to build a commercial wind farm. After placing a temporary moratorium on the acceptance of applications for conditional-use permits for wind farm projects, the county embarked on a two-year process of reviewing its zoning regulations as they related to wind farms. The Board of County Commissioners determined that wind farms should be prohibited in the county. It adopted a county resolution *amending* the county's zoning regulations to impose that restriction. A lawsuit followed.

As in the other cases, whether the procedures required by K.S.A. 12-757(d) applied to the case was not in dispute. The opening sentence of the opinion makes that clear; "[t]his appeal results from the decision of the [Board] to amend its zoning regulations." 289 Kan. at 929. The issue was whether a super-majority vote was required under the statute to return the amendment recommendation to the planning commission. Again there is no binding precedent in this case to conclude that conditional-use permits are changes in zoning, in counties other than Johnson and Sedgwick, that require adherence to the procedures in K.S.A. 12-757.

It is also significant that by the time *Zimmerman* was decided the Supreme Court was omitting the clause "which includes issuing special use permits" from its quotations of *Crumbaker*, 275 Kan. 886. In both *Zimmerman* and *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, 1033, 181 P.3d 549 (2008), the Supreme Court simply noted that it had held that "'the power of a city government to change the zoning of property . . . can only be exercised in conformity with the statute which authorizes the zoning.' As a result, a city's failure to follow the zoning procedures in state law renders its action invalid. [Citations omitted.]" *Zimmerman*, 289 Kan. at 939. Perhaps this was a recognition that the inclusion of the broad clause equating special-use permits with rezonings was unsupported by the statute.

But that did not stop our court from continuing to rely on the dictum from *Crumbaker* as the expression of a solid legal principle.

D. *The unpublished opinions relied on by AWI are also easily distinguishable.*

Although this court owes no deference to unpublished opinions, those relied on by AWI to support its position, that the conditional-use permit granted to Huber is void, suffer the same malady as the published opinions—they are factually distinguishable and did not involve the legal question presented here.

Ternes v. Board of Sumner County Comm'rs, No. 119,073, 2020 WL 3116814 (Kan. App.) (unpublished opinion), *rev. denied* 312 Kan. 902 (2020), the case at the heart of AWI's original petition—in fact the only case it cites in its petition—involved the application for a zoning change *and* the necessary conditional-use permit. The land on which Invenergy wished to install a wind farm was zoned Rural District. Wind farms were only allowed on land zoned Agricultural Commercial, and even then the applicant had to obtain a conditional-use permit to operate the commercial wind farm. So clearly the procedure set out in K.S.A. 12-757 applied to the rezoning application. Invenergy applied for both. There were problems with the notices sent. But the planning commission took up both applications and recommended to the Board of County Commissioners that the zoning change be denied. There would be no need to even address the conditional-use permit if the zoning was denied. One depended on the other. But the planning commission also denied the conditional-use permit—apparently consistent with Sumner County zoning ordinances. The matter went before the Board which voted to grant the zoning change *and* the conditional-use permit. The surrounding neighbors led by Martin Ternes appealed arguing among other issues that the planning commission was the sole arbiter of the conditional-use permit, not the Board, based on the county zoning regulations.

This court's decision revolved around an interpretation of the county zoning regulations and their requirements about conditional-use permits, *not* K.S.A. 12-757. But then, while recognizing that K.S.A. 12-755(a)(5) allowed the county to adopt procedures related to the issuance of conditional-use permits, it turned to the wholly unsupported language that "Kansas courts have consistently found that the procedures in K.S.A. 2019 Supp. 12-757 apply to *conditional use and* special use permits." (Emphasis added.) 2020 WL 3116814, at *7. It cites *Manly* for this holding. Not only did the panel add to the *Crumbaker* language to include conditional-use permits, it treated the dictum as controlling legal principle even though it highlighted the fact that such an interpretation deviated from K.S.A. 12-755(a)(5). *Ternes*, 2020 WL 3116814, at *7.

Making an unsupported statement several times in a string of cases does not make it true. The panel concluded that only the Board could grant a conditional-use permit based on the language of K.S.A. 12-757 no matter if the planning commission approves. *Ternes*, 2020 WL 3116814, at *8. Accordingly, I cannot agree with the decision in *Ternes* when it improperly cites an unsupported legal principle—particularly when the conclusion was unnecessary for a decision in the case. The panel already noted that the Sumner County zoning regulations provided that the planning commission only serves in an advisory role, so its decision could not be the final one if it was simply making recommendations to the Board. *Ternes*, 2020 WL 3116814, at *6. The zoning regulations did not conflict with K.S.A. 12-757. This is simply another case of obiter dictum.

To avoid continuing to belabor this, the other three unpublished cases AWI relies on are readily distinguishable as well. *Vickers v. Board of Franklin County Comm'rs*, No. 118,649, 2019 WL 3242274 (Kan. App. 2019) (unpublished opinion) (same distinguishing facts as *Ternes*); *Rural Water Dist. No. 2 v. Board of Miami County Comm'rs*, No. 105,632, 2012 WL 309165 (Kan. App. 2012) (unpublished opinion) (vote required and reasonableness of decision denying conditional-use permit—application of K.S.A. 12-757 was uncontested); *Blessant v. Board of Crawford County Comm'rs*, No.

89,916, 2003 WL 23018238 (Kan. App. 2003) (unpublished opinion) (sole issue was reasonableness of the Board's decision to deny a conditional-use permit—application of K.S.A. 12-757 was uncontested).

Finally in its reply brief, AWI alerts us to yet two more cases which it contends support its position. *Kaw Valley Companies, Inc. v. Board of Leavenworth County Comm'rs*, No. 124,525, 2022 WL 3693619 (Kan. App. 2022) (unpublished opinion) (no dispute that statutory procedures were followed, no challenge to their application, and *Manly* cited for the dictum from *Crumbaker*), and *Pretty Prairie Wind LLC v. Reno County*, 62 Kan. App. 2d 429, 517 P.3d 135 (2022) (considering whether K.S.A. 2021 Supp. 12-757[f] or K.S.A. 25-3601 et seq. applied to filing of a protest petition to a conditional-use permit—no dispute it was one of the two and no discussion of application of K.S.A. 12-757 in situations like those presented here).

So I conclude by reiterating that facts matter, context matters, and words matter. As our Supreme Court has recognized, sometimes appellate courts use dicta. Sometimes that dicta is persuasive when applied to the right situations, but sometimes that dicta is just a statement in passing to be reconsidered in the right situation where the specific legal principle at issue has been properly briefed. The foundational card on which the majority builds its house is a statement of obiter dictum that causes the house to come crashing down when applied to a case that merits reconsideration of that dictum when the question is squarely presented for decision.

CONCLUSION

The statutes are clear. Conditional-use permits in counties other than Johnson and Sedgwick are governed by K.S.A. 12-755, not K.S.A. 2021 Supp.12-757. They are not amendments to the zoning regulations. And based on K.S.A. 12-755 the county may adopt any procedures it desires to approve such permits as long as it does not conflict

with state law. The procedures adopted by Finney County do not conflict with state law. If the citizens of Finney County find the process distasteful, they may use their political will to get the regulations changed. But until then, the parties agree that Finney County complied with its regulations. Accordingly, the district court's grant of summary judgment should be affirmed.