

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 6, 1997

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

NOTICE

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

No. 96-0102

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**JAMES R. KERSTEN and
SUGAR CREEK CAMPER SALES, INC.,**

Plaintiffs-Appellants,

v.

**BOARD OF ADJUSTMENT OF
THE TOWN OF FULTON,**

Defendant-Respondent.

APPEAL from an order of the circuit court for Rock County:
PATRICK J. RUDE, Judge. *Affirmed.*

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

PER CURIAM. James R. Kersten and Sugar Creek Camper Sales, Inc., appeal from an order affirming a zoning decision by the Town of Fulton Board of Adjustment. The issues are whether the appellants' use of the land was permitted under a prior ordinance and, if not, whether the board erred in

denying their application for a conditional use permit. We conclude that the use was not permitted and the board did not err. We therefore affirm.

The appellants' goal is that the sale of recreational vehicles be a legal use of the property in question. The property was used for that purpose starting in 1992. The appellants argued to the board that such use was permitted under the ordinance in effect at that time. The ordinance designated the property as part of a commercial highway interchange district. Permitted uses included, among others, gas stations, auto repair shops, businesses leasing passenger autos, hotels and motels, restaurants and commercial parking lots. Most relevant to this appeal, permitted uses also included "[t]ourist-oriented retail shops, including souvenir shops, gift shops, and flea markets" and "[e]stablishments engaged in the daily or extended term rental or leasing of house trailers, mobile homes, or campers." Sales of such vehicles were not addressed.

The appellants argue the board erred by concluding that their use of the property was not allowed as a "tourist-oriented retail shop." The parties disagree about the degree of deference to which the decision is entitled. However, even if the decision is entitled to no deference, we agree with the board's conclusion.

The appellants' argument fails most significantly on the question of whether their business is "tourist-oriented." They argue that it is oriented toward "persons who make tours" and may be more tourist-oriented than a flea market, which is an example of a business the board has permitted as "tourist oriented." However, the phrase "tourist" usually means persons who are in the act of traveling, rather than persons who intend to travel at some later time in their new recreational vehicle. If the latter definition were accepted, anyone who intends to travel in the future would be a tourist. A more reasonable reading is that tourists are those visiting or passing through the area. This is consistent with the purpose of the interchange district to "provide facilities to serve the traveling public at locations along federal and state highway routes" and is consistent with the other uses allowed in the district.

Furthermore, if the drafters of the ordinance had intended to allow sales of recreational vehicles, they most likely would have said so in the same provision in which they allowed the rental and leasing of such vehicles. No

rational drafter would assume that the intent to allow sales would be gleaned from that provision's silence on the subject and the separate provision for "tourist-oriented retail shops." A more reasonable conclusion is that the intent was to exclude the sale of recreational vehicles.

After 1992, the zoning ordinance was amended to delete the rental and leasing of recreational vehicles as a permitted use and to allow the rental, leasing or sale of such vehicles as a conditional use. The appellants then applied for a conditional use permit. The board denied the application. The appellants petitioned for certiorari review and have appealed the circuit court's affirmance of the board.

Review on certiorari is limited to whether: (1) the board kept 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 it might reasonably make the order or determination in question. *Coleman v. Percy*, 96 Wis.2d 578, 588, 292 N.W.2d 615, 621 (1980). The appellants argue that the board's decision should be reversed on both the third and fourth grounds.

The appellants argue that the board's decision represented its will and not its judgment. They argue that this is demonstrated partly by the board's failure to make written findings, although they acknowledge such findings are not required. They also argue that it is demonstrated by the procedure that was followed on the application. After hearing testimony, the board members each made a statement of their views on the subject. A motion on the application was then placed on the floor and voted upon without further discussion. The board voted 3-2 to deny the permit. The appellants argue that because there was no discussion about the motion and there was "no consensus on reasons for denial," the decision was made without a reasoning process. We reject the argument. The appellants cite no authority requiring either that the motion precede the board members' expression of views or that the members reach a consensus on the reasons for denial.

The appellants argue that even if we accept the statements of the individual board members as the reasoning of the board as a whole, those statements show that the decision was arbitrary. We disagree. The applicable town ordinance provides the following guidelines: appearance, compatibility

with existing uses in the area, relation to any existing land use plan, immediate and long-range tax base,¹ relation to scenic values, and relation to the public interest and purpose of the ordinance. While not every word spoken by each board member was relevant, each board member made a coherent statement as to at least one relevant factor. Their most relevant concerns were that the sale of recreational vehicles would detract from Kersten's nearby travel trailer park and that the location in question should be used for a business that would serve a larger portion of the traveling public. These concerns were appropriate under the specific standards for granting conditional use permits.

The appellants argue that the board acted oppressively and unreasonably by employing an attorney both to advise the board and to advocate for denial of the permit. Their argument is based on writings, comments and cross-examination by the attorney that demonstrated his belief that the permit should be denied. The appellants attempt to analogize this case to ones in which a board chairperson's comments indicated predisposition² and in which an attorney who had been involved as an advocate for one side in a dispute later became a commissioner.³

We reject the argument. In both cited cases it was a decisionmaker whose conduct was at issue, not the attorney advising the decisionmakers. Nothing in this case shows the board had any improper bias or conflict of interest. Nor do the opinions of the attorney provide grounds for reversal. The appellants cite no authority for the proposition that an attorney in such a position is precluded from informing the board of his or her opinion on the merits of the decision before it.

The appellants also argue that the board's decision was supported by "nothing" in the record. We apply the substantial evidence test, that is, whether reasonable minds could arrive at the same conclusion. See *State ex rel. Richards v. Traut*, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct. App. 1988).

¹ This factor may be relevant because the property may be assessed at a greater value if it has a business that serves a larger section of the public.

² *Marris v. City of Cedarburg*, 176 Wis.2d 14, 498 N.W.2d 842 (1993).

³ *Guthrie v. WERC*, 111 Wis.2d 447, 331 N.W.2d 331 (1983).

We conclude that the decision was sufficiently supported. As stated above, the board's main concerns were that the sale of recreational vehicles would detract from the nearby trailer park and that the location in question should be used for a business serving a larger portion of the public. These concerns were supported by, among other things, photographs of the area, maps showing the limited amount of area in the interchange district, testimony from citizens about the effect of the proposal on the aesthetics of the area, and the applicant's testimony that the business draws only thirty-five to forty cars per week.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.