COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 19, 1996

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(1), 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. 96-0599

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE EX REL. JAG OUTDOOR ADVERTISING, INC.

Petitioner-Appellant,

v.

DOOR COUNTY BOARD OF ADJUSTMENT,

Respondent-Respondent.

APPEAL from an order of the circuit court for Door County: JOHN D. KOEHN, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. JAG Outdoor Advertising, Inc., appeals a circuit court order denying certiorari relief from a decision of the Door County Board of Adjustment (BOA) compelling JAG to conform to maximum size requirements (thirty-two square feet) as a condition to a permit to "reconstruct" two billboards blown down in a storm. JAG contends that the BOA acted contrary to law and that its decision was arbitrary and unreasonable because it

did not apply the "50% rule" permitting repairs to nonconforming uses.[1] The County contends that JAG stipulated prior to the hearing that the 50% rule was inapplicable. Even if we presume without deciding that the parties did not intend to stipulate that the 50% repair rule was inapplicable, we conclude that the record includes substantial evidence to support the BOA's finding that the restoration of the billboards constituted a reconstruction and not a mere repair. We therefore affirm the circuit court order upholding the decision of the BOA.

Upon review of a common law certiorari judgment, the appellate court reviews the decision of the BOA and not the circuit court. ***State ex rel. Harris v. Annuity & Pension Bd.***, 87 Wis.2d 646, 651, 275 N.W.2d 668, 671 (1979). We must decide:

1. Whether the decision maker kept within its jurisdiction.

2. Whether it acted according to law.

3. Whether its action was arbitrary, oppressive and unreasonable and represents its will and not its judgment.

4. Whether the evidence was such that it might reasonably make the order or determination made.

The test on certiorari review is the substantial evidence test. ***State ex rel. Palleon v. Musolf***, 120 Wis.2d 545, 549, 356 N.W.2d 487, 489 (1984). Substantial evidence does not mean a preponderance of the evidence; rather the test is whether, taking into account all the evidence in the record, reasonable minds could arrive at the same conclusion as the board or agency. ***Id.*** The rules of construction applicable to statutes apply to the construction of ordinances. ***Hambleton v. Friedmann,*** 117 Wis.2d 460, 462, 344 N.W.2d 212, 213 (Ct. App. 1984). The meaning of a statute or an ordinance is a question of law that we review de novo. ***Id.*** at 461, 344 N.W.2d at 213.

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[1] The 50% rule is a reference to the provisions found both in § 59.97(10)(a), STATS., and a corresponding provision of the Door County ordinances. The statute provides that a county may not prevent a legal nonconforming use in existence prior to the adoption of the zoning ordinance, but it may prohibit repairs in excess of 50% of the property's assessed value.

The two billboards at issue were located for many years along Highway 57/42 in the Town of Sevastopol in Door County, and the County does not dispute that they predate the zoning ordinance regulating billboards. Although the parties raise issues concerning the BOA's additional finding that one of the billboards was not a legal nonconforming use, we do not address those questions because the finding of a reconstruction rather than a repair is dispositive.

After the signs were blown down and damaged in a windstorm during the week of Thanksgiving 1994, the county zoning administrator advised JAG that the county zoning ordinance required a permit for reconstruction of a sign, and that no permit could issue absent compliance with the maximum size requirements, no more than thirty-two square feet in area.

JAG appealed to the BOA on grounds that the signs were in existence pursuant to leases long before the County adopted its sign ordinances. Prior to the hearing before the BOA, the parties entered into a written stipulation. JAG does dispute the County's assertion that it prepared the stipulation, which provided in relevant part:

> Because the basis for the Order by [the zoning administrator] was that [the reconstruction provisions of the ordinance] prohibits the reconstruction of a sign unless such sign is in full conformity with the requirements of the Ordinance and *because the 50% maximum requirement of [the county ordinance relating to repairs] does not apply therefore the "50% rule" set forth in [the ordinance] is not relevant to these proceedings; and, in addition, because the signs in question have no "equalized assessed value," therefore, there shall be no need nor requirement on the part of JAG Outdoor Advertising to address the "50% rule" referred to.* (Emphasis added.)

The County contends that because JAG drafted the stipulation, any ambiguities should be construed against it, citing cases applying the well-known rule of construction applicable to contracts. JAG, on the other hand, cites ***Milwaukee & Suburban Transport Corp. v. Milwaukee County***, 82 Wis.2d 420, 263 N.W.2d 503 (1978), for the proposition that pretrial stipulations

excluding evidence should be construed consistent with the apparent intent of the parties, the spirit of justice, and the furtherance of fair trials upon the merits, and should not be construed technically so as to defeat the purposes for which they were made. ***Id.*** at 442, 263 N.W.2d at 515-16. In any case, the primary rule is to ascertain and give effect to the intention of the parties. ***Id.***

The record of the proceedings before the BOA contains remarks by counsel for the opposing sides that could be used both to support and to diminish JAG's contention that the stipulation was not meant to treat the 50% rule as irrelevant. We decline to rely upon the now disputed stipulation as a basis to deny JAG relief.

It is our conclusion that substantial evidence supports the BOA's decision that the restoration constituted a reconstruction. The dictionary meaning of the two words provides: A reconstruction is "something reassembled (as from parts) of its original form or appearance." WEBSTER'S THIRD NEW INT'L DICTIONARY 1898 (Unabr. 1978). A repair is "restoration to a state of soundness, efficiency, or health ...." ***Id***. at 1923.

While the distinction between a repair and a reconstruction may not be a bright line, this is not dispositive.

> [I]t must be borne in mind that the policy of the law is the gradual elimination of nonconforming uses and, accordingly, ordinances should not be given an interpretation which would permit an indefinite continuation of the nonconforming use.

State ex rel. Peterson v. Burt, 42 Wis.2d 284, 291, 166 N.W.2d 207, 210 (1969) (quoting 8 MCQUILLIN, MUNICIPAL CORPORATIONS, § 25.189 and cases cited (3d ed.)).

It is not an unreasonable construction of the zoning provisions to interpret "reconstruction" of billboards to cover the circumstances described to the BOA by JAG's general manager, Paul Wauters. Wauters told the BOA that although the face of the north sign was totally intact, it was necessary to redig the holes and put in new posts and then replace the existing sign face. He

testified that repairs to the south sign also involved replacing two poles and reinstalling one-half the existing sign face. These requirements constitute a reassembling from parts to an original form or appearance and go beyond the ordinary restoration of worn and aging components of a sign. Because this is so, the decision of the board was neither contrary to law nor arbitrary and unreasonable. We therefore affirm the circuit court order upholding the decision of the Door County BOA.

By the Court.—Order affirmed.

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