COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1997

NOTICE

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.

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

No. 96-2306

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

STATE OF WISCONSIN EX REL. ROBERT E. BOWMAN,

PETITIONER-APPELLANT,

V.

DANE COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

ROGGENSACK, J. On this certiorari review of the Dane County board of adjustment's affirmance of the zoning administrator's interpretation of the zoning code, we conclude that it properly exercised its administrative discretion in denying Robert Bowman's petition to reverse the zoning administrator's interpretation of Dane County Ordinance § 10.123(9)(b). We

further conclude that certiorari review is not the proper way to challenge the constitutionality of a zoning ordinance, either facially or as applied, but rather, such a challenge should have been made by a declaratory judgment action commenced in circuit court. Therefore, we affirm.

BACKGROUND

This case arises out of Robert Bowman's desire to subdivide his twenty-eight acre parcel which is located in the Town of Cross Plains, in order to give a five acre portion to his daughter for her use as a home site. Bowman purchased the land in 1964 when it was zoned A-1 Agricultural. A-1 Agricultural zoning would have permitted Bowman to make that division. However, in May of 1981, the Town of Cross Plains adopted a land use plan in preparation for a blanket rezoning, and in December of 1981, it adopted Zoning Ordinance No. 2807, which rezoned all of the A-1 Agricultural lands in the Town to A-1 Agricultural Exclusive. A-1 Agricultural Exclusive zoning does not permit the land division Bowman seeks to accomplish.

In November of 1994, Bowman applied to rezone his land from A-1 Agricultural Exclusive to Rural Homes District-2 and Rural Homes District-4 because either of those zoning classifications would have allowed him to divide his land. The Town board approved; the Dane County board approved; but the Dane County executive vetoed the change.

In April of 1995, Bowman asked the Dane County zoning administrator to interpret Dane County Ordinance § 10.123(9)(b) in a manner that would permit any parcel which was zoned A-1 Agricultural Exclusive, but which was a "non-conforming" parcel in that district, to operate as an R-1 Residential parcel. If the zoning administrator had so interpreted the ordinance, Bowman

maintains it would have allowed him to divide his property and give five acres to his daughter.

The zoning administrator did not interpret the ordinance in the manner requested by Bowman. Bowman then appealed to the Dane County board of adjustment, which affirmed the zoning administrator's decision. A timely appeal was taken to the circuit court of Dane County, which also affirmed. Thereafter, an appeal was made to this court and for the reasons set forth below, we affirm as well.

DISCUSSION

Standard of Review.

On appeal, we do not review the circuit court's decision, but rather we review the decision of the board of adjustment, just as the circuit court did. ***Klinger v. Oneida County***, 149 Wis.2d 838, 845 n.6, 440 N.W.2d 348, 351 n.6 (1989). That review is limited to determining whether the board properly exercised its administrative discretion when it affirmed the decision of the zoning administrator. ***Snyder v. Waukesha County Zoning Bd.***, 74 Wis.2d 468, 471, 247 N.W.2d 98, 101 (1976).

This is a certiorari review where the circuit court took no additional evidence. Therefore, the common law standards for certiorari apply. ***Klinger***, 149 Wis.2d at 843, 440 N.W.2d at 350. Our examination of the way in which administrative discretion was exercised by the board of adjustment is limited to consideration of the following four issues: (1) whether the board acted within its jurisdiction and authority; (2) whether the board proceeded on a correct theory of law; (3) whether the board's action was arbitrary, oppressive, or unreasonable; and

(4) whether the evidence was such that the board might reasonably have made the determination that it did. ***Id.; Ledger v. City of Waupaca Bd. of Appeals***, 146 Wis.2d 256, 262, 430 N.W.2d 370, 371-72 (Ct. App. 1988).

Additionally, interpretation of an ordinance is a question of law which we review *de novo*. ***Browndale Int'l, Ltd. v. Board of Adjustment for Dane County***, 60 Wis.2d 182, 199, 208 N.W.2d 121, 130 (1973). And finally, whether an act is within or exceeds the authority of a governmental agency is also a question of law, which we decide independently, and without deference. ***Board of Regents v. Wisconsin Personnel Comm'n***, 103 Wis.2d 545, 551, 309 N.W.2d 366, 369 (Ct. App. 1981).

Certiorari Review.

The board of adjustment has statutory authority to hear an appeal by any person aggrieved by any decision of the zoning administrator. Section 59.694(4), STATS.[1] Likewise, the circuit court has jurisdiction to hear the appeal of any person aggrieved by a decision of the board of adjustment. Section 59.694(10).[2] The review pursuant to § 59.694(10) is defined as a certiorari review. It is not the equivalency of a declaratory judgment action brought before the circuit court. ***Ledger***, 146 Wis.2d at 260, 430 N.W.2d at 371. Because of the specific statutory limitation, only the issues available in a certiorari review may be considered by this court.

[1] Formerly § 59.99(4), STATS., repealed and amended by 1995 Act 201, § 479, effective September 1, 1996. The amendment has no effect on this appeal.

[2] Formerly § 59.99(10), STATS., repealed and amended by 1995 Act 201, § 479, effective September l, 1996. The amendment has no effect on this appeal.

Bowman does not directly challenge the jurisdiction of the board of adjustment; rather, he seeks to expand it by requesting it to determine that the application of A-1 Agricultural Exclusive zoning to his parcel is unconstitutional. However, a board of adjustment is a creature of the legislature; and as such, its powers are proscribed by statute. Section 59.694(7), STATS. And, it has long been held that legal or constitutional challenges to zoning ordinances are not appropriate subject matter for a board of adjustment. *See* ***Kmiec v. Town of Spider Lake***, 60 Wis.2d 640, 645-46, 211 N.W.2d 471, 473 (1973); ***State ex rel. Tingley v. Gurda***, 209 Wis. 63, 67-68, 243 N.W. 317, 319 (1932). A board of adjustment has no power to repeal, declare unconstitutional or ignore any part of a zoning ordinance which has been enacted by the legislative body of the county. *See* ***Ledger***, 146 Wis.2d at 263, 430 N.W.2d at 373. If Bowman believed the ordinance was unconstitutional on its face or as applied, his remedy was a declaratory judgment action filed in circuit court. ***Kmiec***, 60 Wis.2d at 645, 211 N.W.2d at 473. Therefore, we conclude that the board of adjustment acted according to law when it refused to address Bowman's request to consider a "constitutional way" to apply Dane County Ordinance § 10.123 to his property.

In his request for an interpretation of § 10.123(9), Bowman made the following request:

> I ask you to rule that ordinance § 10.123(9)(b) authorizes and conveys R-1 Residence District status on any parcel which I split off from my cited substandard parcel, if done in compliance with 10.123(9)(b), by which I do not need Petition #6090 [Bowman's former petition to rezone] in order to effectuate that purpose.

Bowman apparently based his request for an interpretation of § 10.123(9)(b) on the language within the ordinance which relates to substandard parcels such as his. It states that they, "shall comply with the standards of § 10.05(4), [and that] R-1

Residential District buildings shall comply with the locational requirements of the R-1 Residential District." He asked the zoning administrator to interpret § 10.123(9)(b) as expressly authorizing residential use for substandard sized parcels consistent with an R-1 Residential zoning. In refusing to give the requested construction, the zoning administrator determined that the cited words from the ordinance were meant to cause the "dimensional standards" of § 10.05(5), such as setbacks from lot lines, to be incorporated by reference for the construction of any building on a substandard sized lot zoned A-1 Agricultural Exclusive.

In examining the construction given ordinances, this court follows the same rules in construing the ordinances as it would with statues. ***Hambleton v. Friedmann***, 117 Wis. 460, 462, 344 N.W.2d 212, 213 (Ct. App. 1984). When two ordinances are in seeming conflict, we attempt to construe both of them in a way which will give full force and effect to each. *See* ***Glinski v. Sheldon,*** 88 Wis.2d 509, 519, 276 N.W.2d 815, 820 (1979). Ordinances, like statutes, are construed in a manner which will give effect to the intent of the body which created them. In so doing, we begin with a plain reading of the ordinances at issue. *See* ***State v. Eichman***, 155 Wis.2d 552, 560, 456 N.W.2d 143, 146 (1990).

The parties agree that § 10.123(9)(b) is not a model of clarity, when it refers to "R-1 Residential District buildings." However, when we review the ordinance as a whole, we see that other subparts of § 10.123 also incorporate requirements from the R-1 Residential classification.[3] Because of the repetitive use of R-1 requirements for activities performed within A-1 Agricultural Exclusive

[3] For example, subpart (9)(d), which applies to substandard sized lots, refers to the R-1 requirements for replacing a building which has been accidentally destroyed and subpart (7)(a) uses R-1 as the standard for side yards for all A-1 Agricultural Exclusive parcels, regardless of whether they are non-conforming.

parcels, it is not unreasonable to conclude that the reference to "R-1 Residential District buildings," in subpart (9)(b) means buildings in the A-1 Agricultural Exclusive District that must conform to some of the requirements of the R-1 District. Therefore, the interpretation of the board, that the reference does not create R-1 Residential status for Bowman's land, but is merely a reference to the less rigorous siting requirements of an R-1 Residential parcel which apply to substandard sized lots is a reasonable interpretation.

Bowman next contends that Dane County Ordinance § 10.28 operates to void what he calls "rezoning by ordinance amendment"[4] for parcels that were substandard in size when the rezoning occurred. However, his reliance on § 10.28 to effectively void the rezoning of his land is without merit, as well as without legal citation.

Bowman argues that because A-1 Agricultural Exclusive pertains to parcels of 35 acres or greater and his parcel is only 28 acres, as applied to him, the A-1 Agricultural Exclusive zoning is "in conflict" and therefore § 10.28 prevents his parcel from being rezoned by Ordinance Amendment No. 2807. However, implied repeal of statutes by later enactments is not favored in statutory construction. *See* ***State v. Zawistowski***, 95 Wis.2d 250, 264, 290 N.W.2d 303, 310 (1980). And § 10.28 was not enacted *after* Ordinance No. 2807; it was in effect before the ordinance was passed. If § 10.28 were construed according to Bowman's contention, Dane County would be prevented, by its own ordinance, from creating new and amended ordinances from the time that § 10.28 was enacted in perpetuity. Section 10.28 is a general repealing ordinance. 1A

[4] This appears to be another way of referring to the blanket rezoning which occurred.

SUTHERLAND STATUTORY CONSTRUCTION, §§ 23.08 and 23.09 (5th ed.). We conclude that § 10.28 has no relevance to the rezoning of Bowman's property.

Bowman also contends that the board acted arbitrarily because it confirmed what he contends is an incorrect interpretation of the provisions of § 10.123(1), as his parcel is not suitable for farming and is substandard in size. This argument overlooks alternate stated purposes for A-1 Agricultural Exclusive zoning stated in subpart(1), such as controlling the pace and shape of urban growth, as well as §§ 10.123(9)(b) and (c), which expressly recognize that there will be parcels within an A-1 Agricultural Exclusive District that will be of substandard size. *See* ***Petersen v. Dane County***, 136 Wis.2d 501, 509, 402 N.W.2d 376, 380 (Ct. App. 1987). Therefore, we conclude the board's action was based on reasonable ordinance interpretation; the application of a proper theory of law and was not arbitrary, or oppressive.

CONCLUSION

We conclude that the board of adjustment acted reasonably in its affirmance of the zoning administrator's interpretation of the zoning ordinances at issue and that it properly stayed within its jurisdiction when it refused to make the constitutional determinations Bowman requested. Therefore, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.