COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2613 **Cir. Ct. No. 2014CV644**

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

JOYCE ESSELMAN,

PLAINTIFF-APPELLANT,

V.

TIM ROACH, OUTAGAMIE COUNTY ZONING ADMINISTRATOR, ROBERT STADL, JEANNE BAUM, ROBERT SCHUH, OUTAGAMIE COUNTY BOARD OF ADJUSTMENT AND OUTAGAMIE COUNTY, WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: GREGORY B. GILL, JR., Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Joyce Esselman appeals a circuit court order affirming a decision of the Outagamie County Board of Adjustment finding

Esselman had constructed a pond and filled a natural watercourse on her property without obtaining the requisite permit from Outagamie County. We affirm.

¶2 Esselman owns land on the east side of Winchester Road in the Town of Hortonia. Glenn and Leland Marks (collectively "Marks") own land on the west side of the road. A culvert runs under the road and allows water to drain from the Marks property to the Esselman property. Esselman excavated a pond approximately eighty feet to the east of the culvert, and installed drain tile east of that. She also piled dirt near the culvert. Esselman's acts were intended to alter the natural watershed away from her land to promote drainage of her land for farming. However, neighbors, including Marks, complained these changes resulted in water backing up on their lands.

¶3 Marks gave written notice to Esselman to ameliorate the problem and Esselman refused. Marks complained to the Town of Hortonia board. On December 8, 2008, the town board proceeded with a contested case hearing and concluded Esselman negligently obstructed the natural flow of water by placing fill in the natural watercourse and retarding its natural flow, thereby damaging Marks' land. Consequently, the town board required that Esselman remove all obstructions between the culvert and the pond and maintain the drain tile in good working order.

¶4 Esselman sought certiorari review and declaratory judgment in the circuit court. The court affirmed the board's decision. We affirmed the circuit court's order. *See* ***Esselman v. Town of Hortonia***, No. 2011AP1571, unpublished slip op. (WI App Mar. 27, 2012).

¶5 In 2014, the Outagamie County Zoning Administrator sent Esselman a notice stating:

> It has been brought to our attention that the drainage issue remains on the above described property. This has been an ongoing issue in which you altered the existing surface water drainage system on your property and caused water to back up on the neighboring property. In short, you have filled a natural water course.
>
> You have caused the water to back up onto the Marck's [sic] property, west of Winchester Road. The Zoning Department has also received complaints from property owners to the South of your property in regards to the noticeable change subsequent to your filling project.
>
> You are in violation of Chapter 20 of the Outagamie County Erosion and Sediment Control Ordinance section 20-6(b) … land-disturbing construction activities. …
>
> You are hereby ordered to obtain an Erosion Control Permit from the County Zoning Department by June 1, 2014.
>
> I have enclosed a copy of the application.

¶6 Esselman appealed the order to the board of adjustment. After a hearing, the board of adjustment affirmed the zoning administrator's interpretation of the standards contained within the ordinance. Esselman then sought certiorari review in the circuit court, which affirmed the board of adjustment's decision. Esselman now appeals.

¶7 We review the decision of the board of adjustment, not the decision of the circuit court. *See* ***Clark v. Waupaca Cty. Bd. of Adjust.***, 186 Wis. 2d 300, 303-04, 519 N.W.2d 782 (Ct. App. 1994). We accord a presumption of correctness and validity to the board of adjustment's decision. ***State ex rel. Ziervogel v. Washington Cty. Bd. of Adjust.***, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. A reviewing court may not substitute its discretion for that of the board, the entity to which the legislature has committed these decisions. ***Id.*** Our review is limited to determining whether: (1) the board acted within its jurisdiction; (2) the board proceeded on a correct theory of law; (3) the board's

decision was arbitrary, oppressive, or unreasonable; and (4) the board might reasonably make the determination in question based on the evidence. ***Id.***, ¶14.

¶8 Esselman concedes the board of adjustment acted within its jurisdiction, but takes issue with the three remaining aspects of certiorari review. We conclude the board of adjustment's decision was not arbitrary, oppressive, or unreasonable. Rather, it was based on findings supported by the record and was made according to a correct theory of law.

¶9 The procedural posture of this case is such that we do not proceed from a blank slate. Our decision in the prior appeal that Esselman filled in a non-navigable watercourse established the law of the case. *See* ***State v. Stuart***, 2003 WI 73, ¶20, 262 Wis. 2d 620, 664 N.W.2d 82. Watercourses are regulated by sec. 20-6(b)(6) of the ordinance, which provides that a protective area shall be provided on each side of a watercourse's centerline. The zoning administrator cited (6)b, requiring a fifty-foot protective area from the watercourse centerline for non-navigable watercourses having watersheds more than eighty acres.

¶10 Land-disturbing construction activities may not be commenced without receiving prior approval for an erosion and sediment control plan for the site. There is no dispute that Esselman's acts constituted land-disturbing construction activities, which are defined in sec. 20-5 of the ordinance as:

> any manmade change of the land surface resulting in a change in the topography, existing vegetative and nonvegetative soil cover or the existing topography which may result in stormwater runoff and lead to increased soil erosion and movement of sediment into waters of the state.

¶11 Nevertheless, Esselman argues her conduct was exempt from regulation under the ordinance because it was directly related to "agricultural activity," defined under sec. 20-5 of the ordinance as

> planting, growing, cultivating and harvesting crops for human or livestock consumption and pasturing or outside yarding of livestock, including sod farms and silviculture. This includes waterways, drainage ditches, diversions, terraces, excavating, filling, and similar practices on farm fields.

¶12 We consider ordinance sections in relation to the language of surrounding or closely related sections. *See* ***Pulsfus Poultry Farms v. Town of Leeds***, 149 Wis. 2d 797, 804, 440 N.W.2d 329 (1989). If possible, we also harmonize ordinances in the same chapter that share a public purpose. *See* ***Lake City Corp. v. City of Mequon***, 207 Wis. 2d 155, 157, 558 N.W.2d 100 (1997).

¶13 As the circuit court properly observed, the explicit purpose of chapter 20 of the ordinance is set forth in sec. 20-4(a) as follows:

> It is the purpose of this chapter to further the maintenance of safe and healthful conditions, prevent and control water pollution, prevent and control soil erosion, protect spawning grounds, protect fish and aquatic life, control building sites, control placement of structures and land uses, preserve ground cover and scenic beauty, and promote sound economic growth. This will be done by minimizing the amount of sediment and other pollutants carried by runoff or discharged from land disturbing construction activity to waters of the state in the county.

¶14 When read as a whole, sec. 20-6 provides a mechanism for protecting watercourses, navigable streams and lakes. The intent is to provide protection for such bodies from land-disturbing construction activities. Section 20-6(b)(6) specifically sets forth the framework to protect watercourses from land-disturbing activities and thereby avoid adverse effects on other properties.

The purpose of the ordinance was fulfilled by the board of adjustment's decision that constructing a pond and filling in and obstructing a natural watercourse did not constitute an agricultural activity exempt from the permit requirements of chapter 20.

¶15 The above definition of "agricultural activity" lists certain activities, such as "planting, growing, cultivating and harvesting crops …." The definition "includes waterways, drainage ditches … and similar practices on farm fields." This definition does not indicate such activities may be conducted on a watercourse. A "watercourse" is a separately defined term in chapter 20. "Watercourse" is more specific than the general term "waterways" used in the definition of agricultural activity. Section 20-6 specifically requires protective areas on each side of a watercourse from land-disturbing construction. When one section of an ordinance deals with a subject in general terms and another deals with a part of the same subject matter in a more detailed way, the two should be harmonized if possible, and if there are any conflicts the specific section prevails over the general. *See* ***State v. Amato***, 126 Wis. 2d 212, 217, 376 N.W.2d 75 (Ct. App. 1985). Accordingly, it was reasonable for the board of adjustment to determine that Esselman could not engage in land-disturbing activities on the watercourse that runs through her property without first applying for a permit.

¶16 Contrary to Esselman's perception, it would be unreasonable to interpret chapter 20 of the ordinance as allowing any activity to be completely exempt from regulation, regardless of its effect, as long as the activity was linked to an agricultural end. As the board of adjustment points out in its brief to this court, Esselman's interpretation of agricultural activities taken to its logical extension would allow a landowner to dam the Fox River in order to farm more acreage downstream, without concern for upstream flooding. Under Essleman's

interpretation, there would be no need to apply for a permit or submit an engineering plan under chapter 20 of the ordinance, because the activities would be directly related to agricultural activity and therefore exempt from regulation under the ordinance.

¶17 Indeed, Esselman's interpretation of agricultural activity would allow her activities to go unregulated even if those activities prevented adjacent landowners themselves from engaging in agricultural activities. In this case, the board of adjustment found the evidence "indicated that the action of the applicant caused water to back up and pond on the adjacent property that prevented the planting and growing of agricultural crops." We must avoid absurd or unreasonable results. *See* ***Sands v. Whitenall Sch. Dist.***, 2008 WI 89, ¶15, 312 Wis. 2d 1, 754 N.W.2d 439.

¶18 After taking into account the presumption of correctness and validity afforded to the board of adjustment's decision, the law of the case, the certiorari standards, and the particular ordinance provisions at issue, we conclude the board of adjustment's decision promoted the purpose of the ordinance, and produced a reasonable and just result to which we must defer.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).