

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP2413

Cir. Ct. No. 2001CV2202

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JOHN P. BARNES,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF LANNON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
MARK S. GEMPELER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. John P. Barnes appeals from the judgment dismissing his petition for a writ of certiorari. The issue on appeal is whether the Village of Lannon properly refused to zone Barnes' property as described in the Village's 1999 comprehensive land use plan. Because we conclude that the

comprehensive plan was advisory only, we agree with the circuit court's decision. We affirm the judgment.

¶2 In 1996, Barnes purchased five adjoining parcels of land in the Village. At the time, five and one-half acres of the land were zoned local business district, and six and one-half acres were zoned single-family residential. Barnes then petitioned the Lannon Plan Commission to rezone the land for multi-family use so that he could build fourteen ten-family apartment buildings on the land. Barnes agreed to table his petition while the Village completed a comprehensive land use plan.

¶3 In February 1999, the Village adopted the comprehensive plan. The plan designated about nine acres of Barnes' land as multi-family residential, and the remainder of his land as two-family residential. In December 1999, the Village adopted a new zoning code that rezoned Barnes' property to an agricultural/holding district. Barnes filed a number of petitions over the next three years to have his property rezoned to multi- and two-family residential. Members of the community always voiced their opposition and his petitions were denied. In 2002, the Village commissioned Independent Inspections to complete an evaluation of Barnes' property. As a result of this evaluation, the Village rezoned Barnes' land to single-family residential. Barnes objected to this rezoning and demanded that his property be zoned to conform with the 1999 comprehensive plan.

¶4 In 2003, Barnes petitioned the circuit court for certiorari review of the Village's zoning decision and asked the court to zone his property as multi- and two-family residential. The circuit court concluded that the Village's comprehensive plan was advisory only, and that the Village was entitled to deviate

from that plan. Further, the court concluded that Barnes failed to establish that the Village reached its decision without sufficient evidence. The court dismissed the petition, and Barnes now appeals.

¶5 Barnes argues that the Village’s decision not to rezone his land in conformity with the comprehensive plan was arbitrary and lacked a rational basis. Our review of a certiorari action is de novo. *Peace Lutheran Church and Academy v. Village of Sussex*, 2001 WI App 139, ¶10, 246 Wis. 2d 502, 631 N.W.2d 229. We are limited to four questions: “(1) whether [the Board] stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable, representing its will instead of its judgment; and (4) whether the evidence was such that [the Board] might reasonably have made the determination under review.” *Id.* (citation omitted; alterations in original). As to the third question, a board’s decision will be arbitrary if it has “acted without a rational basis or the exercise of discretion.” *Id.*, ¶11. “The fourth question has been compared to the substantial evidence test under judicial review of administrative proceedings.” *Id.* There is a presumption that the board “acted according to law and the official decision is correct.” *Id.*

¶6 Because zoning ordinances are enacted for the benefit and welfare of municipalities’ citizens, we generally afford great deference to these decisions. *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶40, 235 Wis. 2d 409, 611 N.W.2d 693.

Both the power to zone and the power to veto a zoning change represent legislative functions. Judicial review of legislative functions is limited to cases in which the authority acted in excess of its power or under error of law. Although this court may debate the wisdom or the desirability of a particular zoning decision, we are constrained from substituting our judgment for that of the zoning authority.

Id., ¶41 (citations omitted). Further, a municipality is not required to have a comprehensive plan before adopting a valid zoning ordinance. See *Step Now Citizens Group v. Town of Utica Planning & Zoning Comm.*, 2003 WI App 109, ¶¶44-45, 264 Wis. 2d 662, 663 N.W.2d 833. A comprehensive plan is not mandatory, but merely advisory. *Id.*, ¶45.

¶7 Barnes first argues that the Village's decision was arbitrary and lacked a rational basis because the Village did not conform to the 1999 comprehensive plan. Barnes argues that the failure to follow such a plan is strong evidence of arbitrary action, citing *Petersen v. Dane County*, 136 Wis. 2d 501, 510, 402 N.W.2d 376 (Ct. App. 1987). In *Petersen*, however, the court considered whether the departure from both a land use plan and zoning ordinances constituted evidence of improper exercise of discretion. *Id.* This case presents a different situation. Here, the Village departed from the 1999 plan when enacting the zoning ordinances. We agree with the Village that because a comprehensive plan is merely advisory, the decision not to follow it is not arbitrary on that basis alone. Further, the rezoning of Barnes' land to single-family residential was consistent with the Village's overall goal of maintaining a small-village atmosphere.

¶8 Barnes also argues that the circuit court erred when it found that the Village based its decision to rezone on sufficient evidence. As we have noted, the test for determining whether there was sufficient evidence to support the board's decision is comparable to the substantial evidence test. *Peace Lutheran Church*, 246 Wis. 2d 502, ¶11. "Substantial evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." *Sills v. Walworth County Land Mgmt. Comm.*, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878.

¶9 The Village's decision to rezone the property was based on a reasonable view of the evidence. We agree with the circuit court that the Village based its decision on the strong public opposition from the community to Barnes' plan, the objective analysis conducted by Independent Inspections, and the long-term goal of the community to maintain a small-village atmosphere. The Village's decision was supported by substantial evidence. We conclude that the Village acted reasonably and properly when it rezoned Barnes' property. Consequently, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

