COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3117 **Cir. Ct. No. 2003CV450**

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

DALE A. GRANT AND ROY R. GRANT,

PLAINTIFFS-APPELLANTS,

V.

MARINETTE COUNTY ZONING BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dale and Roy Grant appeal a judgment affirming the Marinette County Zoning Board of Adjustment. The Board had affirmed the zoning administrator's decision allowing Lisa Miller to keep her fence. We

conclude the Board reasonably interpreted the applicable county ordinance and we therefore affirm the judgment.

Background

¶2 On November 4, 2002, Miller was granted a zoning permit for one fence. Four days later, she filed a revised plan, seeking revisions to the permit to include a second "privacy" fence already constructed. This second fence is on the side of Miller's property where the Grants' property adjoins her lot and is the fence at issue. The zoning administrator approved the revisions.

¶3 On January 30, 2003, the administrator wrote to Miller after personally inspecting the fence. He advised Miller that for portions of the fence not intended for privacy, fifty percent or more of the fence had to be open and the side of the fence facing the Grants' property had to be finished.

¶4 In May 2003, Miller sent a letter requesting her fence be recognized as an "open" fence. Under the applicable ordinance, an open fence does not require a zoning permit. MARINETTE COUNTY, WIS., ORDINANCES § 21.06(5) (2000). The zoning administrator referred the request to the Land Information Committee,[1] which in June modified Miller's permit to accept the fence—a cyclone fence with slats—as an open fence instead of a privacy fence.

¶5 In October 2003, the Grants appealed to the Board, which affirmed the classification of Miller's fence as an open fence not subject to a zoning permit

[1] From the record, it appears the zoning administrator was also the chairman of the committee. The record does not reveal precisely why he submitted the question to the committee, but the procedure is not questioned.

requirement. The Grants then appealed to the circuit court for certiorari review. The circuit court affirmed the Board's determination. The Grants appeal.

Discussion

¶6 A person aggrieved by a grant or denial of a zoning variance may commence an action in the circuit court seeking certiorari review. WIS. STAT. § 59.694(10).[2] When such a case reaches this court, "we inquire: (1) whether the board kept within its jurisdiction; (2) whether the board proceeded on a correct theory of law; (3) whether the board's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably [have made] the order or determination in question, based on the evidence." ***Fabyan v. Waukesha County Bd. of Adj.***, 2001 WI App 162, ¶11, 246 Wis. 2d 851, 632 N.W.2d 116.

¶7 We afford a presumption of correctness and validity to the board's decision. ***State ex rel. Ziervogel v. Washington County Bd. of Adj.***, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. We may not substitute our discretion for that of the board, the entity to which the legislature has committed zoning decisions. ***Id.***

¶8 The Grants contend the Board proceeded on an incorrect theory of law when it concluded Miller's fence was "open" under the ordinance and therefore exempt from the zoning permit requirement. Interpretation of an

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

ordinance is a question of law. *See* ***State v. Waushara County Bd. of Adj.***, 2004 WI 56, ¶14, 271 Wis. 2d 547, 679 N.W.2d 514. The ordinance in this case states:

> (5) FENCES. Open fences must not extend waterward of (beyond) the ordinary highwater mark. Open fences do not require a zoning permit. Solid fences used for privacy, decorative or other purposes shall be considered structures and require a zoning permit. Privacy fences shall not exceed 6 ft. in height and shall meet the setback requirement of S21.06(1). Privacy fences shall be located within the lot in such a manner that the owner can maintain both sides and property. The side of the privacy fence facing the adjacent parcel shall be a finished side. Open fences used for farming or agriculture purposes are exempt from the provisions of this chapter.

MARINETTE COUNTY, WIS., ORDINANCES § 21.06(5) (2000).

¶9 No portion of the ordinances defines privacy fence or open fence. When words or phrases are undefined, we apply their common and ordinary meaning. WIS. STAT. § 990.01(1); ***Wisconsin Citizens v. DNR***, 2004 WI 40, ¶34, 270 Wis. 2d 318, 677 N.W.2d 612.

¶10 The Board relied on and implicitly adopted the administrator's definition of a privacy fence, which he read into the record at the public hearing:

> In order to be considered a privacy fence the fence needs to provide privacy. Privacy is defined in the dictionary as the *quality or state of being apart from company or observation*. A fence that is transparent (see through) is not being apart from observation. (Emphasis added.)

The Board further relied on a photo that showed despite the slats in the cyclone fence, one can see through it. Because Miller's fence was transparent, the Board concluded it was not a privacy fence and, therefore, was necessarily an open fence.

¶11 The Grants contend this was error for two reasons. First, the zoning administrator's letter to Miller stated that 50% or more of the fence had to be open

for the fence as a whole to be considered open, and the Grants mathematically demonstrate in their briefs why Miller's fence does not fulfill that standard. The record does not disclose whether the zoning administrator, after writing the letter to Miller, subsequently determined he was in error to require mathematical precision. However, neither the Grants nor the letter itself refer to any ordinance, statute, or other rule for this ratio, and the Grants have made no attempt to establish that the letter is legally binding.

¶12 Second, the Grants contend the Board failed to define an open fence and thus failed to perform its duty. However, it is evident that the Board, in determining that Miller's fence was not a privacy fence, concluded the fence was open. Under the word's common meaning, the Board could reasonably decide that a fence that is transparent is an "open" fence. We discern no error.

¶13 The Grants raise several other complaints regarding Miller's fence. The first set of complaints deals with ordinance requirements for the fence's height, finishing, and placement on Miller's property. However, these restrictions only apply to fences governed by the zoning permits. An open fence does not require a permit and is therefore not subject to the listed limitations.

¶14 The Grants also complain about violations they assert are not only contrary to the ordinance but also violate the Wisconsin Administrative Code,[3] such as a seventy-five foot setback, and they complain the ordinances themselves violate the administrative code.[4] Indeed, the State filed a nonparty brief to discuss

[3] WISCONSIN ADMIN. CODE ch. NR 115 (2000).

[4] To the extent the Grants argue we should interpret the ordinance in light of the administrative code, that rule applies only when ordinances are ambiguous. The Grants have failed to demonstrate any ambiguity.

certain code violations. However, on the record before us, the only issue raised in the circuit court for review dealt with the Board's interpretation of an open fence. The Grants fail to show they raised any other issue with the circuit court. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). We do not consider issues raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

By the Court.—Judgment affirmed.

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