

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 23, 2006

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. 2005AP452

Cir. Ct. Nos. 2004CV110
2004CV112
2004CV113

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MICHAEL J. SCHULTZ AND SHELLY R. SCHULTZ,

PETITIONERS-RESPONDENTS,

v.

**VILLAGE OF STODDARD, JAMES COON, LARRY BOLSTER,
STEVE MILLER AND DEBRA KENDHAMMER,**

RESPONDENTS-APPELLANTS,

MARTY OSINSKI,

RESPONDENT-(IN T.CT.).

**STATE OF WISCONSIN EX REL. VILLAGE OF STODDARD BOARD,
ROBERT MICHNIAK, PRESIDENT, THERESA ANDERSON, JAMES COON,
DAVID PETERSON, STEVE MILLER, LARRY BOLSTER, BRIAN COZY,
RESIDENT TAXPAYERS: GERALD BECKER, LORI FURMAN, NORM
KRAUSE, JAYNNE LEPKE AND ROBIN PALMER,**

PETITIONERS,

V.

VILLAGE OF STODDARD BOARD OF APPEALS, DON DOLL, LAVERN HORSTMAN, WARREN WOLFE AND MICHAEL J. SCHULTZ AND SHELLY R. SCHULTZ,

RESPONDENTS.

STATE OF WISCONSIN EX REL. VILLAGE OF STODDARD BOARD, ROBERT MICHNIAK, PRESIDENT, THERESA ANDERSON, JAMES COON, DAVID PETERSON, STEVE MILLER, LARRY BOLSTER, BRIAN COZY, RESIDENT TAXPAYERS: GERALD BECKER, LORI FURMAN, NORM KRAUSE AND JAYNNE LEPKE AND ROBIN PALMER,

PETITIONERS,

V.

VILLAGE OF STODDARD BOARD OF APPEALS, DON DOLL, LAVERN HORSTMAN, WARREN WOLFE, MARTY OSINSKI, BUILDING INSPECTOR AND MICHAEL J. SCHULTZ AND SHELLY R. SCHULTZ,

RESPONDENTS.

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 DYKMAN, J. Members of the Stoddard Village Board and a group of village residents (Village Board) appeal from a certiorari review affirming a decision of the Stoddard Board of Appeals authorizing Michael and Shelly Schultz to obtain a building permit to construct three self-storage units on an empty lot

zoned Commercial-1 (C-1) on Main Street in Stoddard.¹ The Village Board's primary contention is that the Board of Appeals misconstrued the local zoning ordinance to permit construction of such a structure on property zoned C-1. Because we conclude that the Board of Appeals' interpretation of the ordinance is a reasonable one, we affirm the decision of the circuit court upholding the Board's determination.

Background

¶2 In April 2004, the Schultzes applied for a building permit to erect three self-storage units on a vacant lot zoned C-1 that they own at 115 South Main Street in the Village of Stoddard. The Village of Stoddard Building Inspection Committee did not approve the application, and the Schultzes appealed to the Village Board of Appeals. The Board of Appeals held a hearing. The Village attorney recommended denial of the application. The Schultzes and the Village attorney agreed that the issue before the Board was one of law: whether operation of a self-storage unit is a permitted use on property zoned C-1 under Stoddard Village Ordinance §10.08(A).² Several village residents testified at the hearing, a majority of whom opposed the Schultzes' permit request.

¹ The parties dispute whether the Village Building Inspection Committee, the local committee that initially considered the Schultzes' application, formally denied the application. We cannot ascertain from the record whether the committee denied the application. Regardless, the Village Board has not argued that the committee's failure to take action on the application requires reversal.

² Stoddard Village Ordinance §10.08 provides in pertinent part:

(A) USES PERMITTED—C-1 DISTRICTS

....

(continued)

¶3 At the conclusion of the hearing, the three-member Board of Appeals unanimously approved the Schultzes' application for a building permit. [37] The hearing minutes indicate that immediately after the vote, a resident asked the Board to explain the reasons for its decision. The minutes state that "[t]he Board of Appeals replied they read pertaining documents, took into consideration the objections and reasons for the storage units."

¶4 The Stoddard Village clerk refused to issue the building permit and the Schultzes sought mandamus relief in circuit court. The Village Board filed an action for certiorari review of the Board of Appeals' decision. The Village Board also sought an order to restrain enforcement of the Board of Appeals' decision. The court consolidated these cases and ordered the parties "to submit briefs with any affidavits on or before September 30, 2004" and "to submit responsive briefs with any affidavits by October 11, 2004." Both parties submitted affidavits with each set of briefs. The circuit court affirmed the Board of Appeals' decision, applying the common-law certiorari standard of review. The Village Board appeals.³

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- (13) Other retail stores and shops, and small service businesses catering to neighborhood patronage, including only those deemed to be as appropriate located in C-1 Districts as those enumerated above, and only those not dangerous or otherwise detrimental to persons residing or working in the vicinity thereof, or to the public welfare, and not impairing the use, enjoyment or value of any property.

³ In March 2005, the circuit court denied a motion of the Village to stay the circuit court's decision pending the outcome of this appeal.

Discussion

¶5 As a general rule, in certiorari proceedings, we review the decision of the agency, not the circuit court. *Tateoka v. City of Waukesha Bd. of Zoning Appeals*, 220 Wis. 2d 656, 663, 583 N.W.2d 871 (Ct. App. 1998). That review is limited to the following issues: (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on the correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the Board might reasonably make the order or determination in question, based on the evidence. *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, ¶12, 271 Wis. 2d 547, 560, 679 N.W.2d 514.

¶6 A certiorari review of an agency is usually restricted to the record made before the agency. *See State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). However, a circuit court reviewing a zoning board of appeals' decision may take evidence “[i]f necessary for the proper disposition of the matter.” WIS. STAT. § 62.23(7)(e)10. (2003-04).⁴ Such evidence “shall constitute a part of the proceedings upon which the determination of the court shall be made.” *Id.* “[W]hether it is ‘necessary’ for the circuit court to take evidence is vested in the discretion of the circuit court.” *Klinger v. Oneida County*, 149 Wis. 2d 838, 846, 440 N.W.2d 348 (1989). To properly exercise its discretion to take evidence, the circuit court must state its reasons for doing so. *See id.* at 847. When a circuit court takes new evidence but that evidence is “substantially the same as that taken by the Board, deference to the Board

⁴ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

demands that the evidentiary hearing should be treated as a nullity for purposes of determining the standard of review to be applied to the Board’s decision.” *Id.* at 845.

¶7 In this case, the circuit court ordered the parties to submit briefs “with any affidavits,” and the parties offered several affidavits with their briefs. The Village Board contends that because the circuit court expanded the evidentiary record to include affidavits, it erred when it applied a highly deferential standard of review to the Board of Appeals’ decision and should have reviewed the Board’s decision de novo.⁵ The Village Board does not propose a remedy for this alleged error, whether remand to the circuit court or our own de novo review of the affidavits as well as the Board of Appeals’ record.

¶8 We do not decide whether the circuit court erroneously exercised its discretion in taking affidavits to supplement the Board of Appeals’ record because the asserted error has no bearing on the outcome of this case. This is because none of the additional material contained in the affidavits is relevant to the issue to be decided here, i.e., whether STODDARD VILLAGE ORDINANCE §10.08(A) permits operation of self-storage facilities on property zoned C-1.

¶9 Interpretation of an ordinance, like statutory interpretation, is a question of law that we review independently. *See Hillis v. Village of Fox Point*

⁵ The Village Board also contends that the circuit court should have applied a de novo standard of review because the Board of Appeals “failed to muster the required four votes” and failed to provide sufficient grounds for its decision as required by WIS. STAT. § 62.23(7)(e)9. The Village Board puts too many of its eggs in the standard of review basket. Whether the Board fulfilled the requirements § 62.23(7)(e)9. has no bearing on the circuit court’s standard of review. We discuss the Village Board’s contentions that the Board’s action was contrary to parts of § 62.23(7)(e)9. later.

Bd. of Appeals, 2005 WI App 106, ¶6, 281 Wis. 2d 147, 699 N.W.2d 636. “Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. An ordinance or statute is ambiguous if reasonably well-informed persons are capable of understanding it in two or more senses. *Id.*, ¶47. When construing a zoning ordinance, we resolve ambiguity in the meaning of the ordinance in favor of the free use of private property. *See, e.g., Cohen v. Dane County Bd. of Adj.*, 74 Wis. 2d 87, 91, 246 N.W.2d 112 (1976); *State ex rel. B’nai B’rith Found. v. Walworth County Bd. of Adj.*, 59 Wis. 2d 296, 307, 208 N.W.2d 113 (1973).

¶10 The Village contends that the Board of Appeals’ decision misconstrued STODDARD VILLAGE ORDINANCE §10.08(A)(13) when it determined that the operation of a self-storage facility was a permitted use under the ordinance. Section 10.08(A) lists numerous permitted uses of property in a C-1 district but does not explicitly provide that operation of a self-storage facility is among these. However, § 10.08(A)(13) permits use of property zoned C-1 for

[o]ther retail stores and shops, and small service businesses catering to neighborhood patronage, including only those deemed to be as appropriate located in C-1 Districts as those enumerated above, and only those not dangerous or otherwise detrimental to persons residing or working in the vicinity thereof, or to the public welfare, and not impairing the use, enjoyment or value of any property.

¶11 The Schultzes contend that their proposed self-storage facility is a “small service business[] catering to neighborhood patronage.” The Schultzes assert that their facility would provide a service to local residents by offering them space to store personal property.

¶12 The Village contends that a self-storage facility is not a “small service business” or any other use permitted under STODDARD VILLAGE ORDINANCE §10.08(A), but is rather a “warehouse,” a use that is not permitted in a C-1 district and is permitted only in industrial districts or in C-2 districts with the issuance of a conditional use permit. *See* §§ 10.09(B)(13); 10.10(A).⁶ The Village cites the AMERICAN LAW OF ZONING, Robert M. Anderson, Sec. 16.11 (2d ed. 1976), which defines “warehouse” as “a structure or part of a structure for storing goods, wares or merchandise whether for owner or for others, and whether it is a public or private warehouse.” The Village contends that, in the absence of a specific provision pertaining to self-storage facilities, such facilities should be construed as warehouses under the ordinance.

¶13 We conclude that both interpretations of the ordinance are reasonable and that the statute is therefore ambiguous in the present context. As the Village notes, “warehouse,” as the term is defined by the chapter of the state statutes regulating public warehouses, includes “any building, room, structure or facility used for the storage of property.” WIS. STAT. § 99.01(5). This expansive definition captures the proposed self-storage facility. And under any definition of “warehouse,” the self-storage facility is more like a warehouse than any of the other specifically named uses provided in the Stoddard ordinances. The Village’s interpretation considers the context in which STODDARD VILLAGE ORDINANCE §10.08(A)(13) appears and reaches a reasonable conclusion that such facilities

⁶ STODDARD VILLAGE ORDINANCE §10.09(B)(13) provides that “uses permitted with conditional use permit in C-2 districts” include “warehouses.” STODDARD VILLAGE ORDINANCE §10.10(A)(2) provides that the uses permitted in I Districts include “uses consisting of manufacturing, processing, assembly, storing, distributing and transporting of materials, goods and food-stuffs”

should be treated as “warehouses” and not unspecified “small service business[es].” See *Kalal*, 271 Wis. 2d 633, ¶46 (“[S]tatutory language is interpreted ... not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes”).

¶14 However, STODDARD VILLAGE ORDINANCE § 10.08(A)(13) is a “catch-all” provision intended to capture kinds of retail stores, shops and small service businesses not among those specified in § 10.08(A)(2).⁷ The proposed self-storage facility reasonably fits the category of a “small service business[] catering to neighborhood patronage.” The Schultzes claim, and the Village Board does not dispute, that the proposed facility would provide local residents the service of providing leased space to store personal property. Moreover, we note that the Village Board’s contention that the proposed facility should be treated as a warehouse is weakened by WIS. STAT. § 704.90, which concerns “self-service storage facilities” and distinguishes such facilities from warehouses. The statute explains that “‘self-service storage facility’ means real property containing leased spaces but does not include a warehouse or other facility if the operator of the warehouse or facility issues a warehouse receipt, bill of lading or other document of title” WIS. STAT. § 704.90(1)(g).

⁷ STODDARD VILLAGE ORDINANCE §10.08(A)(2) provides that permitted uses in a C-1 district include:

Retail stores and shops and small service businesses such as: art shops; professional studios; clothing, drug, grocery, fruit, meat, vegetable, confectionery, hardware, sporting goods, stationery, music, variety and notion stores; household appliances, fixture and furnishing stores and repair shops; stores and shops for barbers, beauticians, cabinet makers, electricians, florists, jewelers, watchmakers, locksmiths, painters, plumbers, shoemakers, tailors, dressmakers, pressers, and photographers.

¶15 Having concluded that both interpretations of the relevant ordinances are reasonable and the ordinance is therefore ambiguous, any ambiguity should be resolved in favor of the free use of private property.

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consistently resolve[] all ambiguity in the meaning of zoning terms in favor of the free use of private property. Zoning ordinances are in derogation of the common law and, hence, are to be construed in favor of the free use of private property. The provisions of a zoning ordinance, to operate in derogation of the common law, must be in clear, unambiguous, and peremptory terms.

Cohen, 74 Wis. 2d at 91. We conclude that the Board's interpretation is consistent with the foregoing principle and therefore affirm the Board's determination.

¶16 We turn now to the Village Board's contentions that the Board of Appeals failed to follow two requirements of WIS. STAT. § 62.23(7)(e)9.: that four votes of a board of appeals are necessary to reverse any decision of a municipality, and that the board state the grounds for its determination.⁸ In the circuit court, the Village Board waived its argument regarding whether the number of votes cast at the Board of Appeals was sufficient to supplant the Building

⁸ WISCONSIN STAT. § 62.23(7)(e)9. provides:

The concurring vote of 4 members of the board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance. The grounds for every such determination shall be stated.

Committee's authority. That argument is waived here as well.⁹ See *State v. Carprue*, 2004 WI 111, ¶36, 274 Wis. 2d 656, 683 N.W.2d 31 (issues not raised in the circuit court are deemed waived).

¶17 The Village Board cites *Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of the City of Milwaukee*, 2005 WI 117, 284 Wis. 2d 1, 700 N.W. 87, to support its claim that the Board of Appeals ran afoul of the requirement of WIS. STAT. § 62.23(7)(e)9. that it provide reasons for its decision. However, *Lamar* concerned an application for a zoning variance, not an application for a building permit that, in this case, ultimately turned on the interpretation of an ordinance. See *Lamar*, 284 Wis. 2d 1, ¶¶5-12. Whether to grant or deny a variance is a fact-laden determination for which detailed, specific reasons are necessary to satisfy the statute's requirement that the board state the grounds for its determination. In this case, the Board's determination was not evidentiary, but based on the Board's interpretation of the relevant ordinances. The hearing minutes indicate that the Board (the record does not indicate which board member) stated that "they read pertaining documents, took into consideration the objections and reasons for the storage units." Such an explanation was sufficient under the statute.

⁹ We note that the Stoddard Board of Appeals contains only three members, all of whom voted to reverse the decision to deny the building permit. Under WIS. STAT. § 62.23(7)(e)2., a "board of appeals shall consist of 5 members appointed by the mayor subject to confirmation of the common council" Because Stoddard is a village, it does not have a mayor or a council. It has a village board president who is responsible for appointing board of appeals members and a village board that confirms them. Affidavits filed in circuit court show that the Stoddard Board of Appeals has had only three members for several years. In light of these facts, the Village Board's argument that the Board of Appeals' action is invalid because it lacked four votes to reverse is disingenuous.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

