COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1853

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

WILLIAM JUNGBAUER, BRIAN HENRY, KENNETH A. MILLER, KATHRYN SMITH, GARY BREAULT, JERRY HASSENBERG, DENNIS NISSEN, ROBERT SOLFEST, BOB STREUSS, GAIL SOVELL KENYON, STEVE BREAULT, DAVID KUEHNI, DR. JOHN GRAMER, LORAINE STEFFEN, EUGENE MAUER, DAN BLOMGREN AND JOHN SWINGDORF,

PLAINTIFFS-RESPONDENTS,

V.

POLK COUNTY AND ROBERT HACHEY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Polk County: JAMES H. TAYLOR, Judge. *Reversed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 DEININGER, J. Polk County appeals a judgment in favor of the owners of a lake access lot.[1] The circuit court voided a variance which the County's board of adjustment had granted for an adjoining lot. We conclude the court erred in granting judgment in favor of the access lot owners because they failed to timely file their action under WIS. STAT. § 59.694(10) (1999-2000).[2] Accordingly, we reverse the judgment which declared the variance void, and we vacate the accompanying injunction and award of costs.

BACKGROUND

¶2 As a result of an ongoing dispute between property owner John Ukura and the co-owners of an adjoining lake access lot, the access lot owners commissioned a survey. They discovered that the Ukura residence violated the minimum side-yard setback requirement under the Polk County Shoreland Ordinance. Ukura had also apparently begun a "remodeling/maintenance project" without obtaining a building permit, but the record does not identify the stage of completion of Ukura's project at that time. In addition, zoning records did not accurately reflect a previous owner's conversion of the structure from a garage to a dwelling.

¶3 These events prompted Ukura to submit applications for a land use permit and for a variance to the county zoning office. In addition to the variance from the side-yard setback requirement, he sought permission to convert a garage into a dwelling, add a new roof, and remodel the building. In his variance

[1] Polk County's corporation counsel, Robert Hachey, is also named in the caption as a defendant-appellant, but we will refer to Polk County and Hachey collectively as "the County."

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

application, Ukura identified the adjoining landowners as including the "East Bone Lake Access Association." The association consists of an informal group of co-owners of the access lot; it is not a corporation or other recognized legal entity. On January 9, 1998, the Polk County Board of Adjustment heard Ukura's variance request and granted both the variance and the land use permit.

¶4 WISCONSIN STAT. § 59.694(6) requires the board to "publish a class 2 notice" of its hearings, and it did so for the January 9th hearing. The statute also requires the board to "give due notice to the parties in interest." The lot owners allege in their complaint that they are "interested parties under Section 16.4(c) of the Polk County Shoreland Ordinance" but received no individual notice of the variance hearing "as required by the ordinance." The record contains no copy of the relevant ordinance provision, but there is an affidavit from the lot owners' counsel averring that "Section 16(4)(c)(1) of the Polk County Shoreland Ordinance states in part that the Board of Adjustment 'shall mail notices to the parties in interest.'" For purposes of the summary judgment motion, the County stipulated that "plaintiffs did not receive individual notice by mail regarding the January 9, 1998 hearing of the Board of Adjustment at which a variance was granted to John Ukura."

¶5 On July 7, 1998, the access lot owners wrote a letter to the zoning administrator questioning the sufficiency of the notice for the January 9 hearing, and they requested an investigation into the matter. The access lot owners and their attorney subsequently sent several letters to the County's corporation counsel

regarding the adequacy of the notice for the January 9 hearing.[3] In a December 15, 1998 letter, the corporation counsel informed the access lot owners that he did not plan to advise the board to hold another hearing on the variance request.

¶6 The access lot owners filed their complaint in circuit court on June 24, 1999, seeking a declaration that the variance granted to Ukura was void for improper notice. The circuit court ruled on summary judgment that the variance was void, and it entered a judgment enjoining the County and Ukura "from relying or acting upon said void variance in any manner for any purpose." The County appeals.

ANALYSIS

¶7 The principal issue on appeal is whether the access lot owners timely filed their action to void the variance granted to Ukura. The County contends that the lot owners' complaint is barred under WIS. STAT. § 59.694(10), which requires a certiorari action to be filed within thirty days of the board's decision to grant the variance.[4] The access lot owners became aware of the granting of the variance

[3] In a letter dated November 5, 1998, the access lot owners' attorney indicated that "[t]his matter has been dragging on for a number of months," and threatened litigation if the situation was not resolved on or before November 20, 1998. On December 11, 1998, the attorney sent another letter, requesting the County's written determination of whether it would hold another hearing, "because if your determination is not to hold another hearing, the date of your letter starts the time frame running for further legal proceedings."

[4] WISCONSIN STAT. § 59.694(10) provides as follows:

> (10) CERTIORARI. A person aggrieved by any decision of the board of adjustment, or a taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari. The court shall not stay the decision appealed from, but may, with notice to the board, grant a restraining order. The board of adjustment shall not be required to return the original papers

(continued)

some twelve months before they filed their action. Thus, according to the County, their action was untimely. The County argues that although the variance may have been *voidable* via a timely filed certiorari action due to alleged notice deficiencies, a court may not declare the variance *void* once the statutory time period for challenging the board's decision has expired.

¶8 The access lot owners respond that the County incorrectly asserts that the only means available to challenge the board's decision is by certiorari under WIS. STAT. § 59.694(10). They contend that "the attempted grant of a variance is void *ab initio* for lack of proper notice to interested adjoining landowners," and that an action may be brought at any time to invalidate the variance. For the reasons discussed below, we conclude that the access lot owners failed to timely file their action to set aside the variance.

¶9 Whether the access lot owners timely filed their action raises a question of statutory interpretation. The interpretation of a statute is a question of law which we review de novo. ***State ex rel. Sielen v. Circuit Court***, 176 Wis. 2d 101, 106, 499 N.W.2d 657 (1993).

¶10 The access lot owners rely on ***Goldberg v. City of Milwaukee Board of Zoning Appeals***, 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983), where we noted that a court may expunge a void order "at any time." ***Id***. at 523. In

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> acted upon by it, but it shall be sufficient to return certified or sworn copies thereof. If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review.

Goldberg, some ten days after approving an original variance request, the board of zoning appeals, without a hearing or notice to the applicant, revised a previously granted variance to make it personal to the owner, as opposed to allowing it to "run with the land." ***Id***. at 519. The change was not discovered until after the applicant had completed the purchase of the land in question. ***Id***. We concluded that in revising the variance after proceedings had concluded, the board had acted "in excess of [its] power." ***Id***. at 518. Specifically, because the board acts in a "quasi-judicial capacity" when it decides variance requests, the board's late modification without notice to the landowner was "an arbitrary act and is illegal and void." ***Id***. at 522-23.

¶11 It is true that in ***Goldberg*** we rejected an assertion similar to the one the board makes here: "that the revision is unreviewable because the [landowners] never appealed within the time period set forth in [the relevant statute]." ***Id***. at 523. The present case is distinguishable from ***Goldberg***, however, because no claim is made that the Polk County Board of Adjustment exceeded its powers in granting Ukura's variance. In ***Goldberg***, the board acted, apparently sua sponte and without a hearing or giving notice of any kind, to alter a determination it had previously made. *See* ***id***. at 521. In the present case, the board acted on Ukura's application after conducting a public hearing, for which the statutorily required class 2 notice had been published. We conclude that ***Goldberg*** does not stand for the proposition that any alleged defect in the board's proceedings permits a challenger to seek "at any time" to set aside the board's action.

¶12 The access lot owners also seek to rely on our discussion of notice requirements in ***Oliveira v. City of Milwaukee***, 2000 WI App 49, ¶8, 233 Wis. 2d 532, 608 N.W.2d 419, *reversed*, 2001 WI 27, 242 Wis. 2d 1, 624 N.W.2d 117, where we said that "when government action must be preceded by notice of what

is proposed, failure to give that notice renders what was done void." Their reliance is misplaced, however. First, the supreme court has recently reversed our decision in ***Oliveira***, and its authority as precedent for the proposition cited is thus uncertain. Additionally, ***Oliveira*** dealt with an amendment to a city zoning ordinance under WIS. STAT. § 62.23(7)(d), where the city had allegedly not complied with the statutory requirement for publication of a class 2 notice of the hearing on the proposed zoning amendment. *See* ***id***. at ¶8. Here, there is no dispute that the board published a class 2 notice of its public hearing, listing Ukura's request for a variance from the side-yard setbacks as one of the matters to be considered. Thus, the public's "right to know what its officials are doing that affects the common weal," which concerned us in ***Oliveira***, is not at issue here. ***Id.***

¶13 The supreme court has also discussed the necessity for proper *published* notice of a hearing to consider a variance request. It noted in ***State ex rel. Cities Service Oil Co. v. Board of Appeals***, 21 Wis. 2d 516, 124 N.W.2d 809 (1963), that a "claimed defect in the published notice of a hearing to consider a variance" may entitle "nearby property owners adversely affected, who have been seriously prejudiced thereby … to assert that the board's action in granting the variance is illegal and void." ***Id***. at 534-35. The lot owners, in response to the board's motion for summary judgment, cited what they termed a "litany of gross negligence" on the board's part:

> 1. Failure to mail notices.
> 2. Failure to make routine inquiry.
> 3. Literally sitting on the matter from July to December of 1998.
> 4. Failure to keep specific promises made to William Jungbauer.

> 5. …[T]he Polk County Zoning Office could have resolved the problem in July of 1998 [by ordering a new variance hearing] rather than ignoring it.

Nowhere in their "litany," however, do the lot owners assert a defect in the published notice for the January 9, 1998 hearing. We are not persuaded, therefore, that the lot owners' claims are exempt from the requirements of WIS. STAT. § 59.694(10).

¶14 WISCONSIN STAT. § 59.694(10) provides the procedure for obtaining review of a decision by the board of adjustment: "A person aggrieved by any decision of the board of adjustment … may, *within 30 days after the filing of the decision in the office of the board*, commence an action seeking the remedy available by certiorari…." (Emphasis added.) The board granted the variance at issue on January 9, 1998. Its decision was "filed" in the board's "office" not later than January 12th, as evidenced by a letter of that date from the board's secretary to Ukura informing him that the board had granted a variance from the required side-yard setbacks. The access lot owners did not file their action until June 24, 1999, almost eighteen months after it had been granted and filed.

¶15 The County does not necessarily contend that the access lot owners' time period for challenging the variance in court expired on February 11, 1998, thirty days after the board's decision was filed. For purposes of this appeal, the County concedes that it did not notify the individual access lot owners of the variance proceedings prior to the board's hearing and granting of the variance. The County argues, however, that "[e]ven if plaintiffs were not immediately aware of the variance … they became aware that the variance had been granted many months before their Complaint was filed. The statute of limitations governing the plaintiffs' certiorari action began to run when they learned of the variance."

¶16 The County argues that the rationale set forth in ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Board of Adjustment***, 131 Wis. 2d 101, 388 N.W.2d 593 (1986), should govern on the present facts. The ordinance at issue in ***Brookside*** provided for administrative appeals to the board of adjustment "within a reasonable time," and the parties did not dispute "that filing an appeal within 10 days after notice of the issuance of the permit is a filing within a reasonable time period." ***Id***. at 118. The ordinance did not, however, specify an act or event from which the "reasonable time" for appealing begins to run. The supreme court concluded that, under those circumstances, "[i]t is only reasonable to begin the appeal period when the appellant acquires notice of the event from which the appeal is taken." ***Id***. at 114.

¶17 Here, the statute specifies both the time period for appealing (thirty days) and the event which triggers it (the filing of the board's decision.) The facts of ***Brookside*** are thus arguably distinguishable from those presently before us. But if the ***Brookside*** rationale is not applicable to the present facts, the lot owners' opportunity to seek court review expired thirty days following the filing of the board's decision in January. If, on the other hand, the supreme court's rationale in ***Brookside*** can be applied here to extend the time for commencement of judicial review proceedings until thirty days after the lot owners became aware that a variance had been granted to Ukura, their time to challenge the variance nonetheless expired in mid-summer of 1998. In either case, the owners' action commenced in June 1999, was untimely.

¶18 As we have noted, the County does not dispute that the lot owners did not receive individual notice of the board's hearing on Ukura's variance application. We conclude that the board's failure to provide individual notice of the variance hearing, unlike a failure to publish proper public notice (which

arguably renders the board's action void), does not relieve the lot owners from all time constraints in bringing a court challenge. At most, under the ***Brookside*** rationale, the appeal period simply does not begin to run until they became aware of the board's action. The owners had clearly acquired notice of the granting of the variance when they wrote to the zoning administrator on July 7, 1998, demanding an investigation into the board's handling of the matter. Under the ***Brookside*** rationale, they had until August 6, 1998, to challenge it in court.[5]

¶19 The access lot owners argue that the rationale of ***Brookside*** should not factor into our analysis because "[s]ignificantly, the court did not hold that although an aggrieved party was allowed to appeal, that this was the exclusive

[5] We acknowledge that one could argue, under the holding of ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Board of Adjustment***, 131 Wis. 2d 101, 114, 388 N.W.2d 593 (1986), that judicial review of the granting of a variance could theoretically be sought years after its issuance, if an "aggrieved person" only then became aware of it. The supreme court did not expressly indicate whether would-be challengers to a land use decision must demonstrate a level of diligence in learning of the action they seek to overturn, but the court implied that may be the case. ***Id***. at 114-15 ("A person has notice of a fact under four circumstances: if he or she (1) knows the fact, or (2) has reason to know it, or (3) should know it or (4) has been given notification of it.").

In ***Brookside***, the challengers became aware of the granting of a conditional use permit when construction on the facility commenced, and they brought their action ten days later. The court was clearly concerned about the potential unfairness to the recipient of a conditional use permit stemming from a tardy appeal. *See* ***id***. at 118. It concluded, however, that the applicant for special action from zoning authorities could protect itself by ensuring that those potentially aggrieved by the action are notified of it. ***Id***. ("Before it began construction Brookside Poultry could have protected itself by taking steps to ensure that the Residents had notice of the issuance of the permit."). After "[c]onsidering the interests of the parties and the public," the court concluded that the challengers should be deemed to have acquired notice of the challenged permit when construction began on the project. ***Id***. at 117.

We need not address here whether persons who seek to challenge a variance more than thirty days after it is filed must demonstrate that they were not negligent in not learning of it sooner. The record before us shows that the lot owners became aware of the variance at some time before July 7, 1998, and they did not file this action until almost a year later. Whether they had "reason to know" or "should have known" of the variance earlier than they did is thus irrelevant on the present facts.

means of challenging an improperly granted permit." That is, according to the lot owners, there is more than one way to challenge the granting of a variance. They quote the following language from ***Sohns v. Jensen***, 11 Wis. 2d 449, 105 N.W.2d 818 (1960): "[a]n adjoining … property owner who has *no notice* of an administrative order, has *no knowledge* of such order and has not participated in the proceedings resulting from the order, cannot be deemed to be an aggrieved party who is required to appeal within the meaning of the zoning ordinance." ***Id.*** at 455 (emphasis added). From this passage, the lot owners extrapolate that, while they "*may* file a certiorari appeal, [they are] not compelled to do so to seek a remedy if they had no proper notice of the proceedings."

¶20 The access lot owners misapprehend the import of the quoted passage from ***Sohns*** on which they rely. The question in ***Sohns*** did not involve the timing of an appeal from an adverse board of adjustment decision. Rather, the court concluded in ***Sohns*** only that the plaintiffs, who sought to enforce a county zoning ordinance and to abate a nuisance, were not required to first "exhaust administrative remedies" by appealing either a planning commission decision or an administrator's issuance of a zoning permit to the board of adjustment. ***Id***. at 454-56; *see also* ***Brookside***, 131 Wis. 2d at 112 (discussing ***Sohns***).

¶21 The lot owners also argue that the language of WIS. STAT. § 59.694(10) supports their contention that certiorari review is not the only manner to obtain review of the board's granting of a variance. The statute provides in relevant part: "A person aggrieved by any decision of the board of adjustment … *may*, within 30 days after the filing of the decision … *commence an action*…." (Emphasis added.) The lot owners argue that the use of the phrase "may … commence an action" implies the existence of means other than certiorari under that subsection to challenge the granting of a variance. We reject the argument

because it not only distorts the statutory language but also violates an elementary rule of statutory construction.

¶22 We conclude the plain meaning of the provision that a person "may … commence an action" is simply that whether to seek judicial review of a board of adjustment decision lies within a person's discretion. As we explained in ***Gottlieb v. City of Milwaukee***, 90 Wis. 2d 86, 95, 279 N.W.2d 479 (Ct. App. 1979):

> The maxim or rule that a statute which expresses one thing is exclusive of another, is applied to statutory interpretation. Where a form of conduct, the naming of its performance and operation, the persons and things to which it refers, are designated, there is an inference that all omissions should be understood as exclusions. The rule is that if a statute provides one thing, a negative of all others is implied. Where a statute grants authority to do a thing and prescribes the manner of doing it, the rule is clear that the provision as to the manner of doing the thing is mandatory, *even though the doing of it in the first place is discretionary*….

(Footnotes omitted; emphasis added.) Thus, a person aggrieved by a board of adjustment decision need not challenge it in circuit court, but if he or she wishes to do so, WIS. STAT. § 59.694(10) sets forth the method and manner for doing so. Had the legislature contemplated other avenues of attack on the board's granting

of a variance, it would have specified them, or at least acknowledged their existence.[6]

¶23 Under the access lot owners' proposed interpretation, a person could bring a declaratory judgment action to void a variance at any time, for any reason, even years after it was granted, regardless of when the person became aware the variance had been granted. This interpretation would obviate the statutorily prescribed certiorari proceedings, and thereby defeat the apparent legislative purpose of allowing for efficient and timely review of board of adjustment actions. The recipient of a variance, who in good faith completes a construction or remodeling project after the appeal period specified in WIS. STAT. § 59.694(10) has run, could find himself or herself nonetheless judicially enjoined from relying on the existence of the variance. We cannot impute to the legislature the intent to foster such an unreasonable, not to mention unfair, result.[7]

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[6] *Cf*. ***Forest County v. Goode***, 219 Wis. 2d 654, 667 ¶24, 579 N.W.2d 715 (1998) ("The State correctly asserts that the writ of certiorari is the sole method of review for denial of a variance." (citing WIS. STAT. § 59.694(10))); ***State ex rel. Schwochert v. Marquette County Bd. of Adjustment***, 132 Wis. 2d 196, 201, 389 N.W.2d 841 (Ct. App. 1986) ("[The] language [of WIS. STAT. § 59.99(10), now 59.694(10)] is clear: review of the board's decisions may be had by 'commenc[ing] an action' for certiorari.… And, where the legislature has provided a statutory remedy, those procedures 'must be strictly pursued to the exclusion of other methods of redress.'" (citation omitted)).

[7] See footnote 5, above, regarding the supreme court's expression of concern in ***Brookside***, 131 Wis. 2d at 112, 118, regarding the potential unfairness to the recipient of a conditional use permit stemming from a tardy appeal. *Also, cf.* ***Diehl v. Dunn***, 13 Wis. 2d 280, 287, 108 N.W.2d 519 (1961) ("[T]he plaintiffs had complete knowledge of the issuance of the permits in 1955 and 1956, and sat on their rights for three-and-one-half years permitting the defendants to expend large sums of money in erecting and maintaining their plant before commencing the present action. Such unreasonable and unwarranted delay, coupled with the changed position of the defendants in reliance on the permits, constitutes laches so as to bar the plaintiffs' action.").

¶24 We also observe in this regard that, if a would-be challenger to a zoning decision were allowed to bring a declaratory judgment action to set it aside at any time, irrespective of procedures and timelines established by statute or ordinance, the supreme court could have simply said so in ***Brookside***, instead of developing a rationale, as it did, for commencing the authorized appeal period based on when an aggrieved person acquires notice of the decision. We have summarized the ***Brookside*** rationale as follows:

> [T]he court noted that the aggrieved residents had not received written notice of the zoning administrator's issuance of a building permit. Noting that sec. 59.99(4) mandates a "reasonable" time to appeal, the supreme court was troubled by the fact that absent notice of the decision, there was no way to determine a "reasonable" time to appeal. Rather than allow this absurd result, the court looked to the time when the residents first found out about the building permit, fashioned a constructive notice remedy to start the appeal time running from that date, and thereby resolved the case.

State ex rel. DNR v. Walworth County Bd. of Adjustment, 170 Wis. 2d 406, 413, 489 N.W.2d 631 (Ct. App. 1992) (citations omitted). The point remains, however, that in this case the lot owners became aware of the variance within a few months of its being granted. This may be sufficient grounds to delay the start of the statutory appeal period, but it is not cause for circumventing WIS. STAT. § 59.694(10) altogether.

¶25 Finally, the access lot owners assert that, even if we determine that the thirty-day limitation under WIS. STAT. § 59.694(10) applies in this case, the County should be estopped from asserting it. They claim that "within days of learning that a variance may have been granted" to Ukura, the county zoning administrator told one of the lot owners that there were no "time limits that would

affect his investigation into the propriety of this matter."[8] The doctrine of estoppel may preclude a defendant's assertion of a statute of limitation where the defendant is guilty of fraud or inequitable conduct that caused the plaintiff's untimely filing. *See* ***State ex rel. Susedik v. Knutson***, 52 Wis. 2d 593, 596-97, 191 N.W.2d 23 (1971). However, "[a] party's reliance on another's conduct must be reasonable." ***Schwetz v. Employers Ins. of Wausau***, 126 Wis. 2d 32, 37-38, 374 N.W.2d 241 (Ct. App. 1985), *overruled on other grounds by* ***Colby v. Columbia County***, 202 Wis. 2d 342, 550 N.W.2d 124 (1996).

¶26 We will assume, without deciding, that the zoning administrator's alleged statement constituted "fraud or inequitable conduct." We conclude, however, that the access lot owners could not have reasonably relied on the statement after retaining counsel to represent them in this matter. After retaining counsel, parties must look to their attorneys and not their adversaries to protect their interests. Thus, even if the lot owners could assert an estoppel to extend the time for commencing litigation beyond August of 1998, the tolling of the limitation period would end, at the latest, in December of that year. Their counsel expressly acknowledged on December 11th that a time limitation for "further legal proceedings" existed (see footnote 3), but he did not file suit for another six months. We therefore reject the lot owners' estoppel claim.

CONCLUSION

¶27 For the reasons discussed above, we reverse the appealed judgment. The County argues that the circuit court also erred by (1) entering an injunction

[8] The zoning administrator testified in a deposition that he did not recall being asked by the lot owner about time limits.

against Ukura because he is not a party to the action, and (2) awarding costs to the access lot owners. Because we reverse the judgment declaring the variance void, we also vacate the injunction and the award of costs based thereon.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.