COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1558 **Cir. Ct. No. 2005CV178**

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

ARTHUR G. JAROS, A/K/A ARTHUR G. JAROS, JR., AS TRUSTEE AND IN HIS INDIVIDUAL CAPACITY,

PETITIONER-APPELLANT,

V.

ONEIDA COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. This suit arises out of the Oneida County Zoning Board of Adjustment's refusal to hear an appeal brought by Arthur Jaros, Jr. The Board concluded Jaros's appeal was procedurally barred because Jaros had brought a similar appeal several months earlier. Jaros argues the Board erred

because his new appeal seeks significantly different relief than he requested in his original appeal.[1] We disagree and affirm the judgment.

BACKGROUND

¶2 Jaros owns 1.2 acres on Squash Lake in Oneida County.[2] On October 26, 2004, Jaros applied for a zoning permit from the Oneida County Planning and Zoning Department. The permit requested permission to add two decks to an existing cottage. The first proposed deck was ten feet wide, ran along all but five feet of the east wall of the house, and had stairs facing east. The second proposed deck was on the west side of the cottage, was six feet square and had two stairways. One stairway faced south toward the lake, and the other faced north, toward the rear of the cottage. On November 2, the department denied Jaros's application because it believed the proposed decks were in violation of Oneida County's Shoreland Protection Ordinance.

¶3 Jaros appealed the Department's decision to the Board. After a hearing, the Board concluded the department had incorrectly interpreted the Shoreland Protection Ordinance. The Board ordered the department to grant Jaros a permit, but added two conditions relevant here: (1) The deck on the east side of the house "shall extend away from" the ordinary high water mark of Squash Lake; and (2) the deck on the west side of the cottage "shall not include stairs toward the lake."

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[1] Jaros also raises a number of issues related to the merits of the claim the Board refused to hear. Because we affirm the Board's refusal to hear the claim, we need not reach the merits.

[2] The land is also owned in part by a trust of which Jaros is trustee. Because the distinction between the trust and Jaros personally is not material to the dispute, we refer to Jaros as the landowner throughout.

¶4 Jaros did not appeal the Board's decision. Instead, on March 28, 2005, Jaros applied to the department for another permit. The application requested permission to (1) add five additional feet to the east side deck, so that the deck would extend along the entire side of the cottage; and (2) build stairs facing toward the lake on the deck on the west side of the cottage. The department denied this permit, again citing the Shoreland Protection Ordinance.

¶5 Jaros again appealed to the Board. In his written submission to the Board, Jaros stated the addition to the east side deck was his attempt to build the deck "as originally proposed" to the department in his first application.[3] Regarding the steps, Jaros stated he had not had an adequate opportunity to be heard on that issue in his original appeal and therefore wanted to "re-raise" the issue "by proposing forward facing steps of a somewhat different dimension."[4] The Board refused to hear his appeal, citing a Board rule barring repetitious appeals.

¶6 Jaros appealed the Board's action to the circuit court by certiorari. The court granted the Board summary judgment, reasoning that if "applicants can simply make small modifications such as this to avoid [the Board rule], then the rule will have no practical force at all."

[3] According to Jaros, the extra five feet were omitted when his contractor modified the plans without his knowledge at the request of department staff.

[4] The only specific difference indicated in the record is that the new stairs had seven steps instead of the original six.

STANDARD OF REVIEW

¶7 The circuit court decision in this case was a certiorari review of the Board's refusal to hear Jaros's appeal. We therefore review the Board's decision, not the decision of 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). Our review is limited to: (1) whether the Board acted 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 evidence was such that the Board might reasonably make the order or determination in question. ***Id.***

DISCUSSION

¶8 As we understand his argument, Jaros contends the Board's decision barring his second appeal was in error because the Board misinterpreted its rule barring repetitious appeals, and because the Board's interpretation of the rule violates due process and equal protection. The Board rule in question states:

> A petition that seeks the same or substantially the same relief as a previously filed petition or that seeks to reopen a previously filed petition to rehear or reconsider an appeal will not be heard by the Board. A petition that seeks relief that could have been requested in a previously filed petition that has already been acted upon by the Board will not again be heard by the Board.

ONEIDA COUNTY, WI, BOARD OF ADJ. RULE OF PROCEDURE 17.08(1) (2005).[5]

[5] ONEIDA COUNTY, WI, BOARD OF ADJ. RULE OF PROCEDURE 17.08(1) (2005), was revised in 2006. This version of the rule was in effect when Jaros's appeal took place in April 2005.

(continued)

Jaros argues his new appeal is not barred by RULE 17.08(1), primarily because the new appeal does not request "the same or substantially the same relief" requested in his original appeal.[6] We disagree.

¶9 In both appeals, Jaros asked the Board for permission to build the steps facing the lake. Jaros does not seriously contend that the new steps are not "substantially the same" as the original. In fact, in his second appeal he characterized his permit application for the steps as an attempt to re-raise the same issue. Instead, Jaros argues he is entitled to a second appeal because the Board never gave him an opportunity to be heard on that specific part of his proposal, because the Board's original decision was in error, and because he was the prevailing party in the first appeal.

¶10 Jaros's first two arguments fail because they do not explain why a permit for the new steps is not "substantially the same relief" requested in his original appeal. Had Jaros appealed the Board's original decision, he would have had an opportunity to convince the circuit court that the Board incorrectly interpreted the ordinance, or that its decision violated due process. He chose not to. Jaros's failure to appeal those issues is not grounds for an exception to RULE 17.08(1).

Under the revised RULE 17.08(1), "substantially similar" appeals are no longer barred indefinitely; instead, "substantially similar" appeals are barred for a period of one year. Although neither party raises the issue, it appears that this revision may render Janos's appeal moot.

[6] Jaros also argues his appeal should be governed by ONEIDA COUNTY, WI, BOARD OF ADJ. RULE OF PROCEDURE 17.07(11) (2005) rather than RULE 17.08(1). RULE 17.07(11) states that no decision of the Board "shall set a binding precedent." As the Board points out in its brief, RULE 17.07(11) is designed to allow the Board freedom to decide individual cases on their facts, rather than by reference to earlier Board decisions on different cases with similar facts. It does not conflict with the Board rule barring repetitive appeals by the same landowner.

¶11 Finally, Jaros's assertion that he "completely prevailed" in the first appeal is simply untrue. Jaros prevailed to the extent that the Board allowed certain parts of the deck, but the Board's decision was adverse to him to the extent that the Board did not allow him to build steps toward the lake. Jaros had every right to appeal that portion of the Board's decision to the circuit court by certiorari. *See* WIS. STAT. § 62.23(7)(e)10 (any person "aggrieved" by a board of appeals decision may file certiorari action).

¶12 Similarly, in both appeals Jaros asked the Board for permission to build a deck along the east side of his house. He argues the new deck was not "substantially the same relief" he originally requested because it was twenty-four percent larger than the original, and because its greater proximity to the high water mark meant the Board had to interpret a different part of the Shoreland Protection Ordinance.

¶13 Jaros's argument ignores the fact that the Board rule clearly defines the preclusive effect of an appeal by reference to the relief requested, not by reference to the legal issue posed. That is, RULE 17.08(1) barred all appeals requesting "the same or substantially the same relief," regardless of what section of the Shoreland Protection Ordinance was implicated. The question for the Board, then, was whether the deck Jaros requested in his second appeal was "substantially the same relief" Jaros requested in his original appeal.

¶14 On certiorari review, Board conclusions are entitled to a presumption of correctness. ***Miswald v. Waukesha County Bd. of Adjust.***, 202 Wis. 2d 401, 408, 550 N.W.2d 434 (Ct. App. 1996). Here, the new deck was the same shape as the original, was in the same location, and had steps in the same location. The only difference between the two proposals was that the new deck

extended along the house for an additional five feet. In view of the substantial similarities between the decks proposed in the two appeals, we see no error in the Board's conclusion that Jaros requested "substantially the same relief" in both appeals.

¶15 Finally, Jaros argues the Board's decision not to hear his second appeal violated his due process and equal protection rights. This precise issue was resolved against Jaros in ***Tateoka***, 220 Wis. 2d at 669-72. Jaros argues ***Tateoka*** is distinguishable because he was the prevailing party in his initial appeal, not the losing party as in ***Tateoka***. However, the holding in ***Tateoka*** was based on the fact that the rule barring repetitive appeals was related to a legitimate purpose—bringing "certitude and finality" to board of appeals decisions—and not to who won or lost the initial appeal. ***Id.*** at 670-71. In addition, as noted above, Jaros prevailed in part and lost in part in his initial appeal, and had the right to certiorari review of the portion of that decision that was adverse to him. He therefore was in exactly the same position as the landowner in ***Tateoka***.

By the Court.—Judgment affirmed.

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