**COURT OF APPEALS DECISION DATED AND FILED**

**June 28, 2007**

David R. Schanker
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 Nos. 2006AP2218**
**2006AP2429**

**Cir. Ct. Nos. 2005CV003713**
**2005CV003711**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

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**NO. 2006AP2218**

**JEFFREY J. CHERWINKA AND ROBIN J. CHERWINKA,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**TOWN OF SPRINGDALE,**

**DEFENDANT-RESPONDENT.**

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**NO. 2006AP2429**

**KARL E. HACKER, JUDITH A. HACKER,**
**EDWARD A. BRAND AND**

**KRISTIN L. BRAND,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**TOWN OF SPRINGDALE,**

**DEFENDANT-RESPONDENT.**

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APPEAL from orders of the circuit court for Dane County: WILLIAM C. FOUST and DAVID T. FLANAGAN, III, Judges. *Affirmed*.

Before Lundsten, P.J., Dykman and Bridge, JJ.

¶1 DYKMAN, J. Jeffrey and Robin Cherwinka, Karl and Judith Hacker, and Edward and Kristin Brand (collectively "owners") appeal from orders granting summary judgment to the Town of Springdale in their actions seeking declaratory judgments validating the certified survey maps (CSMs) they filed with the Dane County Register of Deeds.[1] The owners contend that the circuit courts erred in dismissing their declaratory judgment actions because the Town never "rejected" their proposed CSMs, and therefore never triggered the statutory mandate of certiorari review. We conclude that the Town rejected the owners' CSMs sufficient to trigger the requirement for certiorari review, and that they are therefore precluded from seeking declaratory judgments as an alternative remedy.

[1] The two circuit court cases involving the Cherwinkas, Hackers and Brands have been consolidated for this appeal.

*Background*

¶2 The Cherwinkas, Hackers and Brands own property in Dane County in the Town of Springdale. In May 2001, the Town adopted a Moratorium to stay acceptance, review and approval of applications for land division or subdivision.

¶3 In March 2002, while the Moratorium was still in effect, the owners filed CSMs with the Town for approval to divide their property. On March 20, 2002, the Town's clerk returned the CSMs to the owners with letters stating that the Town did not review the applications because at the time the CSMs had been submitted, the Town had adopted a stay on accepting, reviewing and approving land division applications. The letters also stated that the stay had since been lifted, new ordinances were in effect, and that the Town was again accepting submissions. Finally, the letters stated that, additionally, the owner's submissions did not appear to comply with the Town's previous land-division ordinances.

¶4 The owners then recorded their CSMs with the Dane County Register of Deeds. In response, the Town filed a statement with the Dane County Register of Deeds which said that the Town had not approved the owners' CSMs and did not recognize their validity.

¶5 In January 2004, the owners initiated separate lawsuits in circuit court for declaratory judgments to establish that the Town's statement was void and that the owners' CSMs were validly recorded. Both actions were dismissed for failure to comply with the notice of claim requirement under WIS. STAT. § 893.80(1) (2005-06).[2] In November 2005, the owners initiated the current

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

actions for declaratory judgments to establish that the Town's statement was void and the owners' CSMs validly recorded.[3] The circuit courts granted the Town's motions for summary judgment, dismissing the actions, and the owners appeal.

*Standard of Review*

¶6 We review a grant of summary judgment de novo, employing the same methodology as the circuit court. ***Barber v. Weber***, 2006 WI App 88, ¶7, 292 Wis. 2d 426, 715 N.W.2d 683. Summary judgment is only appropriate if the parties' submissions establish "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). This case requires that we apply statutory requirements to undisputed facts, a question of law which we review de novo. *See* ***Murphy v. Droessler***, 188 Wis. 2d 420, 425, 525 N.W.2d 117 (Ct. App. 1994).

*Discussion*

¶7 The Town and the owners agree that certiorari review is the exclusive remedy for an aggrieved party after the Town rejects a proposed CSM,[4] and that the owners did not seek that remedy. The owners assert, however, that the certiorari requirement was not triggered in this case because the Town never "rejected" their proposed CSMs. Alternatively, they argue that the facts of this care warrant deviation from the statutory certiorari requirement. We disagree with

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[3] The issue of the owners' compliance with the notice of claim statute for the current action has not been raised on appeal.

[4] *See generally* ***Master Disposal, Inc. v. Village of Menomonee Falls***, 60 Wis. 2d 653, 658-59, 211 N.W.2d 477 (1973); ***Jefferson County v. Timmel***, 261 Wis. 39, 63-64, 51 N.W.2d 518 (1952).

both contentions, and conclude that the owners are precluded from bringing these declaratory judgments because they were required to seek certiorari review as their exclusive remedy.[5]

¶8 The Town's Land Division and Subdivision Ordinance, sec. 9-3-34(4), states that "[a]ny person aggrieved by … a failure to approve a plat may appeal therefrom, as provided in Sections 236.13(5) and 62.23(7)(e)10, 14 and 15 of the Wisconsin Statutes, within thirty (30) days of notification of the rejection of the plat." Under WIS. STAT. § 236.13(5), "[a]ny person aggrieved by … a failure to approve a plat may appeal therefrom as provided in s. 62.23(7)(e)10., … within 30 days of notification of the rejection of the plat." WISCONSIN STAT. § 62.23(7)(e)10. states that "[a]ny person … aggrieved by any decision of the board of appeals … may, within 30 days after the filing of the decision in the office of the board of appeals, commence an action seeking the remedy available by certiorari." Thus, the parties agree, if the Town notifies a party that the Town has rejected an application for land division, the party may only seek review by certiorari, and must do so within thirty days. We turn, then, to the owners' argument that the March 20 letters from the Town's clerk did not notify the owners that the Town had rejected their submissions for approval to divide their land.

¶9 The March 20 letters read, in part:

[5] Because we conclude that the owners were required to seek certiorari review as their exclusive remedy, we do not reach the owners' arguments regarding the validity of the Town's statement that it would not recognize the owners' CSMs, or the validity of the owners recording their CSMs. Additionally, because this issue is dispositive, we need not discuss the Town's arguments for alternative bases to uphold the circuit courts' decisions.

> On May 14, 2001, the Town Board adopted a temporary stay on the acceptance, review and approval of land division applications. The stay expired on March 15, 2002. Because the stay was in effect when you submitted your certified survey maps, the Town did not review and act on your submission. The stay provided the Town with a short period of time to evaluate its land use policies. While the stay was in effect, the Town adopted an amendment to its 1981 land use plan, (the "amended plan") and adopted a new land division and subdivision ordinance (the "new ordinance"). Copies of the amended plan and new ordinance are enclosed. Now that the stay has expired and the amended plan and new ordinance are in effect, the Town will review and act on land division submissions pursuant to the provisions contained in the amended plan and new ordinance.

¶10 After stating that the submissions did not comply with the new requirements for land division requests and were therefore being returned, the letters state:

> (Also, although the 1981 land use plan and previous land division and subdivision ordinance are no longer in effect, I note that your submission does not appear to comply with the requirements of sections 9-3-13 and 9-3-20 of the Town's previous land division and subdivision ordinance and does not appear to comply with the one lot per 35 acre of ownership requirement contained in the 1981 land use plan.)

¶11 Clearly, the letters conveyed that the Town was not approving the owners' submissions. Indeed, the owners do not argue otherwise. Ultimately, what the owners are really arguing is that the Town's method of rejecting their submissions—via letter from the Town Clerk, pursuant to a stay on accepting, reviewing, and approving submissions for land division—was improper. Thus, the owners argue, there was no *valid* rejection triggering the requirement for certiorari review.

¶12 The problem with the owners' argument is that their disagreement with the Town's method of rejecting their submissions is precisely what triggered

the certiorari requirement. Certiorari review allows the court to review a board's decision to determine:

> (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a 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.

***Osterhues v. Board of Adjustment for Washburn County***, 2005 WI 92, ¶11, 282 Wis. 2d 228, 698 N.W.2d 701 (citation omitted). Certiorari is therefore the appropriate vehicle to challenge a Town's method of rejecting a landowner's application for land use or division.[6] Thus, in ***Master Disposal, Inc. v. Village of Menomonee Falls***, 60 Wis. 2d 653, 211 N.W.2d 477 (1973), the supreme court dismissed a landowner's declaratory judgment action challenging the zoning board of appeal's refusal to hold a hearing on an application for land use. The court explained that certiorari was the exclusive remedy despite the sparse record:

> If the record consists of no more than a petition for review and a refusal of the zoning board of appeals to act, upon that record alone the trial court could take jurisdiction, hear testimony and direct the proper disposition or preferably remand the matter to the zoning board of appeals with directions to conduct a hearing, make a record and then make a supplemental return.

***Id.*** at 659.

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[6] We note the line of Wisconsin cases holding that the statutory certiorari requirement is not exclusive where the substantive constitutionality of an ordinance is challenged. *See* ***Master Disposal***, 60 Wis. 2d at 659; ***Kmiec v. Town of Spider Lake***, 60 Wis. 2d 640, 644-47, 211 N.W.2d 471 (1973). The owners have not raised a constitutional argument in this case, and we therefore do not consider this exception.

¶13 Thus, certiorari review was the exclusive remedy in this case for the owners to assert that the Town's action (or inaction) with respect to CSMs was not a proper rejection, and the sparse record did not preclude that review. Because certiorari review was the appropriate and exclusive remedy to challenge the Town's rejection of the owners' applications, the owners were properly precluded from bringing declaratory judgment actions.

¶14 The owners' argument that the facts of this case warrant deviation from the certiorari requirement is similarly unavailing. The owners cite two cases in support of their argument, ***County of Sauk v. Trager***, 118 Wis. 2d 204, 211, 346 N.W.2d 756 (1984), and ***Town of Menasha v. B&B Race Car Engineering***, 172 Wis. 2d 419, 421, 493 N.W.2d 250 (Ct. App. 1992). We conclude that both cases are distinguishable on their facts, and do not compel the result the owners urge.

¶15 In ***Trager***, 118 Wis. 2d at 206, Sauk County brought an action against Trager for a forfeiture because of Trager's violations of a Sauk County zoning ordinance. In defense, Trager argued that the Sauk County Board of Adjustment's decision, concluding that Trager violated the ordinance, was invalid. ***Id.*** Sauk County argued that Trager was precluded from asserting the invalidity of the County Board's decision because he had failed to seek judicial review of that decision. ***Id.*** We upheld the circuit court's decision to dismiss Sauk County's action and the supreme court affirmed our decision. ***Id.***

¶16 In its decision, the supreme court reiterated that the statutory certiorari review was both exclusive and adequate for an aggrieved party challenging a Board's decision. ***Id.*** at 213-14. The court then concluded that, nonetheless, Trager should not be prevented from asserting its defense in Sauk

County's enforcement action. ***Id.*** at 215. The court focused on four factors in reaching its decision: (1) the question presented in the enforcement action—the validity of the Board's decision—was the same as would have been before the court in a certiorari proceeding; (2) there was no dispute as to the facts, whether the agency exercised its discretion, or whether the ordinance applied to the facts, but was limited to whether the Board correctly interpreted the ordinance, a question of law for the court; (3) the record indicated that the Board's decision was "suspect on its face"; and (4) precluding Trager from presenting his only defense in the action would lead to the harsh result of a $5,000 forfeiture. ***Id.*** at 215-16.

¶17 ***B&B Race Car Engineering***, 172 Wis. 2d at 420, involved a municipal enforcement action. In ***B&B***, we affirmed the circuit court's decision to allow B&B to raise the defense that its property was exempt from past personal property taxes in the Town's action seeking a judgment for those taxes, even though B&B had not followed the statutory procedure for challenging the tax assessment. ***Id.*** at 426. We concluded that the facts required the same conclusion as in ***Trager***, in part because "B&B [was] a reluctant defendant in an action commenced by the taxing entity," as "Trager [was] the reluctant defendant in a court action initiated by the administrative agency." ***Id.*** at 424, 426 (citation omitted).

¶18 We conclude that the procedural posture of ***Trager*** and ***B&B Race Car Engineering*** distinguishes them from this case. Here, the owners are not "reluctant defendants" in an action brought by the Town. They have not raised the validity of the Town's decision as a defense to the Town's complaint against them. Rather, following a non-enforcement action, the owners brought their own declaratory judgment action. We see no reason to allow the owners to circumvent

the statutorily required procedure for bringing that challenge. Accordingly, we affirm the decisions of the circuit court.

*By the Court*.—Orders affirmed.

Not recommended for publication in the official reports.