

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2008

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 No. 2007AP231
STATE OF WISCONSIN**

Cir. Ct. No. 2005CV1746

**IN COURT OF APPEALS
DISTRICT II**

GLENN STAEGE,

PLAINTIFF-APPELLANT,

v.

TOWN OF NORWAY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
STEPHEN A. SIMANEK, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 SNYDER, J. Glenn Staege appeals from an order denying his petition to the circuit court for a writ of certiorari. The court denied the petition on grounds that record evidence established the Town of Norway's legitimate land

use concern when it denied Staege's request for rezoning. Staege contends that the Town's decision to deny his rezoning request was arbitrary and unreasonable, and was unrelated to any legitimate land use considerations. We agree and reverse the order because the board did not apply the correct theory of law and because it did not rely on land use concerns for its decision. We remand the case to the circuit court to direct the Town of Norway Board of Zoning to reconsider the rezoning request, to issue a decision that is free and clear of personal bias, and to put its rationale for that decision on the record.

FACTS AND PROCEDURAL BACKGROUND

¶2 Staege owns a parcel of property currently zoned M-2 and located adjacent to the Town of Norway Industrial Park on Six Mile Road. At the October 27, 2004 town board meeting, Staege requested "conceptual input on rezoning" his property. Staege's goal was to rezone his property from M-2 (general industrial district) to M-3 (heavy industrial district), and to obtain a conditional use permit for outside storage of certain materials and equipment. Zoning in the Town of Norway is subject to the zoning code of Racine county, and rezoning requests must be approved by both the county board and the town board.

¶3 During the October 27 board meeting, a town supervisor and the town attorney "gave background information on Mr. Staege and his on going legal issues with Racine County [and] advised the town should move cautiously or possibly face the same issues the county is now involved with." No formal action was taken at the time.

¶4 On January 27, 2005, Frank Risler, Planning Manager for the Racine County Planning and Development Department, released a memorandum approving the rezoning of Staege's industrial park property to M-3 for several

reasons. Risler explained that “abutting lands to the north are already rezoned M-3,” and that rezoning would “create a reasonable block of M-3 zoning” where currently “scattered M-3 zoned areas” existed. Staeger’s request for rezoning, specifically to operate his business at 21500 West Six Mile Road and to rezone his parcel from M-2 to M-3 for outside storage, was ultimately denied by the board on April 27, 2005.¹ Staeger sought reconsideration, observing that the board granted the requests of other property owners seeking M-3 zoning for their industrial park property.

¶5 At its meeting in June, the board stated its concern about what items Staeger would store outside if rezoning was approved. The board asked Staeger to submit additional information about his plans for outside storage and he complied. At its meeting on July 27, a board member asked Staeger “if [he was] asking the town to rezone this parcel ... as a junkyard? This is the nature of [Staeger’s] business in the Town of Raymond.” The board then voted to deny rezoning.

¶6 Staeger sought certiorari review before the circuit court. He alleged that the decision of the board was a result of personal bias against him and was not related to any legitimate land use concern. Staeger moved for summary judgment against the Town of Norway. In its review of the matter, the circuit court relied heavily on the written meeting minutes because the audio tapes from the hearings were “inaudible and, therefore were not able to be transcribed.” The court concluded, “[u]nfortunately, nothing in the official minutes cited above gives this Court any insight as to the statutory factors or other criteria the board considered

¹ Staeger also requested that the board take up the matter of a conditional use permit if rezoning was granted. Because the board declined to rezone Staeger’s property, it did not reach the issue of the conditional use permit.

in rejecting Mr. Staege’s request for rezoning.” To remedy this and make review possible, the court remanded the matter back to the board and directed the board to “state the statutory or other criteria ... under which the board rejected the request for rezoning and ... state its reasons why the facts of this case did not fit the criteria considered.” The court’s order is dated April 24, 2006.

¶7 On October 24, 2006, after conferring with counsel in closed session, the board prepared a statement in response to the circuit court’s remand order. The document set forth nine reasons for denial of Staege’s rezoning request:

1. This parcel has an Environmental Corridor filled with large, old trees that are still strong and healthy.
2. There are pristine wetlands with appropriate flora and fauna to be an asset to a business climate—not a junk climate.
3. The petitioner’s history needed to be considered since it was documented in print in several newspapers over the years.
4. Mr. Staege’s past business practice indicates he prefers to operate beyond the petitioned and approved conditions.
5. Mr. Staege has an extensive history with Racine County elected officials as well as the Racine County Planning Department. All this history is documented in volumes and through the press.
6. Mr. Staege moved a great deal of his junk onto the property before he was the official property owner; before he had conditional use to operate a business on this property; before he had occupancy inspection to utilize the office area; many unlicensed and inoperable vehicles were parked on this property before approvals were given.
7. Junk is not a part of AA Welding and Supply—the name of Mr. Staege’s business for which approvals were sought.
8. Mr. Staege indicated he would be parking vehicles wherever there was room on the property and, if necessary,

would place pans under the vehicles stored in the corridor and wetland and woodland areas. He also indicated he would need to remove trees to park these vehicles.

9. The decision to deny the rezone was to keep a buffer between M-3 zoning and residential zoning.

The board noted that Staege had received a temporary conditional use permit for AA Welding & Supply to operate from the property, to store welding canisters outside, and to park company vehicles on the property. In the six months that Staege held the permit, he “did manage to fill the inside of the building ... with his junk. When the Town of Norway’s building inspector finally was able to inspect the inside of the building, he was surprised and upset that Mr. Staege had not been upfront and honest with him.” The board then characterized these revelations as a “partial list” of its reasons for denying Staege’s rezoning request.²

¶8 Staege took his case back to the circuit court, seeking certiorari review on the now supplemented record.³ He again asked the court to reverse the board’s denial of his rezoning request. The court held a hearing on November 7, 2006, and after hearing the arguments of the parties and reviewing the relevant documents ruled in favor of the Town of Norway. In doing so, the court stated that “on its face” the document containing nine reasons for denying Staege’s rezoning request did “not demonstrate arbitrary treatment” and listed “legitimate concerns” related to the use of the property. It also noted that Staege’s “reputation [preceded] him,” and that the court had jailed Staege in the past “for non-compliance with county zoning requirements.” Staege moved for

² Staege correctly observes that some of the events cited by the board post date the board’s vote to deny his rezoning request and therefore could not have informed the board’s decision.

³ Upon its return, the case was heard by a different circuit court judge.

reconsideration and the court denied his motion on grounds the record contained evidence of the board's "legitimate land use concern" when it denied his rezoning request. Staeger appeals.

DISCUSSION

¶9 Staeger presents two issues on appeal. First, he argues that the board acted in an arbitrary and capricious manner, denying his rezoning request because of personal animus rather than legitimate land use concerns. One by one, he counters the board's assorted reasons for denying his request. In the alternative, he argues that the board violated his constitutional right to equal protection under the law.

¶10 This matter is before us on certiorari review; therefore we accord a presumption of "correctness and validity" to the board's decision. *See State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. Certiorari review exists only to test the validity of agency decisions. *Winkelman v. Town of Delafield*, 2000 WI App 254, ¶3, 239 Wis. 2d 542, 620 N.W.2d 438. When we review a zoning decision by a local board, we limit our review to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether the decision was arbitrary, oppressive or unreasonable, and represented the board's will rather than its judgment; and (4) whether it might reasonably make the decision in question based on the evidence. *Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals*, 2005 WI 117, ¶16, 284 Wis. 2d 1, 700 N.W.2d 87. Staeger concedes that the board was within its jurisdiction when it ruled on his rezoning request, but he asserts that the remaining three factors provide grounds for reversal.

¶11 Staege contends that the board misapplied the law of zoning. Generally, the purpose of zoning power is to control land use and development. See *Ziervogel*, 269 Wis. 2d 549, ¶22. Staege directs us to *Cushman v. City of Racine*, 39 Wis. 2d 303, 306, 159 N.W.2d 67 (1968), for the proposition that the grant of police power to a municipality to zone property use must be “for the purpose of promoting health, safety, morals, or the general welfare of the community.” *Cushman* directs local zoning authorities to consider the “character of the district” in which the parcel is located and warns against “spot zoning,” whereby a single lot is zoned differently than land in the vicinity and “same use district.” *Id.* at 306-07, 310. The lesson of *Cushman*, Staege asserts, is that a rezoning request requires the board to consider the appropriate land use for the property, in the context of surrounding property, and to disregard personality or political traits that are ascribed to the landowner.

¶12 More recently, we summarized the proper framework for analysis of zoning issues:

The pertinent inquiries go to whether the rezoning is consistent with long-range planning and based upon considerations which affect the whole community. The nature and character of the parcel, the use of the surrounding land and the overall scheme or zoning plan are also relevant. Finally, the interests of public health, morals and safety must also be considered, as well as the promotion of public welfare, convenience and general prosperity.

Step Now Citizens Group v. Town of Utica Planning & Zoning Comm., 2003 WI App 109, ¶29, 264 Wis. 2d 662, 663 N.W.2d 833 (citations omitted). All of these considerations are appropriate for board deliberations.

¶13 In its remand order to the board, the circuit court directed that “[c]onsistent with the Supreme Court’s decision in [*Lamar*], the Board shall state

the statutory or other criteria considered ... and shall state its reasons why the facts of this case did not fit the criteria considered.” In *Lamar*, the court held “[t]he Board must allow for meaningful certiorari review by stating the ‘grounds’ for its decision—the reasons that [the property owner’s] application does or does not fit the statutory criteria.” *Lamar*, 284 Wis. 2d 1, ¶39.

¶14 Having reviewed the board’s list of reasons for denial, we ascertain no specific legal criteria against which the board measured the facts. The board did not invoke a single zoning ordinance to support its decision. It provided descriptive statements of the desirable characteristics of the land, but did not explain how rezoning from M-2- to M-3 would diminish those characteristics. It highlighted negative impressions the board had of Staege personally, but offered no law authorizing the use of personal reputations in zoning decisions. Essentially, the board did nothing to clarify what legal theory informed its decision.⁴

¶15 We turn next to the third and fourth factors of certiorari review; specifically, whether the board’s decision was arbitrary and capricious, representing its will rather than its judgment and whether the record supports the board’s decision. The circuit court remanded the matter to the board to make a record of its reasons for denying Staege’s rezoning request. The court aptly noted that certiorari review of a decision is impossible without the rationale behind the

⁴ At oral argument, the Town asserted that it properly considered relevant factors such as the public health, morals, and safety as well as the promotion of public welfare, convenience and general prosperity. See *Step Now Citizens Group v. Town of Utica Planning & Zoning Comm.*, 2003 WI App 109, ¶30, 264 Wis. 2d 662, 663 N.W.2d 833. It was unable to explain why these factors would prevent Staege from rezoning to M-3 when adjacent property was rezoned to M-3 without similar concerns.

decision. *See State v. Trudeau*, 139 Wis. 2d 91, 110, 408 N.W.2d 337 (1987) (the board must give the reviewing court something to review).

¶16 Pursuant to the remand order, the board submitted its “partial list” of nine reasons for its decision. Staeger asserts that the reasons enumerated by the board are unrelated to land use and demonstrate an arbitrary and capricious decision. He claims that the board was biased against him because of a history of litigation with Racine county, because of the nature of the business he wished to operate on his property, and because the board predicted he would create a junk yard. Zoning decisions are particularly vulnerable to bias due to the localized nature of the decisions and the fact that zoning committee members are drawn from the immediate area. *See Marris v. City of Cedarburg*, 176 Wis. 2d 14, 25, 498 N.W.2d 842 (1993). Bias can distort judgment and lead to decisions not founded on facts or rational analysis. *See id.* at 25-26. Board members should recuse themselves when there is actual bias or even an impermissibly high risk of bias. *See id.* at 25.

¶17 The board’s own words appear to confirm Staeger’s accusations. In its list of reasons for denying Staeger’s request, the board cites with disapproval Staeger’s “history ... since it was documented in print in several newspapers,” his “past business practice” of operating outside approved conditions, his “extensive history with Racine County elected officials as well as the Racine County Planning Department,” and the presence of “junk” unrelated to his welding supply business on the property. We also recall the comments made at the October 27, 2004 meeting by a town supervisor and the town attorney; specifically they gave “background information” on Staeger and his ongoing legal issues with the county and advised that “the town should move cautiously” or risk similar problems. At oral argument, the Town asserted that there should be local control

over zoning decisions, that the board was not looking at what *might* happen if Staeger's request was approved but rather was looking at what *did* happen at Staeger's business property, and that zoning decisions are not made in a vacuum. Nonetheless, Staeger had a right to have his request decided by an impartial board. *See id.* at 24. When a board prejudges the facts or the application of law, the property owner's right to an impartial decision maker is violated. *See id.* at 26.

¶18 The board also mentions the desirable characteristics of the healthy trees in the area, as well as "pristine wetlands" and "appropriate flora and fauna." It is unclear from the record, however, what impact Staeger's proposed rezoning would have on the natural assets of the land. Risler, planning manager for Racine county, explained that "[o]nly a portion of the Staeger parcel is wetlands." Risler compares that with property adjoining Staeger's parcel that was rezoned from M-2 to M-3 in April 2005, noting that the "area of wetlands on the adjoining property is larger than that on the Staeger property."

¶19 The board was also clearly concerned with what it called a "junk climate" on Staeger's property, but outside storage on M-3 property is controlled by the municipality. The Racine county zoning code gives the planning and development committee the power to approve the "location and operation [of] ... [o]utside storage and manufacturing areas" in the M-3 district. *See RACINE COUNTY, WIS., CODE OF ORDINANCES ch. 20, art. VI, div. 29, § 20-776(a)(5) (2007)*. The conditional use process would specifically address outside storage of "junk." *Id.*, art. VIII, div. 5, § 20-1226(4). Here, the board employed a zoning decision to exert power more properly delegated to the conditional use permit process.

¶20 Staege concedes that the board raised one concern that is properly considered in a rezoning decision: buffering. The board’s final reason for denying Staege’s request is that it would “keep a buffer between M-3 zoning and residential zoning.” Staege asserts that the buffering rationale is a pretext to lend legitimacy to the board’s decision and is unsupported by the facts. We look to the record to determine whether any reasonable view of the evidence supports the board’s determination that Staege’s property buffered residential properties from the M-3 district. See *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 277, 461 N.W.2d 827 (Ct. App. 1990). If there is any relevant, credible, and probative evidence to support the board’s determination, we will uphold its decision. See *Delta Biological Res., Inc. v. Board of Zoning Appeals*, 160 Wis. 2d 905, 915, 467 N.W.2d 164 (Ct. App. 1991).

¶21 Staege asserts that the board could not have intended to use his property to buffer residential property from the M-3 industrial district because his property does not abut residential property. He emphasizes that other parcels granted M-3 zoning are closer to residential property than his parcel and that the properties adjacent to his are all zoned M-3 or A-2 (agricultural). The board’s denial, he argues, is akin to spot-zoning rather than to a legitimate concern for buffering. Having searched the record, we must agree. The property around Staege’s parcel is industrial or agricultural property. In his January 27, 2005 memorandum, Risler opined that rezoning of Staege’s property would create “a reasonable block of M-3 zoning.” Furthermore, in his affidavit, Risler states, “I have determined that there are eight (8) residences in the Town of Norway in closer proximity to properties zoned M-3 in the Town of Norway Industrial Park than (sic) any such residences with respect to the Staege parcel.” Risler further averred that “residences were in closer proximity to properties rezoned from M-2

to M-3 both in January of 2004 and in April of 2005.” In other words, properties that were situated in a more likely buffer zone were rezoned to M-3, but Staege’s parcel was not.

¶22 Insisting that Staege’s property remain zoned M-2 serves no apparent buffering purpose. Without record evidence to support its reasoning, we must conclude that the board’s decision was arbitrary. See *Lamar*, 284 Wis. 2d 1, ¶16 (the board must base its decision on the evidence).

¶23 Because we reverse based on the preceding analysis, we need not take up Staege’s equal protection argument. See *Barber v. Weber*, 2006 WI App 88, ¶19, 292 Wis. 2d 426, 715 N.W.2d 683 (“When the resolution of one issue disposes of an appeal, we will not address additional issues.”) (citation omitted).

CONCLUSION

¶24 The board can follow the dictates of the law, the Town argued, but one must acknowledge that members cannot clear their minds of facts that they know to be true. We understand this commonsense argument, but it does not change the board’s responsibilities under the law or the property owner’s right to an impartial board. The primary focus of zoning decisions must be the land *use*, not the land *owner*. See *Ziervogel*, 269 Wis. 2d 549, ¶22. Accordingly, we reverse and remand to the circuit court to direct the board to reconsider the rezoning request and to issue a decision supported by an on-the-record rationale that is free of bias, founded on applicable law, and supported by the evidence.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

