COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0476 **Cir. Ct. No. 98-CV-123**

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

CLARK WOLFF AND LINDA WOLFF,

PLAINTIFFS-APPELLANTS,

V.

GRANT COUNTY BOARD OF ADJUSTMENT, GRANT COUNTY PLANNING AND ZONING COMMITTEE, AND GRANT COUNTY,

DEFENDANTS-RESPONDENTS,

TOWN OF JAMESTOWN,

INTERVENOR-DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Grant County: EDWARD E. LEINEWEBER, Judge. *Affirmed*.

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

¶1 LUNDSTEN, J. Clark and Linda Wolff appeal a judgment of the circuit court in favor of the Grant County Board of Adjustment (BOA), the Grant County Planning and Zoning Committee (County Zoning Committee), Grant County and the Town of Jamestown (Town).[1] The circuit court affirmed a decision of the BOA denying the Wolffs' application for a planned residential development. The court also dismissed Counts II, III and IV of the Wolffs' complaint, seeking mandamus relief and alleging causes of action for inverse condemnation and a taking pursuant to 42 U.S.C. § 1983 (1994), respectively. For the following reasons, we affirm.

Background

¶2 The Wolffs own approximately 108 acres of land at the southwest tip of Wisconsin in Jamestown. The property is bordered to the north by Highway 61/151, to the south by the Illinois border, to the east by a privately owned farm, and to the west by the Mississippi River. The only road access to the Wolff property is through Illinois. The Wolffs reside in a home that they constructed on the property.

¶3 In May of 1996, the Wolffs filed an application with the Grant County zoning administrator for a conditional use permit to establish a planned residential development, in compliance with § 3.21 of the Grant County Comprehensive Zoning Ordinance. At a July 1996 hearing before the County Zoning Committee on the application, the Wolffs' counsel indicated that the Town

[1] When discussing the respondents' arguments on appeal, we will collectively refer to all respondents as the BOA. When we refer to any respondent in its individual capacity, it will be obvious.

of Jamestown was opposed to the development due to the lack of a Wisconsin road access to the property. The County Zoning Committee approved the application. The BOA reversed the decision because the zoning administrator had neglected to notify the Town of the application forty days prior to the County Zoning Committee hearing as required by § 3.27(5h) of the Zoning Ordinance.

¶4 The County Zoning Committee held a second hearing in March of 1997. At that hearing, committee members and a town representative discussed obstacles to the Town meeting its obligation to provide public services, such as fire protection and ambulance service, due to the lack of a Wisconsin road access. At the conclusion of the hearing, the County Zoning Committee voted to approve the application if the Wolffs could satisfy the Town's concerns.

¶5 The Wolffs appealed the County Zoning Committee's decision to the BOA. At the July 1997 hearing on the appeal, the Wolffs argued that the County Zoning Committee's approval was vague and improperly delegated authority to the Town. Counsel for the Town discussed the access problems to the property due to the rugged, steep terrain of the Illinois access and the lack of a Wisconsin access for providing public services. Counsel also informed the BOA that members of the County Zoning Committee viewed the property by bus after a recent public hearing. The BOA ultimately determined that the County Zoning Committee's motion was unclear and the matter should be remanded for clarification.

¶6 The County Zoning Committee met again in October of 1997. The Committee discussed the same concerns relating to the difficulty in providing public services without a Wisconsin road access. While recognizing that the Town did not have veto power, the Committee voted to deny the application based

upon the Town's concerns. The Wolffs again appealed the Zoning Committee decision to the BOA.

¶7 A hearing was conducted by the BOA in February of 1998. The Wolffs again argued that the County Zoning Committee had improperly delegated its authority to the Town. Representatives of the Town and the County Zoning Committee again discussed the difficulty in traversing the property due to the rugged terrain of the current access and the Town's desire for a Wisconsin public road access. The BOA denied the application based on the issues raised regarding school busing, fire protection, ambulance and police services.

¶8 The Wolffs petitioned the circuit court for certiorari review of the BOA's decision. In Count II of their complaint, the Wolffs sought mandamus relief. Counts III and IV alleged causes of action for inverse condemnation and a taking pursuant to 42 U.S.C. § 1983. The Town moved to intervene as a party. The circuit court denied that motion and this court reversed, holding that the Town had a substantial interest in the matter. The Wolffs moved for partial summary judgment on their certiorari claim and the BOA moved for partial summary judgment on Counts II, III and IV.

¶9 After hearing both parties' motions, the circuit court denied the Wolffs' summary judgment motion, concluding that summary judgment was inapplicable to a statutory certiorari proceeding. The court then remanded the matter to the BOA to make written findings in support of its decision without supplementing the record in any way. In July of 2000, the BOA issued its findings pursuant to the court's order.

¶10 Thereafter, the court dismissed the Wolffs' certiorari claim and affirmed the BOA's decision. The court entered an amended judgment in

February of 2001, dismissing the entire complaint on the merits. The Wolffs appeal.

Discussion

A. Whether the BOA Erred in Denying the Wolffs' Application for a Planned Residential Development

¶11 The Wolffs sought review by certiorari of the BOA's decision pursuant to WIS. STAT. § 59.694(10) (1995-96).[2] On appeal, we review the decision of the BOA, just as the circuit court did, and not the circuit court's decision. *See* ***Klinger v. Oneida County***, 149 Wis. 2d 838, 845 n.6, 440 N.W.2d 348 (1989).

¶12 This case involves the denial of an application for a conditional use permit. "A conditional use permit allows a property owner to put property to a use which the ordinance expressly permits when certain conditions have been met." ***Bettendorf v. St. Croix County Bd. of Adjustment***, 224 Wis. 2d 735, 741, 591 N.W.2d 916 (Ct. App. 1999). When deciding whether to grant a conditional or special use permit, a board of adjustment considers whether the proposed use meets with the specific requirements set forth by the ordinance at issue, as well as the ordinance's general purpose.[3] *See generally* ***Edward Kraemer & Sons, Inc. v. Sauk County Bd. of Adjustment***, 183 Wis. 2d 1, 10-11, 515 N.W.2d 256 (1994). The board may not ignore any standards set forth in the ordinance. ***Id.*** at 13.

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[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

[3] The terms "conditional use" and "special use" mean the same thing. ***Delta Biological Res., Inc. v. Bd. of Zoning Appeals***, 160 Wis. 2d 905, 910 n.4, 467 N.W.2d 164 (Ct. App. 1991).

¶13 We will uphold the BOA's findings of fact if substantial evidence supports its decision, even if substantial evidence also supports the opposite conclusion. *See* ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 568 n.4, 579 N.W.2d 668 (1998). Substantial evidence means relevant, credible and probative evidence upon which reasonable persons could rely to reach a conclusion. *See* ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). A board of adjustment, and not the reviewing court, determines the weight and credibility of the evidence. *See* ***Delta Biological Res., Inc. v. Bd. of Zoning Appeals***, 160 Wis. 2d 905, 915, 467 N.W.2d 164 (Ct. App. 1991).

¶14 Board of adjustment decisions enjoy a "presumption of validity and correctness." ***Miswald v. Waukesha County Bd. of Adjustment***, 202 Wis. 2d 401, 411, 550 N.W.2d 434 (Ct. App. 1996). The party challenging the board's decision, therefore, has the burden of overcoming a presumption of correctness. ***Id.***

¶15 The parties agree that our review of the BOA's decision is directed at these four questions: (1) whether the BOA kept within its jurisdiction; (2) whether the BOA acted according to law; (3) whether the BOA's actions were arbitrary, oppressive or unreasonable, representing its will and not its judgment; and (4) whether the evidence was such that the BOA might reasonably have made the determination under review. ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 24, 498 N.W.2d 842 (1993). The Wolffs allege that the BOA erred with respect to all four questions. We disagree.

1. Whether the BOA Kept Within its Jurisdiction

¶16 The Wolffs first assert that the BOA acted outside its jurisdiction when it considered more than the issues raised in the Wolffs' appeal and instead

rendered a *de novo* decision on the merits of their application. The BOA does not deny that it conducted a *de novo* proceeding; rather, it contends it had the authority to do so. We agree.

¶17 The BOA's authority is defined in WIS. STAT. § 59.694. Pursuant to § 59.694(7), a board of adjustment has the power to "hear and decide appeals where it is alleged there is error in an order, requirement, decision or determination made by an administrative official in the enforcement" of a statute or zoning ordinance. Subsection (8) provides that:

> In exercising the powers under this section, the board of adjustment may, in conformity with the provisions of this section, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make the order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

Thus, the statute expressly grants the BOA all of the powers of the County Zoning Committee and thereby necessarily gives it the authority to consider additional arguments and evidence.

¶18 Additionally, WIS. STAT. § 59.694 was modeled after the Standard State Zoning Enabling Act, § 7 (1926). *See* ***Klinger***, 149 Wis. 2d at 842 n.3.[4] Other states construing their statutes modeled after § 7 of the Act have concluded that it provides a board of adjustment with the power to conduct a *de novo* hearing on a zoning decision. *See* 4 ANDERSON'S AMERICAN LAW OF ZONING § 2205, at 14-15 (Kenneth H. Young ed., 4th ed. 1997); ***Caserta v. Zoning Bd. of Appeals***,

[4] WISCONSIN STAT. § 59.694 was previously numbered WIS. STAT. § 59.99. 1995 Wis. Act 201, § 479.

626 A.2d 744, 748 (Conn. 1993) (citing language nearly identical to § 59.694(8) and concluding that "it is clear from both the entire statutory scheme and our zoning case law that the zoning board hears and decides such an 'appeal' *de novo*").

¶19 Accordingly, we conclude that the BOA did not exceed its authority when it heard additional evidence and gave its own reasons for affirming the County Zoning Committee's denial of a conditional use permit.

¶20 It follows that we need not address the Wolffs' claim that the Town sought to unlawfully force them to purchase access to their property from a Wisconsin neighbor and then gift that property to the Town or their claim that the County Zoning Committee improperly delegated its decision-making authority to the Town. The BOA based its affirmance of the County Zoning Committee's decision on the problems associated with access through Illinois, without regard to these other issues.

2. Whether the BOA Acted According to Law

¶21 The Wolffs next contend that even assuming the BOA had the power to conduct a *de novo* proceeding and decide the application anew, the BOA still erred in numerous ways when applying the proper legal standards. We find many of the Wolffs' arguments to be undeveloped and, therefore, undeserving of a response. As best we can discern, the Wolffs' arguments containing some support and meriting a response are as follows: (a) the BOA erroneously applied the criteria for approval of a conditional use permit instead of "legislatively fixed standards"; (b) the BOA erroneously failed to apply a "special problems" analysis; and (c) the BOA failed to formulate conditions to alleviate any special problems.

a. Whether the BOA erroneously applied criteria for conditional use permits instead of "legislatively fixed standards"

¶22 The Wolffs' property is zoned A-2. Section 3.05(1) of the Grant County Comprehensive Zoning Ordinance lists "permitted uses" for A-2 zoned property. One such permitted use is "[s]ingle family dwellings in an approved Planned Unit Development." Section 3.05(1d).

¶23 Section 3.21 of the Zoning Ordinance is devoted to the "Planned Unit Development." Subsection (1c) sets forth the application procedure for a planned unit development, which includes the submission of an application to the County Zoning Committee for approval of a planned unit development permit. The application must be in accord with the requirements for a "conditional use permit" as those are set forth in § 3.27. Additionally, when passing upon an application for a conditional use permit, the County Zoning Committee is instructed to consider a variety of factors found at § 3.27(5c). A planned residential development falls under § 3.21 of the Zoning Ordinance at subsection (3).

¶24 The Wolffs assert that the "approved Planned Unit Development" referred to in § 3.05(1d) "cannot reasonably refer to the same approval as is required for a conditional use permit." The Wolffs suggest that even though a planned unit development pursuant to § 3.05(1d) requires an application filed with the County Zoning Committee pursuant to § 3.21, the criteria for approving the application is different than the criteria for approving a conditional use planned unit development. More specifically, the Wolffs suggest that a planned unit development under § 3.05(1d) need only satisfy certain "legislatively fixed standards." The Wolffs conclude that the BOA decision is flawed because the

BOA did not find that the Wolffs' application failed to meet legislatively fixed standards.

¶25 The Wolffs' argument is contrary to the plain language of the ordinance. Sections 3.05(1) and (1d), read in combination, indicate that "Permitted Uses" include "[s]ingle family dwellings in an approved Planned Unit Development." Thus, the "permitted use" of a single family dwelling is dependent on an "approved Planned Unit Development." Planned unit developments are governed by § 3.21, which requires a developer to obtain approval from the County Zoning Committee for a planned unit development permit. The permit application must be in accord with the requirements for a conditional use permit as specified in § 3.27. Nothing in the language of the ordinance directs the County Zoning Committee to apply a different, more deferential standard in approving a permit for a proposed planned unit development accommodating single family residences.

b. Whether the BOA erroneously failed to apply a "special problems" analysis

¶26 The Wolffs next assert that a proper conditional use analysis requires the BOA to determine what "special problems" if any would be caused by the proposed use, and then balance those problems against the benefit of the use, while considering conditions that might alleviate the problems. In the absence of any special problems, the Wolffs suggest, denial of a permit is arbitrary. While the Wolffs acknowledge that the availability and adequacy of governmental services may be a special problem in some uses, they suggest that "there is no indication here of any inadequacy under any objective standard."

¶27 A few Wisconsin courts have indicated that conditional uses are devices designed to cope with situations where a particular use, though consistent with the use classification of a specific zone, may nonetheless create "special problems" if allowed to locate as a matter of right in a particular zone. *See*, *e.g.*, ***State ex rel. Skelly Oil Co. v. Common Council, City of Delafield***, 58 Wis. 2d 695, 700-02, 207 N.W.2d 585 (1973) (holding that WIS. STAT. § 62.23(7)(e) vests exclusive authority in the board of zoning appeals to pass upon conditional uses or special exceptions); ***City of Waukesha v. Town Bd. of Waukesha***, 198 Wis. 2d 592, 603-05, 543 N.W.2d 515 (Ct. App. 1995) (holding that the town board's amended ordinance was void and invalid because it allowed for the placement of a planned unit development in any district subject only to the approval by the board as a conditional use). Relying on this language, the Wolffs argue that "special problems" are not just any problem. Rather, they are "impacts greater than those which ordinarily result from such a use." Here, the Wolffs suggest, the type of governmental services currently offered would not have to change, as it would, for instance, if the proposal sought to build a chemical plant. The Wolffs then assert that a residential development does not involve any special hazards, apparently concluding that the BOA was obliged to grant the application for a conditional use permit.

¶28 We do not read ***Skelly*** or ***City of Waukesha*** to require a board of adjustment to grant an application for a conditional use permit absent a finding, based on some objective standard apart from those requirements in the ordinance at issue, that the proposed use will create a special problem greater than that which would generally result from such a use. Indeed, we find no Wisconsin cases suggesting as much. The fact that the residential development does not require a change in public services as, for instance, the development of a chemical plant

would, is of no consequence. The BOA only had to consider the criteria established under § 3.21 for the grant of a conditional use permit, taking into account those factors enumerated in § 3.27. The BOA followed the correct procedure and applied the correct criteria.

c. Whether the BOA erroneously failed to formulate conditions to alleviate any special problems

¶29 The Wolffs state that the BOA was required to consider "conditions for the use, i.e., impos[e] means of alleviation of any such special problems." We understand the Wolffs to be asserting that the BOA must attempt to find means of alleviating any special problems identified. We disagree. A board of adjustment does not have the burden of formulating conditions enabling an applicant to obtain a conditional or special use permit. *See* ***Kraemer***, 183 Wis. 2d at 16. Such uses are permitted uses only when the standards prescribed by the ordinance are met. "The applicant, not the Board, has the burden of showing that the permit meets these standards." ***Id.*** at 16-17.

3. Whether the BOA's Decision was Arbitrary, Oppressive or Unreasonable and Whether the Evidence Supported the Decision

¶30 The Wolffs' brief does not separately argue these last two questions, and we also address them together. The Wolffs' arguments regarding these questions boil down to this: the BOA's decision was arbitrary because the BOA's concerns were not justified by empirical comparisons with other rural developments in the county. For example, the Wolffs acknowledge that the path to their proposed development is circuitous and steep, but argue there is no showing that it is appreciably more circuitous or steep than routes to other similar developments that have been approved.

¶31 We first respond that boards of adjustment are not required to provide comparative data to justify decisions. Rather, the burden is on the applicant to satisfy the board that the proposed development satisfies the applicable criteria contained in the zoning code at issue. *See* ***Kraemer***, 183 Wis. 2d at 16-17.

¶32 Moreover, even if we were to agree that some of the BOA's particular findings regarding access are unsupported by the record, we would still affirm. It is apparent to us, as it was to the circuit court, that the BOA's overriding concern was the lack of control over access through Illinois. Approval of the Wolffs' development would impose on local governments the responsibility to provide a broad range of services, including fire safety, law enforcement and school busing. We cannot say it is arbitrary or irrational to be concerned that problems may arise because the provision of such services will require the cooperation of governments over which Wisconsin and Grant County officials have little influence and no control. Certainly the record supports this concern. For example, the Wolffs contend that agreements with Illinois communities will suffice to provide adequate fire protection. But there is no guarantee that such agreements will continue to be workable or affordable in the future.

¶33 Accordingly, the BOA's concerns fall squarely within the factors identified in the ordinance. *See*, *e.g.*, GRANT COUNTY COMPREHENSIVE ZONING ORDINANCE § 3.21 (preamble) (intent of section is to "encourage good community development" and "a more efficient use of … public services" by allowing "under certain circumstances" a more flexible means of land development); § 3.21(3e) (proposed development "shall be located in an area where adequate public and private facilities and services are available"); § 3.27(5c)6 (in passing upon

conditional use, evaluation of proposed use shall consider the "location of the site with respect to existing or future access roads").

B. Whether the Circuit Court Erred in Dismissing the Mandamus Claim

¶34 The Wolffs next assert that the circuit court erred in dismissing Count II of their complaint, requesting a writ of mandamus, pursuant to the BOA's motion for summary judgment. This court reviews summary judgment decisions *de novo*, applying the same standards as the trial court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶35 "The existence or nonexistence of an adequate and specific remedy at law is one of the first questions to be determined in a mandamus proceeding, and when such other remedy exists, courts uniformly refuse to entertain petitions for writs of mandamus." ***Underwood v. Karns***, 21 Wis. 2d 175, 179, 124 N.W.2d 116 (1963). A specific statutory remedy will preclude resort to mandamus. *See generally* ***State ex rel. Schwochert v. Marquette County Bd. of Adjustment***, 132 Wis. 2d 196, 201, 389 N.W.2d 841 (Ct. App. 1986) ("[W]here the legislature has provided a statutory remedy, those procedures 'must be strictly pursued to the exclusion of other methods of redress.'" (Citation omitted.)).

¶36 Here, the Wolffs were not entitled to mandamus because an adequate remedy at law exists to redress their claimed injury. WISCONSIN STAT. § 59.694(10) specifically provides that 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." Accordingly, we conclude the circuit court properly dismissed Count II of the Wolffs' complaint seeking a writ of mandamus.

C. Whether the Circuit Court Erred in Dismissing the Inverse Condemnation Claim

¶37 Count III of the Wolffs' complaint set forth a claim for inverse condemnation pursuant to WIS. CONST. art. I, § 13. The Wolffs characterize the BOA's action as a conditional approval and suggest the approval was conditioned on the Wolffs purchasing access rights over adjoining property in Wisconsin, construction of a road, and dedication or gifting of that road to the public. The Wolffs contend this conditional approval constituted an illegal taking. The circuit court also dismissed this claim on summary judgment.

¶38 We first observe that the Wolffs' characterization of the BOA's decision is in error. The BOA did not conditionally approve the application, contingent on the Wolffs making any purchase or gift. Rather, the application was unequivocally denied. Moreover, it is apparent that denial of the permit did not constitute an illegal taking.

¶39 When determining whether WIS. CONST. art. I, § 13 is triggered by the allegations concerning a particular piece of property, "the threshold inquiry is whether the property has been 'taken.'" ***Eberle v. Dane County Bd. of Adjustment***, 227 Wis. 2d 609, 621, 595 N.W.2d 730 (1999) (citing ***Zealy v. City of Waukesha,*** 201 Wis. 2d 365, 378, 548 N.W.2d 528 (1996)). A "taking" need not arise from an actual physical occupation of land by the government. ***Eberle***, 227 Wis. 2d at 621. A taking can occur absent physical invasion only where there is a legally imposed restriction upon the property's use. ***Id.*** at 622.

¶40 Takings that do not involve physical invasions of land are called "regulatory takings." *See* ***Hoepker v. City of Madison Plan Comm'n***, 209 Wis. 2d 633, 651, 563 N.W.2d 145 (1997). In order to be considered a taking for which compensation is required, a regulation or government action "must deny the landowner all or substantially all practical uses of a property." ***Zealy***, 201 Wis. 2d at 374. Stated another way, a taking occurs when a restriction "practically or substantially renders the land useless for all reasonable purposes." ***Howell Plaza, Inc. v. State Highway Comm'n***, 92 Wis. 2d 74, 85, 284 N.W.2d 887 (1979) (citation omitted).

¶41 Language from ***Eternalist Found., Inc. v. City of Platteville***, 225 Wis. 2d 759, 593 N.W.2d 84 (Ct. App. 1999), is applicable here:

> The [local government's] zoning decisions undoubtedly reduced the potential economic value of the [owner's] land. But such a reduction in economic value—even if dramatic—does not constitute a taking when the owner is left with some beneficial use of the land and the reduction is the result of the [local government's] legitimate exercise of its power over the pace and quality of development of the land within its jurisdiction. As the Supreme Court has made clear, the mere diminution in the value of the property does not constitute a taking.

Id. at 773.

¶42 Here, the BOA's decision to deny the application for a permit did not place a legal restriction upon the Wolffs which permanently prevented them from improving their property in any way, rendering their property useless for all reasonable purposes. *See* ***Howell Plaza***, 92 Wis. 2d at 84-85 ("If the commission had placed a legal restriction upon petitioner such that it was permanently prevented from improving its property in any way, a taking would probably have

occurred."). We conclude the circuit court did not err in dismissing the Wolffs' claim for inverse condemnation.

D. Whether the Circuit Court Erred in Dismissing the § 1983 Claim

¶43 The Wolffs contend that the circuit court erred in dismissing their 42 U.S.C. § 1983 claim, which claim was based on a taking within the Fifth Amendment to the United States Constitution. Because we have concluded that the Wolffs have suffered no taking, we need not address this issue. *See* ***Eternalist Found.***, 225 Wis. 2d at 774.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.