COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1437 **Cir. Ct. No. 00-CV-341**

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

MARY KAY MCCALLUM,

PLAINTIFF-RESPONDENT,

V.

MARATHON COUNTY BOARD OF ADJUSTMENT,

DEFENDANT,

RONALD CHRISTIANSEN AND RANDY CHRISTIANSEN,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Ronald and Randy Christiansen and the Marathon County Board of Adjustment (collectively, the Christiansens) appeal from an order

vacating the board's decision to grant the Christiansens' application for a special exception zoning permit. The Christiansens argue that the circuit court erred by concluding that the board: (1) failed to adequately address the proper factors for granting the permit; (2) improperly placed the burden of proof on those opposing the permit; and (3) erroneously refused to allow a board member to abstain from voting. We reject the Christiansens' arguments and affirm the order.

BACKGROUND

¶2 In the spring of 1998, the Christiansens applied for a special exception permit from Marathon County to establish a granite quarry on land zoned agricultural. Following a public hearing in June 1998, the board denied their application. In March 1999, the Christiansens again applied for a special exception permit, adding provisions to their second application relating to the quarry's operating conditions. The board denied the Christiansens' second application, and the Christiansens subsequently sought review of the denial in the circuit court. In January 2000, the circuit court reversed the board's decision and remanded the matter for further proceedings.

¶3 Following a hearing on the application, the board voted to grant the permit with various conditions applied. Mary Ann McCallum, a neighboring property owner, sought certiorari review. The circuit court vacated the board's decision and this appeal followed.

ANALYSIS

¶4 On certiorari review, this court reviews the decision of the Board of Adjustment, not the decision of the circuit court. ***Bd. of Regents v. Dane Cty. Bd. of Adj.***, 2000 WI App 211, ¶10, 238 Wis. 2d 810, 618 N.W.2d 537. Our certiorari

review is limited to one or more of the following: (1) whether the board kept 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 make the decision it did. ***Id.***

¶5 The Christiansens argue that the board adequately addressed the proper factors for granting the permit. Pursuant to MARATHON COUNTY, WIS., ZONING CODE §17.08 (1998), "special exception" is defined as follows: "Uses which may be permitted in a district through the granting of a special exception by the Board of Adjustment, upon finding by the Board that specified conditions are met." Further, § 17.50(4) provides that the board, in passing upon an application for a special exception permit, "shall consider" the following factors:

> [T]he statement of purposes of this chapter and the A-3 District, the potential for conflict with agricultural use, the need of the proposed use for a location in an agricultural area, the availability of alternative locations, compatibility with existing or permitted uses on adjacent lands, the productivity of the lands involved, the location of the proposed use so as to reduce to a minimum the amount of productive agricultural land converted, the need for public services created by the proposed use, the availability of adequate public services and the ability of affected local units of government to provide them without an unreasonable burden, the effect of the proposed use on water or air pollution, soil erosion and rare or irreplaceable natural resources.

¶6 The Christiansens argue that "a reasonable view of the evidence shows the relevant conditions were addressed by the Board." On the contrary, however, the record shows that the board failed to consider several of the zoning code factors. As the circuit court found, "there is no mention in the record of the productivity of the lands involved, the location of the proposed use so as to reduce

to a minimum the amount of productive agricultural land converted, or the need for public services." Further, although the board mentioned the remaining factors, it was primarily in response to concerns raised by those opposing the permit. Significantly, however, the board dismissed consideration of some of the factors as not within its power. The board's refusal to consider these factors despite the zoning code's mandate of their consideration evinces the board's failure to proceed on a correct theory of law.

¶7 Moreover, it appears that the board improperly placed the burden of proof on those opposing the permit. The burden of proof is properly placed on the party seeking a special use exception permit. *See* ***In re Estate of Anderson***, 147 Wis. 2d 83, 88, 432 N.W.2d 923 (Ct. App. 1988).

¶8 Here, both a board member and a land use specialist testified that the burden of proof was on those opposing the permit to show why the permit should be denied. The Christiansens, however, argue that the testimonies, read in context, do not evince a misunderstanding of the proper burden of proof. We are not persuaded. Robert Bruss, identified as a "land use specialist," commented:

> What I'm hearing is that the presumption is basically the burden of proof is on the applicant to show why it should be granted rather than why it … shouldn't be granted. In a rezone you assume the burden of proof is on the applicant to show why that rezone is in the public interest. … With a special exception permit, which under other municipal law is called a conditional use permit, it's something that is considered to be compatible with that zoning district, and that conditions can be put on that application to make it more agreeable to the surrounding parties and do justice to both the purpose and intent of the ordinance, and the applicant and the neighbors. … The proposal is coming to the Board with the understanding that the Board has the freedom to put use limitations on, or conditions on to make the application more in compliance with the intent of the code. The Board can deny a special exception permit. I think in a case like this, if I saw that something was coming

> through that was directly in conflict with one of the stated standards of the ordinance or other aspects of the zoning ordinance, I'd recommend denial. But the understanding from all of my education and the last 20 years of doing this, is that the burden of proof in a special exception permit would be on somebody opposed to the project as to why it either should be denied or have conditions put on.

Although the Christiansens emphasize the fact that Bruss was not a board member, the record shows that he testified extensively throughout the hearing, ultimately offering his recommendation to the board. Additionally, board member William Bruening stated: "and the burden of proof is on the other people, and if it's not reasonable we have to accept it. … [W]ithin county zoning the Board of Appeals process is such that the burden of proof is on the other people if it's unreasonable." Given these statements, it appears that the board failed to apply the proper burden of proof and thus proceeded on an incorrect theory of law.[1]

¶9 Finally, we conclude that the board erred by refusing to allow Bruening to abstain from voting. As the board was preparing to vote on the motion to deny the application, Bruening stated, "I know personally and professionally …, I would rather abstain." Board member Gerald Hoffman responded, "To abstain from voting you'd have to get permission of the Board, and you have to have a real good reason. … Otherwise, if you don't have a conflict of interest, my position would be that you should take a vote."

¶10 Section 17.90(3)(c) of the zoning code provides that the minutes are to be kept including "the vote of each member upon each question or, if absent or

[1] The Christiansens additionally contend that the evidence nevertheless supports the board's decision. We conclude, however, that whether the Christiansens presented evidence to satisfy their burden of proof is irrelevant to whether the board applied the proper burden of proof and considered the requisite factors in granting the special exception permit.

failing to vote indicating such fact, the reasons for the Board of Adjustment's determination and its findings of fact." Because the zoning code requires the minutes to reflect a member's failure to vote, abstention is presumably permissible under the code. Therefore, the board's refusal to allow Breuning's abstention is indicative of arbitrary action by the board. In any event, because we conclude that the circuit court properly vacated the board's decision to grant the special exception permit, the issue regarding the board's failure to allow Bruening's abstention is moot.[2]

By the Court.—Order affirmed.

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

[2] Because the vote granting the special exception permit was unanimous, this court recognizes that Bruening's vote was not determinative of the Board's ultimate decision.