

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 19, 2002**

Cornelia G. Clark  
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. 02-0330  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CV-599**

**IN COURT OF APPEALS  
DISTRICT II**

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**MICHAEL E. STOETZEL AND SUSAN C. STOETZEL,**

**PLAINTIFFS-RESPONDENTS,**

**v.**

**WASHINGTON COUNTY BOARD OF ADJUSTMENT,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Washington County:  
ANDREW T. GONRING, Judge. *Reversed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. The Washington County Board of Adjustment appeals a circuit court order reversing the board's decision to deny Michael and Susan Stoetzel's application for a conditional use permit to construct a single-family residence on a floodplain. For the reasons discussed below, we reverse the circuit court and reinstate the board's decision.

## BACKGROUND

¶2 The Stoetzels own approximately nine acres of property in Washington County. In 1999, they obtained a permit from the County Board of Adjustment allowing them to build a private road across a portion of their land which lies in a floodplain, in order to facilitate the construction of a private residence on a portion of the land which was believed to lie outside of the floodplain. A subsequent survey revealed that the entire property actually lies within the floodplain.

¶3 The following year, the board denied the Stoetzels' application for a conditional use permit to build their residence, citing concern over whether the fire department would be able to provide appropriate services in the event of a flood as required by local zoning ordinances and administrative provisions. The Stoetzels sought certiorari review. The circuit court reversed the board's decision and directed that an appropriate permit be issued, concluding that a series of letters from the fire department ought to have allayed the board's concerns. We will discuss the letters and their significance in greater detail below.

## STANDARD OF REVIEW

¶4 On certiorari, we review the decision of the board, rather than the circuit court, and our review is limited to the record created before the board. *See State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). We will consider only whether: (1) the board stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive, or unreasonable, representing its will and not its judgment; and (4) the evidence was such that the board might reasonably make the order or determination in question. *See id.* "The facts found by the [board] are conclusive if supported by

‘any reasonable view’ of the evidence, and [the court] may not substitute [its] view of the evidence for that of the [board].” *Id.* (citations omitted).

### ANALYSIS

¶5 The Stoetzels first contend that the board erred in denying their application because “[t]here is no provision in Chapter 26 [the local zoning ordinance], as it relates to the construction of the driveway or the residence on the property, which authorizes or requires application for a conditional use permit.” It is not entirely clear whether the Stoetzels are asserting that no conditional use permit is required because the land is already zoned for residential use or because they believe that the first permit they received was sufficient. In any event, neither contention is persuasive.

¶6 First, Chapter 26 of the local zoning ordinance requires that “[t]he use or development of any land ... [within the floodplain] shall be in compliance with the terms of this chapter and other applicable local, State and Federal regulations” and that “[a]ny deviation from the standards of this chapter, for which a permit has been denied by the zoning administrator, may be allowed only upon written request for a variance submitted to the zoning administrator, after a public hearing and the issuance of a variance by the Board of Adjustment.” FLOODPLAIN ZONING ORDINANCE §§ 26.02(3) and 26.07(4)(d). The Stoetzels do not contest that the site upon which they wish to build is below the regional floodplain elevation. Therefore, the provisions of the floodplain ordinance do apply, and the Stoetzels were required to either fully comply with all relevant provisions of the ordinance or to obtain an appropriate variance in order to build a house there.

¶7 While the parties have not included the Stoetzels’ initial permit application in the appellate record, the board’s decision dated August 5, 1999,

indicates that the Stoetzels had applied “for a permit to construct a private road through a flood plain for access to a residence they proposed to build,” because a building permit would not be issued unless and until the Stoetzels had first received permission to build an access road. The variance application dated July 21, 2000, was for the “[c]onstruction of a single-family residential home.” We are satisfied that the first permit was issued solely for the construction of an access road, and did not cover the construction of a residence, which was the subject of the application at issue here. The board was entitled to take different concerns into account for the construction of the road and the house. Therefore, the estoppel doctrine cited by the Stoetzels has no bearing here.

¶8 We next consider whether the board could reasonably determine that the Stoetzels had failed to comply with applicable local, state, or federal floodplain requirements. The Department of Natural Resources has promulgated administrative rules relating to development standards in floodfringe areas. WISCONSIN ADMIN. CODE § NR 116.13(2)(d) provides, in relevant part:

If existing streets or sewer lines are at elevations which make compliance with [dry land access requirements] impractical, the municipality may permit new development and substantial improvements where access roads are at an elevation lower than the regional flood elevation, provided:

....

2. The municipality has written assurance from the appropriate units of police, fire and emergency services that rescue and relief can be provided by wheeled vehicles to the structures during regional flooding, taking into account the anticipated depth, duration and velocity of the regional flood event in the area, thereby protecting human life and health and minimizing property damage and economic loss.

¶9 The Stoetzels obtained the necessary assurance from the police department. However, in a letter dated January 7, 2000, the chief of the fire department informed the planning commission that:

Given the elevation data of the proposed access road and potential flooding at the property, the Fillmore Fire Department may or may not be capable of providing emergency service by wheel axle vehicles during an anticipated regional flooding event.

Fillmore Fire Department will make a reasonable attempt to service the Stoetzel property if there is a regional flooding and likewise with other property.

The Stoetzels subsequently made additional attempts to obtain written assurance from the fire department. But, in a letter dated May 30, 2000, the fire department chief informed the county attorney that the department's insurer had advised him not to sign any letter of assurance stating that the department could provide emergency service by wheeled-axle vehicle in the event of flooding. The chief indicated that the department would lose its insurance coverage if it provided such an assurance.

¶10 Finally, in an undated letter addressed to the board, the fire chief stated:

This letter is intended to clarify my correspondence dated January 7, 2000 addressed to the Washington County Park and Planning Commission. In my letter of January 7, 2000, I stated that the Fillmore Fire Department "may or may not" be capable of providing emergency service to the subject premises.

This letter was intended to state that the Fillmore Fire Department does not guarantee that it will be able to provide emergency services to this property, or to any other property in the Fillmore Fire Department service area. There are a number of circumstances, such as debris in a roadway, breakdowns of fire equipment, other calls to which the Fire Department has responded, etc. which would preclude the Fire Department from providing an

immediate response to an emergency call initiated from the residence in question.

This letter is intended to clarify the letter of January 7, 2000 to the extent that the Fire Department does not guarantee response to those calls. Response depends upon the ability of the Fire Department to respond to those calls, which ability can be affected as noted above.

The Fire Department anticipates that response to emergency calls from a residence to be constructed on the lot in question would receive the same attention as other requests from similarly-situated properties.

¶11 The Stoetzels contend that, taking all of the fire department chief's correspondence together, it was arbitrary and unreasonable for the board to conclude that the written assurance required by WIS. ADMIN. CODE § NR 116.13(2)(d) had not been satisfied. We disagree.

¶12 The first letter indicates that the fire department may or may not be able to provide wheeled access to the Stoetzel property during a regional flooding event, given the elevation of the access road. Nothing in either of the subsequent letters refutes the possibility that such service may be unavailable. The second letter plainly refuses to provide written assurance based on insurance concerns. The third letter explains that the department's refusal to provide written assurance is a general policy, due to a number of events aside from regional flooding which could impede service. The board could reasonably conclude that the third letter's assertion that the Stoetzel property would be given the same "attention" as other similarly situated properties fell short of assuring that the wheeled vehicles could reach the property during a regional flooding event.

¶13 In light of our conclusion that the board's determination should be reinstated, we need not address the parties' arguments regarding the permissible scope of the trial court's proposed remedy.

*By the Court.*—Order reversed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5  
(1999-2000).

