COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1292 **Cir. Ct. No. 2010CV145**

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

MICHAEL TOUBL AND ROGER BRYDEN, D/B/A COON CREEK SPORTSMAN'S CLUB, LLC,

PLAINTIFFS-RESPONDENTS,

V.

TOWN OF BELOIT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES WELKER, Judge. *Reversed*.

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 VERGERONT, P.J. This case arises out of the revocation of a conditional use permit (CUP) the Town of Beloit granted to Michael Toubl and James Bryden to operate a bird hunting preserve. The Town Board of Supervisors

revoked the CUP after concluding that Toubl and Bryden violated the terms of the CUP. The two filed this action for a permanent injunction preventing the Town from revoking the CUP. The circuit court granted the injunction, concluding the Town board's revocation of the permit was arbitrary. We agree with the Town that the Town board's action was reasonable and not arbitrary. Accordingly, we reverse the circuit court's order granting the injunction against the Town.

BACKGROUND

¶2 In January 2007, Toubl and Bryden (collectively, the club owners) applied for a CUP to operate the Coon Creek Sportsman's Club, a bird hunting preserve. The hunting club, run by Toubl, hosts hunts on Bryden's property. The property at issue is located in an A-1 exclusive agricultural district. At the time the club owners applied for the CUP, bird hunting preserves were neither permitted nor conditional uses in A-1 districts. TOWN OF BELOIT, GENERAL ZONING ORDINANCES § 2.05A.2-4. However, in February 2007, the Town board adopted an ordinance adding bird hunting preserves to the list of conditional uses in A-1 exclusive agricultural districts. Ordinance No. 07-05 (Feb. 19, 2007).

¶3 In July 2007, the board issued CUP 513 to the club owners. This CUP authorized them to operate a bird hunting preserve. The CUP also authorized them to use as a clubhouse a legal nonconforming structure located on one of the parcels. In September 2007, this building was completely destroyed by fire.

¶4 The board renewed the CUP on April 7, 2008, after a hearing on that date. The references to "the club house" in the original permit were not removed from the renewed permit. On May 14, 2008, the club owners signed the renewed CUP, indicating that they had received it and agreed to abide by its terms.

¶5 On April 21, 2008, after the CUP was renewed but before the club owners signed it, Bryden applied for a building permit to construct a new building on a different parcel of his property. On the application, Bryden listed "ag building" as the project description. On the same day the application was made, a building permit was issued. The permit stated "agricultural use only."

¶6 About ten months later, several Town supervisors learned that the club owners were using the new building as a clubhouse for the hunting club. The Town zoning administrator sent the club owners a letter ordering them to cease using the new building as a clubhouse, but they continued using it as a clubhouse. In April 2009, the club owners applied for an amendment to the CUP to allow the hunting club to use the new building as a clubhouse. The Town planning commission tabled this application pending submission of a site plan, but the club owners did not submit one.

¶7 After a public hearing in January 2010, the board voted unanimously to revoke the CUP. The board minutes state that the board did so because it concluded that the club owners had violated the CUP by using the new building as a clubhouse.

¶8 Shortly thereafter, the club owners filed this action, alleging that the board's decision to revoke the CUP was arbitrary and seeking a permanent injunction preventing the Town from revoking the permit. The circuit court concluded that the Town's actions were arbitrary and granted the injunction.[1] The

[1] The circuit court also dismissed the Town's counterclaim for an injunction against the club owners and for a fine. The Town does not address its counterclaim in its briefs on appeal. We therefore do not address it. However, nothing in this opinion prevents further proceedings on the Town's counterclaim consistent with this opinion.

circuit court's conclusion of arbitrariness was based on its determination that, when the board issued the renewed CUP, it intended that the new building would be used at least in part as a clubhouse.

DISCUSSION

¶9 On appeal, the Town contends that it acted reasonably in revoking the CUP and therefore the permanent injunction against the Town should be vacated. In the following sections we first decide the proper standard for our review. We then analyze the circuit court's decision and conclude that certain findings material to the circuit court's conclusion of arbitrariness are clearly erroneous. Finally, based on the court's findings that are not clearly erroneous and the undisputed facts, we conclude the board acted reasonably in revoking the CUP.

I. Standard of Review

¶10 We begin by addressing the appropriate standard of review. The club owners contend that we should review the circuit court's decision under the standard we apply to discretionary decisions. They rely on ***Hoffman v. Wisconsin Electric Power Company***, 2003 WI 64, ¶23, 262 Wis. 2d 264, 664 N.W.2d 55, in which the court held that the decision whether to grant an injunction and the determination of its form and scope are within the circuit court's discretion. However, the court in ***Hoffman*** was addressing the circuit court's decision to issue a permanent injunction *after* there had been a determination—in that case, by a jury—that the plaintiff had prevailed on its underlying claim. ***Id.***, ¶24. ***Hoffman*** does not stand for the proposition that, whenever a party seeks permanent injunctive relief, the decision whether the party prevails on the claim for which they seek that remedy is within the circuit court's discretion. Rather, the determination whether the party prevails on the underlying claim is determined

according to the same legal standards whether or not permanent injunctive relief is sought.

¶11 In this case, the underlying claim—the claim that, according to the club owners, entitles them to permanent injunctive relief—is that the board acted arbitrarily in revoking the CUP. In analyzing the appropriate standard of review for the court's decision that the board acted arbitrarily, we first note that this complaint does not seek review by certiorari of the board's decision, which is the usual method for a judicial challenge to a board's decision. Specifically, the club owners did not follow the statutory procedures for municipal administrative review and then judicial review by certiorari.[2] *See* WIS. STAT. §§ 68.02-68.12; 68.13 (2009-2010).[3] On certiorari review the circuit court is limited to deciding whether a board "kept within its jurisdiction, acted according to law, acted arbitrarily or unreasonably, and whether the evidence was such that the board might reasonably make the order or determination it made." ***Cohn v. Town of Randall***, 2001 WI App 176, ¶25, 247 Wis. 2d 118, 633 N.W.2d 674 (citation omitted). With respect to a board's factual findings, we do not disturb them if any reasonable view of the evidence supports them. ***Kapischke v. County of Walworth***, 226 Wis. 2d 320, 328, 595 N.W.2d 42 (Ct. App. 1999). On an appeal from the circuit court's certiorari review, this court reviews the decision of the

[2] A municipality may elect not to be governed by these provisions if "by an ordinance or resolution" it provides administrative review procedures. WIS. STAT. § 68.16. The record does not disclose whether the Town has opted to provide its own review procedures, but if it has done so and has not provided for judicial review by certiorari, review by common law certiorari is available. *See* ***Franklin v. Housing Authority of Milwaukee***, 155 Wis. 2d 419, 424, 455 N.W.2d 668 (Ct. App. 1990).

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

board, not the circuit court, and our review of the board's decision is limited in the same way as the circuit court. ***Board of Regents v. Dane Cnty. Bd. of Adjustment***, 2000 WI App 211, ¶10, 238 Wis. 2d 810, 618 N.W.2d 537. Central to the review on certiorari by both the circuit court and this court is the principle that the board's or agency's decision is accorded a presumption of correctness and validity. ***Driehaus v. Walworth Cnty.***, 2009 WI App 63, ¶13, 317 Wis. 2d 734, 767 N.W.2d 343.

¶12 Although the Town asserted in its amended answer that the proper proceeding to challenge the revocation of the CUP in the circuit court was by certiorari review, the Town apparently did not pursue this issue in the circuit court. Apparently the Town did not object to the court conducting its own evidentiary hearing. On appeal, the Town makes no objection to the procedure followed in the circuit court.[4] We therefore accept that procedure and determine our standard of review accordingly.

¶13 The standard of review for a circuit court's factual findings is that we affirm unless they are clearly erroneous. ***Brandon Apparel Group, Inc. v. Pearson Props., Ltd.***, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544. Whether the board made an arbitrary or unreasonable decision is a question of law, which we review de novo. ***Driehaus***, 317 Wis. 2d 734, ¶13.

[4] Had the Town pursued this issue, the circuit court would have been required to either apply the exhaustion doctrine and dismiss the case or determine that the facts of the case came within an exception to the exhaustion doctrine. *See* ***Metz v. Veterinary Examining Bd.***, 2007 WI App 220, ¶¶13-15, 305 Wis. 2d 788, 741 N.W.2d 244.

II. Analysis of the Circuit Court's Decision

¶14 The circuit court based its conclusion that the board acted arbitrarily on the following factual findings: (1) the original CUP and the renewed CUP both refer to "the club house"; (2) the renewed CUP became effective in May 2008; (3) the Town issued the building permit for the new building prior to renewing the CUP; and (4) the only structure on the property in May 2008 was the new building described in the building permit. Because the circuit court found that the board renewed the CUP after it issued the building permit, it determined that the Town "intended in the issuing of a conditional use permit that the [new] building would be used at least in part as a clubhouse. Otherwise that provision in the conditional use permit would be meaningless."

¶15 The court's finding that both the original and the renewed CUP refer to "the club house" is supported by the plain language and is thus not clearly erroneous. However, we conclude the other three factual findings are clearly erroneous.

¶16 By finding that the renewed CUP became effective in May 2008, the circuit court necessarily determined that the renewed CUP did not become effective until the club owners signed it on May 14, 2008. (We say "necessarily" because there is no evidence of another May date in connection with the renewed CUP.) However, the renewed CUP plainly states that it became effective on April 7, 2008. The heading of the permit states: "Amended and Renewed April 7, 2008." At the conclusion of all the terms, the permit states: "EFFECTIVE DATE: This permit shall be valid for a period of one (1) year from the date first stated above." We see no support in the record for viewing the effective date of the renewed CUP to be the date on which the club owners signed it and agreed to be

bound by its terms. Nor do we see a legal theory that supports this conclusion. A CUP is not a contract; it is issued by the Town and can be enforced by the Town. ***Town of Cedarburg v. Shewczyk***, 2003 WI App 10, ¶¶15-17, 259 Wis. 2d 818, 656 N.W.2d 491. We conclude it is undisputed that the renewed CUP became effective April 7, 2008, and the circuit court's finding that it became effective in May 2008 is clearly erroneous.

¶17 Because it is undisputed that the renewed CUP became effective April 7, 2008, and that the Town issued Bryden a building permit on April 21, 2008, the circuit court's finding that the Town issued the building permit prior to renewing the CUP is also clearly erroneous.

¶18 With respect to the court's finding that the new building was the only structure on the property in May 2008, it is undisputed that the old clubhouse had burned down the preceding fall and the board knew this. However, we have found nothing in the record supporting a finding that the new building existed in May 2008. The club owners themselves disagree with the substance of this finding: they state in their response brief that "[o]n May 14, 2008, no building existed on the property, because the prior building was burned to the ground…." It follows from this concession that the new building did not exist on April 7, 2008, the date on which the board issued the renewed permit. Even apart from this concession, in the absence of any other evidence, the only reasonable inference from the issuance of the building permit on April 21 is that the new building did not exist on April 7.

¶19 In summary, several of the factual findings that are material to the circuit court's conclusion of arbitrariness are not supported by the record. In the next section we will examine whether the board's revocation of the renewed CUP

was arbitrary given these undisputed facts: (1) the renewed CUP, like the original CUP referred to "the club house;" (2) the renewed CUP became effective on the date the board issued it, April 7, 2008; (3) on April 7 when the board held the hearing and renewed the CUP, there was no building on the property and no building permit had yet been sought or issued for a new building.

III. Whether Revocation of the CUP Was Arbitrary

¶20 As the parties agree, their dispute over whether the Town acted arbitrarily turns on whether the club owners violated a term of the renewed CUP. The Town's ordinances provide:

> 1. Compliance Required. The conditions set forth in the approved Conditional Use Permit shall be complied with by the applicant and property owners and future tenants or users of the property. Any deviation or alteration of use from those conditions shall constitute a violation of the terms of the Conditional Use Permit. Such violation shall constitute a violation of this Ordinance and will be subject to prosecution and penalties under the terms of this Ordinance.
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> 2. Revocation of a Conditional Use Permit. If a conditional use has not operated in conformity with the conditions of the permit or other requirements in the Zoning Ordinance, the Town Board may after due notice and public hearing, revoke the conditional use permit by a majority vote.

TOWN OF BELOIT, GENERAL ZONING ORDINANCES § 2.12F.1-2.

¶21 The renewed CUP contains parallel provisions, permitting revocation for any violation of a term of the permit, § I.6.a, and providing that the CUP is "subject to the general conditions of the Town of Beloit Code of Ordinances and the specific conditions of use contained in this permit." § I.1.

¶22 The Town contends that by using the new building—built on property in an A-1 exclusive agricultural district—as a clubhouse for the hunting club, the club owners violated the terms of the renewed CUP. In the Town's view, "the club house" refers to a building replacing the old clubhouse that is a legal nonconforming use, like the old clubhouse.[5] The Town asserts that the use of the new building is not a legal nonconforming use.

¶23 The club owners' position is that the new building is a legal nonconforming use because the old building was a legal nonconforming structure and they are using the new building in the same manner. In the alternative, they argue, the reference to "the club house" in the renewed permit means their new building, even if it is not a legal nonconforming use.

¶24 We first consider whether the new building is a legal nonconforming use. This arguments requires us to construe the statute, WIS. STAT. § 60.61(5m), and the town ordinance, TOWN OF BELOIT, GENERAL ZONING ORDINANCES § 2.17D.4, on legal nonconforming uses. This presents a question of law, which

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[5] "A legal nonconforming use is 'a use of land for a purpose not permitted' under the zoning ordinance but which was an active and actual use existing prior to the commencement of the zoning ordinance. [In contrast,] [a] conditional use is one which the zoning code allows." ***State ex rel. Brooks v. Hartland Sportsman's Club, Inc.***, 192 Wis. 2d 606, 616, 531 N.W.2d 445 (Ct. App. 1995) (citations omitted).

WISCONSIN STAT. § 60.61(5m) provides, in relevant part,

> (5m) Restoration of certain nonconforming structures. (a) Restrictions that are applicable to damaged or destroyed nonconforming structures and that are contained in an ordinance adopted under this section may not prohibit the restoration of a nonconforming structure if the structure will be restored to the size, subject to par. (b), location, and use that it had immediately before the damage or destruction occurred, or impose any limits on the costs of the repair, reconstruction, or improvement….

we review de novo. ***FAS, LLC v. Town of Bass Lake***, 2007 WI 73, ¶9, 301 Wis. 2d 321, 733 N.W.2d 287. We apply the same principles of construction to ordinances as we do to statutes. ***Id.***, ¶21. If the language has a plain meaning, we apply that plain meaning. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

¶25 WISCONSIN STAT. § 60.61(5m) provides that an ordinance may not prohibit a nonconforming structure destroyed by fire from being rebuilt if it is "restored to the size, … location, and use that it had immediately before the damage or destruction occurred…." Consistent with this statute, TOWN OF BELOIT, GENERAL ZONING ORDINANCES § 2.17D.4 provides: "If a nonconforming structure is *moved for any reason for any distance whatever*, it shall thereafter conform to the regulations for the district in which it is located after it is moved." (Emphasis added.) It is undisputed that the new building was constructed in a different location than the old building. Therefore, under the plain language of the statute and the ordinance, the new building is not a legal nonconforming structure.

¶26 We next consider whether the renewed CUP nonetheless permits use of the new building as a clubhouse for the hunting club. As we understand the club owners' argument, they assert that, because the renewed CUP allows for a clubhouse, because the old building was validly used as a clubhouse, and because the new building is used in the same manner as the old building, the only reasonable inference is that the new building comes within the term "the club house" in the renewed CUP. We disagree because the undisputed facts do not support this inference.

¶27 It is undisputed that the CUP was renewed on April 7, 2008, and Bryden did not apply for a building permit until April 21, 2008. There is no

evidence that the board knew when it renewed the CUP that Bryden intended to rebuild the clubhouse in a different location. It is therefore not reasonable to infer that the board intended for the new building to be "the club house" referred to in the CUP.

¶28 Moreover, even if we overlook the fact that the renewed CUP was issued before a building permit was applied for and issued, it is not reasonable to infer that "the club house" in the CUP refers to the new building. The building permit application states that it is for an "ag building," and approval of this permit is conditioned on the building being for "agricultural use only." The ordinance definition of agriculture does not include bird hunting preserves or hunting clubs.[6] It is not reasonable from this evidence to conclude that the Town intended that the new building would be used as a clubhouse by the hunting club, in direct contradiction to the condition stated on the building permit.

¶29 The Town, as already noted, construes the reference to "the club house" in the renewed CUP to permit a replacement building that is a legal nonconforming use. We conclude the Town's proposed construction is the proper construction of the renewed CUP. It is a reasonable construction and the club owners have not identified an alternative reasonable construction. The one they advocate is unreasonable given the undisputed facts.

[6] TOWN OF BELOIT, GENERAL ZONING ORDINANCES § 2.20B, titled "Specific Words and Phrases," defines "agriculture" as: "The production of livestock, dairy animals, dairy products, poultry or poultry products, fur-bearing animals, horticultural or nursery stock, fruit, vegetables, forages, grains, timber, trees, or bees and apiary products. The term also includes wetlands, pasture, forest land, wildlife land, and other uses that depend on the inherent productivity of the land." Ordinance No. 04-26 (Dec. 6, 2004).

¶30 Because the renewed CUP does not permit the club owners to use the new building as a clubhouse, we conclude the club owners violated the CUP, which was also a violation of the ordinance. *See* TOWN OF BELOIT, GENERAL ZONING ORDINANCES, § 2.12F.1. Therefore, the board acted reasonably in revoking the renewed CUP.

CONCLUSION

¶31 We conclude the evidence supports only one conclusion: that the board acted reasonably and not arbitrarily in revoking the CUP. Accordingly, we reverse the circuit court's order issuing a permanent injunction and remand with directions to vacate the injunction. Ordinarily, we would also direct the circuit court to dismiss the action. However, because the court's order granting the injunction against the Town also dismisses the Town's counterclaim to enjoin the club owners from operating the hunt club and to impose a fine, we do not direct the circuit court to dismiss the action. *See* ***supra***, ¶8 n.1. As we stated in footnote 1, nothing in this opinion prevents further proceedings on the Town's counterclaim consistent with this opinion.

By the Court.—Order reversed.

Not recommended for publication in the official reports.