

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2011

A. John Voelker
Acting 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. 2010AP2616

Cir. Ct. No. 2009CV795

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CLIFFORD SPICKLER AND DEBRA SPICKLER,

PLAINTIFFS-APPELLANTS,

v.

**EAU CLAIRE COUNTY BOARD OF LAND USE APPEALS AND EAU CLAIRE
COUNTY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County:
WILLIAM M. GABLER, SR., Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Clifford and Debra Spickler appeal an order affirming, on certiorari review, the decision of the Eau Claire County Board of

Land Use revoking a conditional use permit that had been issued to the Spicklers. We affirm.

FACTS

¶2 The facts are undisputed. The Spicklers own a house located in an RH, Rural House zoning district in Eau Claire County. In an RH district, a single-family dwelling is a permitted principal structure and a private garage is a permitted accessory structure. EAU CLAIRE COUNTY, WIS., CODE §§ 18.07.015A., 18.07.025A.¹ The maximum height of an accessory structure in an RH district is twenty feet. CODE § 18.07.040B.2. The cumulative area of all accessory structures “shall not exceed 1,200 square feet without the approval of a conditional use permit” and an accessory structure “shall not contain any living area within the structure which shall include but not be limited to bedrooms, living rooms, bathrooms, or kitchens.” CODE § 18.07.045C.1., C.2.

¶3 In 2006, the Spicklers applied for a conditional use permit for the construction of a garage in which to store collector cars. The Spicklers wanted to build a 5,280 square foot structure and, therefore, needed a conditional use permit. A conditional use permit application must include a “[s]ite plan drawn to scale” and a “[d]etailed description of the nature of the use.” CODE § 18.21.030C., G. Standards for conditional use permit approval include that “[t]he proposed use [be] in conformance with the purpose of the zoning district in which it is located” and “[t]he use will not be injurious to the use and enjoyment of other property in the

¹ There is no dispute about the ordinance provisions that apply to this appeal and, therefore, this court will not cite to a particular year of codification. The Code is available at http://www.co.eau-claire.wi.us/residents/CODE/docs/Microsoft_Word___TITLE_18.pdf.

immediate vicinity for purposes already permitted.” CODE § 18.21.060A, B. A conditional use permit “will lapse and become void one year after approval ... unless a certificate of occupancy has been issued or a land use permit issues.” CODE § 18.21.080. “Any alteration of a site plan or established conditions of an approved conditional use permit shall require the approval of the [c]ommittee after a public hearing has been held.” CODE § 18.21.100B. A conditional use permit may be revoked if the Planning and Development Committee after a public hearing, determines the terms of the permit have been violated or the use is substantially detrimental to persons or property in the neighborhood. CODE § 18.21.090.

¶4 After a public hearing, the Committee approved the Spicklers’ application. As issued, the conditional use permit (CUP) limited the use of the accessory structure to “personal storage only.” The site plan submitted with the application was “made part of the permit” and the Spicklers were required to obtain a land use permit prior to construction. The CUP also referred to the zoning code sections governing lapse and revocation of the conditional use permit. *See* CODE § 18.21.080 through § 18.21.100.

¶5 The Spicklers applied for and were issued a land use permit on November 16, 2006. That application was signed by Clifford Spickler and indicates that he “agree[d] to exercise this permit in accordance with all applicable Eau Claire County Codes.” (Some uppercasing omitted). The land use permit described the structure to be built as a “5280’ garage for personal storage” with an estimated value of \$84,000. (Some uppercasing omitted). A land use permit “becomes null and void” two years after issuance unless construction has been completed. CODE § 18.31.040A. 4.

¶6 In April 2009, Marv Lemke, the County Zoning Inspector received a complaint about the construction. After a visit to the site, Lemke sent a letter to the Spicklers identifying “code concerns,” including that the land use permit had expired and the height of the structure exceeded the maximum allowable height of twenty feet. Lemke also indicated that the structure appeared to exceed 5,280 square feet. Lemke directed the Spicklers to cease construction until a valid land use permit was issued.

¶7 On April 25, 2009, Rod Eslinger, supervisor of land use controls for the Committee, advised the Spicklers he would be seeking the revocation of the conditional use permit. In that letter, Eslinger noted that the Spicklers had told staff the structure will be used as a principal residence in the future. Eslinger identified six violations of county zoning ordinances.²

¶8 The Committee held a public hearing on the revocation request. Eslinger told the Committee that Spickler had obtained a sanitary permit for a new septic system to serve a four-bedroom dwelling shortly after the land use permit had been issued. The building plans were before the Committee, and they showed the structure exceeded 15,000 square feet. Dining, living, and family kitchen areas were included. Plumbing had been roughed-in. A fireplace, elevator, spiral staircase, and fire pole were shown on the drawings. The height of the structure, measured to the top of a cupola, exceeded fifty-five feet. Spickler told the

² The violations were: (1) exceeding the terms of the conditional use permit and for a use not permitted by the conditional use permit; (2) constructing a residence without the issuance of a land use permit; (3) constructing a residence without the issuance of a uniform dwelling code permit; (4) constructing a second principle residence; (5) constructing a structure that exceeds the height limitations for an accessory structure and residence; and (6) exceeding permissible thresholds for land disturbance activity (storm water and erosion control).

Committee he had obtained a conditional use permit and land use permit for the structure and “relied on the people in charge” when he “asked if there were any other permits or regulations ... we would need.” Spickler said he was told the conditional use permit and land use permit “cover[ed] everything because it [wa]s a garage.” Spickler admitted telling the architect to draw up building plans that could be used “if this was ever going to be a house” and that he wanted the option to sell his property “with the idea that [the buyers] could change [the structure] and make it into a house.” Spickler admitted that \$84,000 for the structure was “way under priced.” The Committee voted unanimously to revoke the conditional use permit.³

¶19 The Spicklers appealed to the County Board of Land Use Appeals. After a public hearing, the Board voted 4-1 to revoke the conditional use permit.⁴

The Board made the following factual findings:

- The structure “violated the spirit of the zoning code because [its] size and dimensions ... supercede[d] the primary residence.”
- The structure’s square footage exceeded 15,000 square feet and its height exceeded the maximum allowable height limit for an accessory structure in an RH zoning district.
- The site plans, blueprints, documents, and photographs showed the Spicklers intended the structure to be a secondary dwelling, and such a use was “different and inconsistent with the original site plans and drawings submitted” when the conditional use permit was approved.

³ Several letters from neighboring property owners were introduced and six neighbors and Clifford’s daughter made statements to the Committee.

⁴ Eslinger and the Spicklers’ attorney made presentations to the Board. Other persons also spoke in favor of, and in opposition to, the revocation.

- The site plans and blueprints identify four bedrooms, and kitchen, dining, and living areas. Plumbing is in place to allow for the conversion of the structure to a home in the future.
- The sanitary permit issued for the property indicated a four-bedroom, one-to-two family dwelling.
- Photographs “clearly show[ed] plumbing pipes installed in the structure.”
- Separate well, septic, electrical, and propane installations exist on the property, and those installations “imply the structure is being constructed to provide a stand-alone dwelling.”
- In his testimony, Clifford Spickler referred to the structure as a house and indicated the structure would have a bathroom.
- The structure is not completed. It was not completed during the time allowed for construction under the conditional use permit and land use permit. A certificate of occupancy was not issued within one year of the issuance of the conditional use permit and the land use permit expired on November 16, 2008.
- Several neighbors submitted letters in opposition to the construction of a building that violates the zoning code. One neighbor testified in opposition.
- The Spicklers produced a self-created hardship by constructing a structure that did not comply with the conditional use permit.

The Board made the following conclusions of law:

- Pursuant to CODE § 18.31.060, the Spicklers did not meet the burden of proof necessary to verify the structure is an accessory structure and in compliance with the zoning code.
- The construction of the structure, not in compliance with the conditional use permit or the zoning code, is a self-created hardship.
- The conditional use permit lapsed because a certificate of occupancy was not issued within one year of its

issuance. The land use permit expired on November 16, 2008.

- The conditional use permit was violated and the use is detrimental to adjacent property owners.
- The structure does not comply with Eau Claire County zoning ordinances.
- The continued construction of the structure would be detrimental to adjacent properties.
- The alteration of the site plan or conditions in the conditional use permit were not approved by the Committee.
- Upholding the conditional use permit would conflict with and violate the spirit of the zoning code because “the size and dimensions of the structure supercede and are not consistent with [the] primary residence on the property.”
- Underlying zoning authority regulates the property and the conditional use permit.
- Pursuant to CODE § 18.07.040, the maximum height of the structure was twenty feet, with fourteen feet to the eaves. The structure exceeds that maximum height.
- Pursuant to CODE § 18.07.045.C., an accessory structure over 1,200 square feet requires a conditional use permit and shall not contain any living rooms, bathrooms, kitchens, or bedrooms.

Based on those findings and conclusions, the Board revoked the conditional use permit.

¶10 On certiorari review, the circuit court affirmed. The Spicklers appeal and renew many of the contentions rejected by the circuit court.

DISCUSSION

¶11 In an appeal from a circuit court decision on certiorari, we review the record of the board to which certiorari is directed, not the judgment or findings of the

circuit court. *Klinger v. Oneida Cnty.*, 149 Wis. 2d 838, 845 n.6, 440 N.W.2d 348 (1989).

When no additional evidence is taken, statutory certiorari review is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably make the order or determination in question based on the evidence.

State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment, 2004 WI 23, ¶14, 269 Wis. 2d 549, 676 N.W.2d 401. The Board’s decision enjoys a presumption of correctness and validity, and the Spicklers bear the burden of overcoming this presumption. See *Miswald v. Waukesha Cnty. Bd. of Adjustment*, 202 Wis. 2d 401, 411, 550 N.W.2d 434 (Ct. App. 1996). We will not disturb the Board’s decision if any reasonable view of the evidence sustains the decision. See *Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976).

¶12 Underlying many of the Spicklers’ appellate arguments is a common theme—they were only required to comply with the express conditions listed on the conditional use permit, those conditions did not include compliance with the Eau Claire County zoning code and, therefore, “[c]ompliance with every provision of the [z]oning [c]ode was not a term” of the conditional use permit. The Spicklers argue, without any citation to authority, “[u]nspecified violations of zoning law are not a basis for revocation” of the conditional use permit.

¶13 We disagree. Section 18.03.010 of the zoning code provides “[n]o structure ... shall ... be ... constructed ..., unless in conformity with all the regulations specified in [the] subtitle for the district in which it is located.” The plain language of the zoning code required compliance. The conditional use

permit allowed the Spicklers “to put [their] property to a use which the ordinance expressly permit[ted] when certain conditions ... [were] met.” See *Town of Rhine v. Bizzell*, 2008 WI 76, ¶21, 311 Wis. 2d 1, 781 N.W.2d 780. The issuance of a conditional use permit so the Spicklers could erect an accessory structure larger than 1,200 square feet, however, did not exempt them from compliance with the remaining provisions of the zoning code. See *Town of Cedarburg v. Shewczyk*, 2003 WI App 10, ¶16, 259 Wis. 2d 818, 656 N.W.2d 491 (conditional use permits are governed by ordinances within the zoning code). Therefore, the Spicklers’ contention that the Board’s revocation decision cannot be based on violations of the zoning code fails.⁵

¶14 The Spicklers’ reliance on *Bettendorf v. St. Croix County Board of Adjustment*, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999) is misplaced. In that case, we held a revocation of a conditional use permit cannot be based on the violation of a condition that was not included in the permit when issued. *Id.* at 740-41. It does not stand for the broader proposition asserted by the Spicklers—revocation of a conditional use permit cannot be based on the violation of a zoning code ordinance not specifically highlighted or identified in the conditional use permit.

¶15 The Spicklers contend the Board erroneously assigned to them the burden of proof to establish that the conditional use permit should not be revoked. As pointed out by the circuit court in its decision, if the Spicklers had followed proper procedures when they exceeded the limits of the zoning code and conditional

⁵ The violations of the zoning code include the expiration of the land use permit and the presence of living areas.

use permit, they would have had to apply for a variance and would have had the burden to establish the need for the variance. *See* CODE § 18.31.020.C.6.a. We also agree with the circuit court’s observation that the Spicklers’ objection “is not a substantive objection because all of the evidence introduced before the Committee and the Board overwhelming[ly] demonstrate[d] [a] ... flagrant[] violat[ion of] the conditional use permit and many county ordinances.”

¶16 The Board’s decision to revoke the conditional use permit is supported by substantial evidence—“evidence of such convincing power that reasonable persons could reach the same decision as the board.” *Clark v. Waupaca Cnty. Bd. of Adjustment*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994). The conditional use permit contemplated an accessory structure of 5,280 square feet for the storage of collector cars. The Spicklers built a structure that exceeded 15,000 square feet and included roughed-in plumbing and living areas. A sanitary permit was obtained and a septic system was installed. The Spicklers candidly admitted constructing the building so it could be used as a residence in the future. The structure’s height far exceeded the twenty-foot limitation for an accessory structure. Construction was not completed in a timely fashion, and the land use permit had expired. There was overwhelming evidence from which a reasonable decision maker could conclude the Spicklers violated the conditional use permit. Therefore, the Board did not act arbitrarily in revoking the conditional use permit.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

