

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 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. 2010AP1778

Cir. Ct. No. 2007CV36

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GAGE INC., LLP,

PETITIONER-APPELLANT,

V.

VILLAGE OF SISTER BAY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gage Inc., LLP, appeals an order affirming, on certiorari review, the Village of Sister Bay's denial of a request for a conditional use permit. Gage argues: the Village's conditional use ordinance is unconstitutionally vague; the denial was arbitrary and without an adequate factual

basis; it was denied due process because there was an impermissibly high risk of bias; and the circuit court erroneously denied its motion to supplement the record. We reject Gage's arguments and affirm.

BACKGROUND

¶2 Gage proposed to develop a three-story combined condominium and hotel in Sister Bay. Some of the thirty-four units would be owned as residential condominiums, while the remainder would be rented on a commercial transient basis, i.e., a hotel. The proposed project was located in the "B-3 Downtown Business District," adjacent to property owned by the Village president, Denise Bhirdo.

¶3 Under the B-3 district zoning regulations, hotels are one of thirty-eight permitted uses. *See* VILLAGE OF SISTER BAY, WIS., ZONING CODE § 66.0323(a).¹ A "condominium hotel," on the other hand, is a conditional use, and is defined as: "A condominium ownership property where more than 25 percent of the units are available for rent for more than 30 days per year or on a commercial transient lodging basis."² VILLAGE OF SISTER BAY, WIS., ZONING CODE § 66.1402(a) (April 2011).³

¹ All references to the zoning code are to the July 2009 version unless noted otherwise.

² There is no dispute that Gage's proposed development was a condominium hotel as defined in the zoning regulations.

³ The Village provides an invalid appellate record citation in its brief. Thus, we resorted to the current version of the zoning code online, *available at* <http://intranet.sisterbay.com/Shared%20Documents/Forms/AllItems.aspx>.

¶4 After conducting several public hearings, the Village plan commission voted to recommend denial of the conditional use permit to the Village board. At a public hearing, the board voted to deny the conditional use permit. Bhirdo served on both the plan commission and the board, but recused herself at all of the public hearings. The circuit court upheld the board's decision.

DISCUSSION

Whether the ordinance is unconstitutionally vague

¶5 Gage argues the Village's conditional use ordinance is unconstitutionally vague because it fails to provide developers any guidance as to what factors will influence the issuance or denial of a conditional use permit. Our supreme court has explained:

The role of courts in zoning matters is limited because zoning is a legislative function. An ordinance is presumed valid and must be liberally construed in favor of the municipality. The party challenging the constitutionality of an ordinance bears a heavy burden. In Wisconsin, 'an ordinance will be held constitutional unless the contrary is shown beyond a reasonable doubt, and the ordinance is entitled to every presumption in favor of its validity.'

Town of Rhine v. Bizzell, 2008 WI 76, ¶26, 311 Wis. 2d 1, 751 N.W.2d 78 (citations omitted).

¶6 The Village's zoning code defines conditional uses as:

Uses of a special nature as to make impractical their predetermination as a permitted use in a district. Conditional uses have been used in zoning ordinances as flexible devices, which are designed to cover situations where a particular use, although not inherently inconsistent with the use classification of a particular zoning district, may create special problems and hazards if allowed to develop and locate as a matter of right in a particular zoning district.

VILLAGE OF SISTER BAY, WIS., ZONING CODE § 66.1402(a) (April 2011). The zoning code also explains the intent of the downtown business district. In part:

The Downtown Business district (B-3) is intended to apply to the Village's downtown business district and Village center. This area is typified by small lots, and buildings with minimal setbacks. The downtown business district is intended to offer greater flexibility in area requirements and setback requirements than other districts in order to promote the reuse of buildings and lots and the construction of new developments in the downtown business district consistent with the existing scale of development. The character, appearance and operation of any business in the downtown district should be compatible with any surrounding areas.

VILLAGE OF SISTER BAY, WIS., ZONING CODE § 66.0323. The intent statement also includes, among others, the following improvement and expansion principle: "A mixture of land uses to encourage walking as an alternative to driving, and provide more employment and housing options." *Id.* Finally, the conditional use provision of the zoning code states:

Conditional uses will be reviewed to see if they are *in accordance with the purpose and intent of the chapter and is (sic) found to be not hazardous, harmful, offensive or otherwise adverse to the environment or the value of the neighborhood or the Village.* Toward this end, the Plan Commission shall review the site, existing and proposed structures, architectural plans, neighboring uses, parking areas, driveway locations, highway access, traffic generation and circulation, drainage, sewerage and water systems and the proposed plan of operation. Conditions such as landscaping, architectural design, type of construction, construction commencement and completion dates, sureties, lighting, fencing, planting screens, operational control, hours of operation, improved traffic circulation, deed restrictions, highway access restrictions, increased yards, or parking requirements may be required by the Plan Commission upon its finding that these are necessary to fulfill the purpose and intent of this chapter.

VILLAGE OF SISTER BAY, WIS., ZONING CODE § 66.1007(e) (June 2006) (emphasis added).

¶7 We conclude that the conditional use ordinance, in tandem with the B-3 district statement of intent, is sufficiently definite. An ordinance is not rendered void just because some discretion is necessarily accorded the board. *State ex rel. Saveland P.H. Corp. v. Wieland*, 269 Wis. 262, 274, 69 N.W.2d 217 (1955). An ordinance regulating site development need not be created with a particular degree of specificity other than is necessary to give developers reasonable notice of the areas of inquiry that will be examined in approving or disapproving the development. *Town of Grand Chute v. U.S. Paper Converters, Inc.*, 229 Wis. 2d 674, 686, 600 N.W. 2d 33 (Ct. App. 1999).

¶8 Indeed, general review criteria or standards for conditional uses have been accepted as passing constitutional muster in Wisconsin. For example, our supreme court has approved the following very general conditional use review criteria: “provide for wise use of the county’s resources” and “to avoid harm to the public health, safety and welfare.” *Kraemer & Sons, Inc. v. Sauk Cnty. Adjust. Bd.*, 183 Wis. 2d 1, 3, 14-15, 515 N.W.2d 256 (1994). In *Wieland*, the court upheld an ordinance requiring generally that the “architectural appeal” and functional plan of the building cannot be so inconsistent with structures already constructed “as to cause a substantial depreciation in the property values” of the immediate neighborhood. *Wieland*, 269 Wis. at 265, 276. In another case, an ordinance was challenged as unconstitutionally vague for providing “no standards or guides” for the issuance or denial of conditional use permits. *Smith v. City of Brookfield*, 272 Wis. 1, 5, 74 N.W.2d 770 (1956). Rejecting the challenge, the court held that the general statement of purpose in the zoning ordinance’s preamble provided sufficient criteria for issuing or denying permits. *Id.* at 3, 5-8.

Whether the board's decision was arbitrary or without sufficient evidentiary basis

¶9 Our review of the board's decision is limited to:

(1) whether [it] 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 [it] might reasonably make the order or determination in question based on the evidence.

State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjust., 2004 WI 23, ¶14, 269 Wis. 2d 549, 676 N.W.2d 401. When the sufficiency of the evidence is challenged, the board's decision must be upheld if supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion. *Sills v. Walworth Cnty. Land Mgmt. Comm.*, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878.

¶10 Gage asserts that because an ordinary hotel is a permitted use in the downtown business district, "the only relevant subject matter for consideration in reviewing Gage's application for a conditional use permit was the impact of some of the residential units being condos instead of only hotel rooms." According to Gage:

Here the Village Board's determination to deny the conditional use permit (and the Plan Commission's decisions underlying it) were based on looking at the development in all its aspects. The analysis was not limited to the impact of a specific number of condominiums to the proposed development but rather the impact of any development at all and what the public officials thought was best.

This is erroneous. The reason is [that] it is not fair to put your entire project up for discussion when only one aspect is really properly at issue.

Gage cites no authority for its position that review of a conditional use permit must be narrowly restricted to a single aspect of the whole development. We may disregard arguments that are not supported by legal authority. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶11 In any event, the board’s concerns with “height, mass, setbacks and greenspace issues,” and Gage’s unwillingness to modify its plans to a two-story rather than three-story building, are sufficiently related to the factors identified in the conditional use ordinance and the business district statement of intent. As the board observed, “Sister Bay does not currently have any other large 3 story buildings in the B-3 district”

¶12 Gage, however, contends that concerns with the project’s size are irrelevant because an ordinary hotel of the same size would be permitted. Rejecting Gage’s position, the circuit court reasoned:

A substantial factor given for opposing the project was the different impact on the Village of a project with significant residential units versus one with more transient, rental units. There is evidence that the latter, although perhaps the same size and height[,] would be more valuable to the Village’s other businesses, particularly restaurants and shops, than residential units, where owners are more likely to eat in and perhaps not do as much business in the downtown area. It would appear this was the Village’s intent in allowing some degree of limited rental units only as a conditional use while hotels are permitted. Indeed, purely residential uses are apparently not authorized at all in this District.

The Village decided the business district should be primarily commercial, rather than residential. Distinguishing between hotels with their high turnovers and condo-hotels, with less turnover is rational and within the Village’s powers in promoting the general welfare of the community. The Village could even reason that allowing a bigger building may be worth the advantage to the community of the high turnover that a hotel would likely bring. The Village’s consideration of the advantages of a

permitted use (hotel) as opposed to a conditional use (condo-hotel) is within its discretion.

We agree with the circuit court's well-reasoned analysis.⁴ The board could reasonably determine that Gage's proposed residential condominium/hotel would have the same detriment as a hotel of the same scale, but not the same benefit to downtown businesses.⁵ That cost-benefit analysis is properly within the board's discretion.

¶13 Additionally, we observe that residential condominiums in vacation areas such as Door County are often owned by nonresidents of the community. Thus, those units may be frequently vacant. Vacant residences provide no customers for neighboring restaurants and shops.

Whether there was an impermissibly high risk of bias

¶14 Due process rights can be violated in zoning decisions "when there is bias or unfairness in fact or when the risk of bias is impermissibly high." *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 24-25, 498 N.W.2d 842 (1993). Gage argues the risk of bias was impermissibly high, asserting that Bhirdo negotiated with Gage prior to its request for a conditional use permit. Gage claims

⁴ We note, however, that multiple-family dwellings are also conditional uses in the business district. See VILLAGE OF SISTER BAY, WIS. ZONING CODE § 66.0323(b)(3) (July 2009). Thus, purely residential uses may be permitted in the district under certain conditions. However, we likewise note that residential condominiums are expressly prohibited in the district under any circumstances. See *id.*, § 66.0323(c)(7).

⁵ Gage emphasizes the "fundamental tenet that inclusion of a conditional use in an ordinance is equivalent to a legislative finding that the prescribed use is one that is in harmony with the other uses permitted in the district." *Sills v. Walworth Cnty. Land Mgmt. Comm.*, 2002 WI App 111, ¶17, 254 Wis. 2d 538, 648 N.W.2d 878. The board did not, however, outright reject the prospect of any condominium hotel use no matter its scale. Rather, the record suggests the board would have approved the project if it was scaled down to two stories.

she then objected to the project after Gage changed its plans so as to no longer require purchase of Bhirdo's adjacent land.

¶15 Even assuming, arguendo, the truthfulness of Gage's representations, there was no impermissible risk of bias. Bhirdo recused herself during the public meetings addressing Gage's request. Bhirdo did not vote on the permit request. We see no reason why Bhirdo could not voice her objections to the project in her personal capacity as a concerned citizen affected by the proposed development. Gage does not produce any evidence that the remaining plan commission or village board members were anything less than impartial. The board's decision is accorded a presumption of honesty and integrity. *Marris*, 176 Wis. 2d at 29-30.

Whether the circuit court erroneously denied a motion to supplement the record

¶16 Gage sought to supplement the certiorari record with two sets of documents. The first set was submitted to substantiate Gage's claims that Bhirdo had negotiated with Gage prior to its application for a conditional use permit. We have already determined that, even assuming such negotiations, there was no impermissible risk of bias. Those records are therefore irrelevant. The second set of records pertained to negotiations between Gage and the Village after the board's denial of the conditional use permit. Any involvement in the matter by Bhirdo *after* the board's denial of the conditional use permit is also irrelevant to our review of the board's decision.

By the Court.—Order affirmed.

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

