COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0949 **Cir. Ct. No. 03CV000286**

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

KEVIN J. KOLLOCK,

PLAINTIFF-RESPONDENT,

V.

CITY OF CUMBERLAND ZONING BOARD OF APPEALS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed*.

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

¶1 CANE, C.J. The City of Cumberland Zoning Board of Appeals (City) appeals from a judgment reversing its denial of Kevin Kollock's application for a permit to build a garage in his front yard. The City argues that (1) together CUMBERLAND, WIS., ZONING ORDINANCE §§ 17.08, 17.14 and 17.25 prohibit accessory buildings in the front yards of residential district lots; (2) any other

conclusion would lead to an absurd and unreasonable result; (3) the zoning code unambiguously requires front lots to remain open and unobstructed; (4) the zoning code should be liberally construed in favor of the City; and (5) even if the code is strictly construed, it still prevents accessory buildings from being erected in front yards.

¶2 Because we conclude the code does not clearly and unambiguously prohibit homeowners from building garages in their front yards, we agree with the circuit court that the board did not proceed under a correct theory of law. The judgment is therefore affirmed.

Background

¶3 Kollock and his wife, Jone, own a home on Beaver Dam Lake within the city limits of Cumberland. The Kollocks' lot is long and narrow and fronts, or rather backs, directly on the water. When Kollock decided he wanted to put a detached garage on the property, he applied for permission to build an "accessory" building in the front yard, between the road and the house.[1] Four months after receiving Kollock's application, the City's zoning administrator denied his permit request. Kollock appealed the decision to the zoning board. After a hearing, the board denied Kollock's appeal, upholding the zoning administrator's interpretation of the zoning code.

[1] The Kollocks claim, and the City does not deny, they cannot place a garage in their back or their side yard.

¶4 Kollock complained to the circuit court, requesting certiorari review of the board's decision under WIS. STAT. § 59.69(13).[2] The court eventually reversed the board on the grounds that the ordinances at issue were ambiguous with regard to accessory buildings in front yards and ambiguous ordinances had to be construed in favor of the landowner. The board now appeals that decision.

Discussion

Standard of Review

¶5 When we review a zoning board's denial of a building permit pursuant to a writ of certiorari, we ask only the following questions:

> (1) [w]hether the Board kept within its jurisdiction; (2) whether it proceeded on the 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 v. Waushara County Bd. of Adj., 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514. This standard of review is deferential with regard to factual findings; however, the interpretation of statutes and ordinances presents questions of law the reviewing court determines independently. *See* ***State v. Ozaukee County Bd. of Adj.***, 152 Wis. 2d 552, 559, 449 N.W.2d 47 (Ct. App. 1989) ("The rules governing interpretation of ordinances and of statutes are the same.").

¶6 When an ordinance is clear on its face, our review is limited to the ordinance itself. *See* ***Swanson Furniture Co. v. Advance Trans. Co.***, 105 Wis. 2d

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

321, 326, 313 N.W.2d 840 (1982). An ordinance is not rendered ambiguous merely because the parties disagree about its meaning. ***Forest County v. Goode***, 219 Wis. 2d 654, 663, 579 N.W.2d 715 (1998). If, however, an ordinance is capable of being understood in two or more different ways by reasonably well-informed people, it is ambiguous. ***Id.*** Whether an ordinance is ambiguous is a question of law we review de novo. *See* ***Boltz v. Boltz***, 133 Wis. 2d 278, 284, 395 N.W.2d 605 (Ct. App. 1986).

¶7 To determine the meaning of ambiguous ordinances, we apply standard rules of construction, but can look as well to the "scope, history, context, subject matter, and object of the statute in order to ascertain legislative intent." ***State v. Setagord***, 211 Wis. 2d 397, 406-07, 565 N.W.2d 506 (1997). The plain, obvious and rational meaning of an ordinance is always to be preferred to any curious, narrow, or hidden sense. *See* ***State ex rel. B'nai B'rith Found. v. Walworth County Bd. of Adj.***, 59 Wis. 2d 296, 307, 208 N.W.2d 113 (1973). We will resolve ambiguity in the meaning of zoning terms in favor of the free use of private property. *See* ***id.*** at 309-10.

¶8 The City's arguments all turn on a single contested point: does the zoning code unambiguously prohibit Kollock from building a garage in his front yard? No section of the code contains an explicit ban on front yard garages.[3] The City rather contends that, when read together, CUMBERLAND, WIS., ZONING ORDINANCE § 17.08 (defining terms), § 17.14 (discussing accessory buildings) and § 17.25 (establishing setbacks) of the zoning code clearly manifest the intent that

[3] Since the circuit court's decision, Cumberland has passed a new ordinance banning accessory buildings in the front. *See* CUMBERLAND, WIS., ZONING ORDINANCE § 17.14(2)(a) ("Accessory buildings are not allowed in the front.")

no buildings be constructed in front yards. Section 17.08(2) defines yard as an "open space on the same zoning lot with a principal building or group of buildings, which is unoccupied and unobstructed from its lowest level upward, except as otherwise permitted in this chapter." Section 17.14(2) sets out requirements for accessory buildings located "forward of the rear building line."[4] Finally, § 17.25(4) requires side and rear yard setbacks of eighteen inches for all accessory buildings. Based on the interplay of these code sections, the City argues that front yards must remain open and unobstructed unless otherwise permitted and that accessory buildings forward of the rear building line must mean buildings in the side yard because the code only specifies accessory building setbacks for side and rear yards. The code, the City concludes, thus clearly and unambiguously prohibits garages in front of houses. We are not persuaded.

¶9 The fact that we have to look at several sections of an ordinance to ascertain legislative intent or the meaning of a particular provision does not by itself establish ambiguity. *See, e.g.,* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted … as part of a whole; in relation to the language of surrounding or closely-related statutes."). The City suggests reasonably that while CUMBERLAND, WIS., ZONING ORDINANCE § 17.14(2) appears to authorize placing accessory buildings in front and side yards—"forward of the rear building line"—the meaning of that authorization is limited by § 17.25(4), which establishes accessory building setbacks only for rear and side yards.

[4] The term "rear building line" is not defined in the code.

¶10 However, Kollock offers an equally reasonable construction of the same code sections, arguing that neither CUMBERLAND, WIS., ZONING ORDINANCE § 17.14(2) nor § 17.25(4) prohibit accessory buildings in front yards yards. The first section contemplates such building; the second merely establishes specific setbacks for those who choose to place a building in the side or rear of a lot. Kollock and the City thus disagree on the meaning of an undefined term and the way that meaning is modified by a section that does not explicitly refer to it. When disagreement arises directly from language that even when liberally construed gives rise to different meanings, that language is ambiguous. *See* ***Kalal***, 271 Wis. 2d 633, ¶47.

¶11 The City now argues that even if the disputed language is ambiguous, zoning ordinances are liberally construed in favor of the City under WIS. STAT. § 62.23(7)(a): "This subsection and any ordinance, resolution or regulation enacted or adopted under this section, shall be liberally construed in favor of the city and as minimum requirements for the purposes stated." According to the City's brief on appeal, the circuit court thus erred when it concluded that zoning ordinances must be construed in favor of landowners unless they are unambiguous. The City contends that the court erred in relying on ***Cohen v. Dane County Bd. of Adj.***, 74 Wis. 2d 87, 91, 246 N.W.2d 112 (1976), because the ***Cohen*** rule applies only to county ordinances enacted under WIS. STAT. § 59.69(13).[5] City zoning ordinances are governed by § 62.23(7)(a), which requires liberal construction.

[5] The provision establishing counties' power to zone differs at several key points: "The powers granted in this section shall be liberally construed in favor of the county exercising them, and this section shall not be construed to limit or repeal any powers now possessed by a county." WIS. STAT. § 59.69(13).

¶12 As Kollock notes, the City did not make this argument before the circuit court. Indeed, Kollock raised the issue in his brief in support of his request for certiorari relief and the City chose not to respond. This court will generally not consider issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶13 In this case, however, it makes no difference whether the City is correct that city zoning codes must be liberally construed. We use the principles of liberal construction to help us find meaning when meaning is unclear or to extend application of a provision. Once we have concluded that an ordinance is ambiguous, we have already determined that it cannot be clarified by liberal construction. CUMBERLAND, WIS., ZONING ORDINANCE § 17.14(2), which provides that accessory buildings can be built forward of the rear building line, does not prohibit garages from being placed in front yards even when liberally construed. The two provisions the City cites as modifying or limiting the meaning of § 17.14(2) do nothing more than make conflicting interpretations of the provision reasonable.

¶14 As the supreme court has made clear, the power of the zoning authority to control land use for the purpose of promoting public health, safety, and general welfare is to be broadly construed. ***Cohen***, 74 Wis. 2d at 90. The power to be liberally construed under WIS. STAT. § 59.69(13) is the power to enact land use restrictions. *See* ***Cohen***, 74 Wis. 2d at 91. Whether the supreme court would construe WIS. STAT. § 62.23(7)(a) in the same way is not entirely clear.[6]

[6] The effect of the ordinance has been analyzed in relation to attacks on the validity of spot zoning provisions. ***Cushman v. Racine***, 39 Wis. 2d 303, 306, 159 N.W.2d 67 (1968) ("[The] ordinance must be liberally construed in favor of a municipality. Consequently an alleged invalidity of the ordinance must be clearly shown by the party attacking it."); s*ee also* (continued)

What is clear is that when ordinances are ambiguous as a matter of law, the court has "consistently resolved all ambiguity in the meaning of zoning terms in favor of the free use of private property." ***Cohen***, 74 Wis. 2d at 91. Because zoning ordinances operate in derogation of the common law, their provisions must be "in clear, unambiguous and peremptory terms." ***Id.***

¶15 We conclude that, even under a liberal construction, neither CUMBERLAND, WIS., ZONING ORDINANCE § 17.14(2) alone or in conjunction with the relevant provisions of §§ 17.08 and 17.25 unambiguously prohibits placing accessory buildings in front yards. We therefore also agree with the circuit court that the zoning board did not proceed under a correct theory of law.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

Step Now Citizens Group v. Town of Utica Planning & Zoning Comm., 2003 WI App 109, ¶26, 264 Wis. 2d 662, 663 N.W.2d 833. There appears to be no precedent for treating the language of the granting provision as limiting constructions of legally ambiguous ordinances to a city zoning board's interpretation of those ordinances. In a concurrence analyzing the history of the subdivision of land outside of incorporated cities and towns, Justice Prosser references grants of power that closely resemble those discussed here, suggesting that this language reflects legislative concern with zoning bodies' authority rather than a principle of construction. ***Wood v. City of Madison***, 2003 WI 24, ¶66-95, 260 Wis. 2d 71, 659 N.W.2d 31 (Prosser, J., concurring).