COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2012

Diane M. Fremgen
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 Nos. 2011AP1471
2011AP1472

Cir. Ct. Nos. 2010CV886
2010CV887

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

No. 2011AP1471

WALWORTH HOMES, LLC,

PLAINTIFF-APPELLANT,

V.

WALWORTH COUNTY AND WALWORTH COUNTY BOARD OF ADJUSTMENT,

DEFENDANTS-RESPONDENTS.

No. 2011AP1472

COLTON MEISINGER TRUST, DANIEL MEISINGER TRUST, KENT J. HARMON TRUST, MARGARET TAYLOR HARMON TRUST, JAMES WILLIAM HARMON TRUST, HOLLAND M. SHODEEN TRUST, WYATT A. SHODEEN TRUST, CRAIG A. SHODEEN, TRUSTEE, MAEGAN B. SHODEEN TRUST, SAMANTHA N. SHODEEN TRUST AND HUNTER W. SHODEEN TRUST, ERIC M. SHODEEN, TRUSTEE,

PLAINTIFFS-APPELLANTS,

V.

WALWORTH COUNTY AND WALWORTH COUNTY BOARD OF ADJUSTMENT,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated cases, Walworth Homes, LLC, and the Colton Meisinger Trust, et al. (collectively, "Walworth Homes"), appeal judgments affirming a Walworth County Board of Adjustment decision Walworth Homes found unpalatable. We reject Walworth Homes' claim that the Board proceeded on an incorrect theory of law, acted in excess of its authority or rendered a decision that was arbitrary, oppressive or unreasonable. We affirm.

¶2 The entities that comprise Walworth Homes own real estate in the Town of Delavan. The buildings currently on the parcels are deemed "existing substandard structures" because they predate the current zoning ordinance and do not comply with the current ordinance's setback restrictions. The existing buildings are "vacant and dilapidated." The Town wants the buildings removed. Walworth Homes also wants to raze the existing buildings and eventually to reconstruct them in their same locations and footprints so as to use the "grandfathered" setback lines.

¶3 Walworth Homes indicated their desire to the Walworth County Land Use & Resource Management Office ("Land Use Office") and requested an opinion that would explain the applicable restrictions and regulations so that the owners could "determine [the] feasibility of rebuilding a new commercial building on the property." The Zoning Administrator, on behalf of the Land Use Office, advised Walworth Homes that their right to reconstruct or replace a substandard structure is contingent on obtaining a zoning permit before tearing down the existing one and that the zoning permit would expire in twenty-four months.

¶4 The answer did not sit well with Walworth Homes and they appealed to the Board. Walworth Homes argued that nowhere in the ordinance does it expressly provide that a landowner's right to use established setback lines expires twenty-four months after the substandard structure is removed. The Zoning Administrator testified on behalf of the Land Use Office. Finding the Land Use Office's interpretation of the ordinance to be valid, the Board upheld it.

¶5 Walworth Homes then filed a two-claim complaint in the circuit court. One claim requested certiorari review; the second sought a declaratory judgment that the Board erroneously interpreted the ordinance. The court set a certiorari briefing schedule, intending to decide the case on the record and briefs. Walworth Homes objected, arguing that the briefing schedule was premature because they should be allowed to conduct discovery. The court declined to hear Walworth Homes' motion for an order to vacate the briefing schedule.

¶6 The Board moved for a protective order limiting the scope of the record as prescribed by WIS. STAT. § 59.694(10) (2009-10)[1] and common-law certiorari procedures, on the basis that certiorari review provided Walworth Homes' exclusive remedy. Walworth Homes opposed the motion, contending they were entitled to discovery on the declaratory judgment claim. The court granted the Board's motion for a protective order and set a new briefing schedule. Limiting its review to the administrative record and the parties' briefs, the court sustained the Board's decision. Walworth Homes appeals.

¶7 On appeal we review the Board's decision, not the circuit court's. ***Roberts v. Manitowoc County Bd. of Adjustment***, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499.[2] Our inquiry on certiorari review is limited to whether the Board kept within its jurisdiction; whether it acted according to a correct theory of law; whether its action was arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and whether its determination was reasonable based on the evidence before it. ***Mills v. Vilas County Bd. of Adjustments***, 2003 WI App 66, ¶11, 261 Wis. 2d 598, 660 N.W.2d 705. The Board's decision is presumptively correct and valid. ***State ex rel. Ziervogel v. Washington County Bd. of Adjustment***, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. As we may not substitute our discretion for that committed to the Board by the legislature, we will not disturb the Board's findings if any reasonable view of the evidence sustains them. ***Id.***

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

[2] We therefore need not address Walworth Homes' assertion that the circuit court applied an incorrect standard of review.

¶8 The ordinance at issue is the Walworth County Shoreland Zoning Ordinance. *See* WALWORTH COUNTY, WIS., ORDINANCES ch. 74, art. III (2002). Walworth Homes argues that the Board did not act according to law because its interpretation runs contrary to the ordinance's plain language.

¶9 The rules governing interpretation of ordinances and of statutes are the same and present a question of law we review independently. ***State v. Ozaukee Cnty. Bd. of Adjustment***, 152 Wis. 2d 552, 559, 449 N.W.2d 47 (Ct. App. 1989). Our interpretation begins with the ordinance's plain language. *See* ***Bruno v. Milwaukee County***, 2003 WI 28, ¶7, 260 Wis. 2d 633, 660 N.W.2d 656. Walworth Homes focuses on § 74-219, which provides in relevant part:

> Sec. 74-219. - Existing substandard structures.
>
> The legal use of a structure (principal, conditional or accessory) existing at the time of the adoption or amendment of this ordinance may be continued although the structure's size and/or location does not conform to the required yard, height, parking, loading, access and lot area provisions of this ordinance.
>
> ….
>
> (3) Existing substandard structures (principal and/or accessory) may be moved, removed, razed, and reconstructed, or replaced to their original design (building envelope) and location (footprint) and any proposed additions and enlargements to the original design (building envelope) and/or location (footprint) shall conform with the established building setback lines of all side yard, street yard, and rear yards, but may never be closer than five feet to any lot line. Any proposed additions and enlargements shall conform to the required shoreyard, height, parking, loading, and access provision of this ordinance.

WALWORTH COUNTY, WIS., ORDINANCES ch. 74, art. III, div. 7, § 74-219.

¶10 Walworth Homes argues that § 74-219 imposes no time limit or permit requirement. That may be so if read in isolation, but an ordinance's plain meaning is to be determined by reference to the context in which it is used and as part of a whole. *See* ***Osterhues v. Board of Adjustment for Washburn Cnty.***, 2005 WI 92, ¶24, 282 Wis. 2d 228, 698 N.W.2d 701.

¶11 Here, the Board looked to several provisions of the ordinance:

> Section 74-219 is titled "Existing Substandard Structures" in conjunction with established building setback lines. Section 74-156 reads that the Zoning Ordinance shall be interpreted and applied in its entirety. [Section] 74-162, Compliance, reads that no structure can be altered without a zoning permit. [Section] 74-248, Zoning Permit, … indicates a permit is valid for 24 months.

It further concluded that allowing an open-ended time to rebuild a substandard structure using an established yard would not serve the purpose and intent of the ordinance; that the word "structure" in § 74-162 has no limiting modifier and thus implies that "all structures" require a zoning permit; and that to replicate phrases in multiple provisions would be unnecessarily burdensome, given that the ordinance is to be interpreted as a whole. The Board's interpretation of the plain language of the ordinance was reasonable.

¶12 In a similar vein, Walworth Homes contends that the Board acted under an incorrect theory of law by writing a time limit and permit requirement into "Ordinance § 74-219(3)." *See* ***Ozaukee Cnty. Bd. of Adjustment***, 152 Wis. 2d at 564-65 (a board of adjustment is authorized only to apply the law, not to rewrite it). As noted above, the Board looked to the Shoreland Zoning Ordinance as a whole, considered the interplay of its provisions, and, as § 74-156

directs, "interpreted and applied [it] in its entirety." Even if the Board could have rewritten the law, there was no need to.

¶13 Walworth Homes next asserts that the ordinance's purpose and intent should not have factored into the Board's decision. If the Board did not consider the ordinance ambiguous, they argue, it should not have resorted to "extrinsic sources of legislative intent." We disagree with that characterization. "Purpose" and "Intent" are not "extrinsic sources" but enacted provisions of the ordinance itself. *See* WALWORTH COUNTY, WIS., ORDINANCES ch. 74, art. III, div. 1, §§ 153, 154. Even so, Walworth Homes then argues, the ordinance's purpose and intent "do not mandate the Board's interpretation." They need only reasonably allow it, however. *See* ***Mills***, 261 Wis. 2d 598, ¶11.

¶14 We also are not persuaded that "reasonable policy" compels adopting Walworth Homes' position because it may be impractical to reconstruct a substandard structure within two years. Walworth Homes offered no evidence in support of that claim. In any event, while a permit shall expire within twenty-four months after its issuance "if the structure for which a permit is issued is not substantially completed,"§ 74-248(6) also allows the applicant to re-apply for one.

¶15 Pressing on, Walworth Homes argues that the Board's unreasonable interpretation of the ordinance was arbitrary and oppressive and represented its will rather than its judgment. A decision is arbitrary if it is "unreasonable or without a rational basis." ***Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976). This argument is a repackaging of their claim, already rejected, that the Board's decision was based on an incorrect theory of law. Further, our record review reveals nothing to demonstrate any bias, arbitrariness, irrationality or other unreasonableness in the Board's decision.

¶16 Walworth Homes next complains that the Board's interpretation of the ordinance "has the added problem of being unconstitutional." Although our reading of the complaint does not suggest it, Walworth Homes asserts that the declaratory judgment action implied a constitutional challenge to the ordinance.

¶17 In an action for declaratory relief where an ordinance is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and is entitled to be heard. ***Town of Walworth v. Village of Fontana-on-Geneva Lake***, 85 Wis. 2d 432, 435, 270 N.W.2d 442 (Ct. App. 1978); *see also* WIS. STAT. § 806.04(11). Walworth Homes' failure to do so deprives the court of jurisdiction. *See* ***Bollhoffer v. Wolke***, 66 Wis. 2d 141, 144, 223 N.W.2d 902 (1974).

¶18 Finally, Walworth Homes argues the circuit court should have allowed them to conduct discovery to prepare for trial on its declaratory judgment claim. Walworth County corporation counsel argued that the declaratory judgment claim was simply a "piggyback" to the first and that, in certiorari matters, the doctrine of exhaustion of remedies applied. The circuit court agreed that it would determine the matter on briefs and the record.

¶19 WISCONSIN STAT. § 59.694(10) provides that a person aggrieved by a decision of a board of adjustment may commence an action seeking the remedy available by certiorari. Where a statute sets forth a procedure for review of administrative action and court review of the administrative decision, such remedy is exclusive and must be employed before other remedies are used. ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis. 2d 416, 422, 254 N.W.2d 310 (1977). An aggrieved person may bypass a statutorily prescribed review procedure if that procedure is inadequate, ***Sauk County v. Trager***, 118 Wis. 2d 204, 213-14, 346

N.W.2d 756, 761 (1984), or where the constitutional validity of the zoning ordinance is at issue, *see* ***Kmiec v. Town of Spider Lake***, 60 Wis. 2d 640, 645, 211 N.W.2d 471 (1973). Whether to apply the exhaustion doctrine is a matter within the circuit court's discretion. *See* ***St. Croix Valley Home Builders Ass'n, Inc. v. Township of Oak Grove***, 2010 WI App 96, ¶10, 327 Wis. 2d 510, 787 NW.2d 454.

¶20 Here, Walworth Homes made no claim or showing that certiorari review was inadequate. Despite their assertion to the contrary, the declaratory judgment claim requests only a declaration that the ordinance imposes no time limit for reconstructing a substandard building after its demolition, not a declaration that the ordinance is constitutionally invalid. The circuit court concluded that certiorari review could properly and fully address the relief Walworth Homes sought. We agree. The circuit court properly exercised its discretion in requiring Walworth Homes to follow through to completion its remedies in certiorari before asking the court to step in.

By the Court.—Judgments affirmed.

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