**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

March 20, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**Nos. 95-1861**
**96-0911**

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

**95-1861**

**FRAN INGEBRITSON,**

**Plaintiff-Respondent-Cross Appellant,**

**v.**

**THE ZONING BOARD OF APPEALS OF THE CITY OF MADISON, GEORGE CARRAN, ZONING ADMINISTRATOR OF THE CITY OF MADISON, LINDA GRUBB, NEIGHBORHOOD PRESERVATION SUPERVISORY OF THE CITY OF MADISON AND THE CITY OF MADISON,**

**Defendants-Appellants-Cross Respondents,**

**MENTAL HEALTH CENTER OF DANE COUNTY, INC.,**

**Intervenor-Defendant-Appellant-Cross Respondent.**

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**96-0911**

**FRAN INGEBRITSON,**

**Plaintiff-Respondent,**

**v.**

**THE ZONING BOARD OF APPEALS OF THE CITY OF MADISON, WISCONSIN, GEORGE CARRAN, ZONING ADMINISTRATOR OF THE CITY OF MADISON, LINDA GRUBB, ADMINISTRATIVE NEIGHBORHOOD PRESERVATION SUPERVISOR OF THE CITY OF MADISON AND THE CITY OF MADISON,**

**Defendants-Appellants,**

**MENTAL HEALTH CENTER OF DANE COUNTY, INC.,**

**Intervenor-Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. This appeal concerns the validity of a City of Madison ordinance rezoning property located at 802 East Gorham and the proper interpretation of that ordinance and a related deed restriction. The property is now owned by the Mental Health Center of Dane County (MHCDC). The building on the property is an historic landmark. Fran Ingebritson, a resident in the neighborhood, initiated this action, which challenges the validity of the rezoning of the property from General Residential-5 (R5) to Office Residential (OR) in 1986 and various determinations of the City of Madison zoning administrator and Zoning Board of Appeals (ZBA) relating to the Yahara House, the facility that MHCDC operates on the property.

On cross-motions for summary judgment, the trial court ruled that the rezoning was illegal spot zoning[1] but that the deed restriction permitted the

[1] Spot zoning is the practice of allowing a single lot or area special privileges that are

operation of Yahara House. The court also concluded that neither the City of Madison zoning administrator nor the ZBA had the authority to interpret the deed restriction. Although the court decided that the ZBA acted arbitrarily and capriciously when it denied Ingebritson's request to reopen an earlier decision of the ZBA--that the operation of the Yahara House was permitted in the OR classification--the court also decided that this issue was moot in view of its ruling of illegal spot zoning.

On appeal, the City and MHCDC contend that: (1) Ingebritson lacks standing; (2) the doctrine of laches bars Ingebritson's challenge to the 1986 rezoning; (3) the 1986 rezoning was not illegal spot zoning; (4) the ZBA did not exceed its authority in interpreting the deed restriction and did properly interpret it; and (5) the ZBA's denial of Ingebritson's request to reopen its July 22, 1993 decision was not arbitrary and capricious. Ingebritson cross-appeals, contending that the trial court erred (1) in its interpretation of the deed restriction, and (2) in concluding that the issues raised in her petition for review by certiorari were moot.

We conclude that Ingebritson has standing to challenge the 1986 rezoning, but that the proper application of the doctrine of laches bars a remedy for that claim. We conclude she also has standing to challenge the ZBA's decision not to reconsider its July 22, 1993 determination that Yahara House is an office within the meaning of the OR classification and its decision that the deed restriction permits accessory uses for professional and business offices as provided in the OR classification. We conclude the ZBA did not act arbitrarily and capriciously in denying Ingebritson's request to reconsider its July 22, 1993 determination. Finally, we conclude the ZBA had authority to review the zoning officials' interpretation of the deed restriction in this context and that its interpretation should be affirmed.[2]

(..continued)
not extended to other land in the vicinity in the same use district. ***Bubolz v. Dane County***, 159 Wis.2d 284, 297, 464 N.W.2d 67, 73 (Ct. App. 1990). Spot zoning is not per se illegal but should only occur when it is in the public interest and not solely for the benefit of the property owner who requested the rezoning." ***Id.***

[2] The City and MHCDC also contend that Ingebritson's claim of illegal spot zoning is barred because she failed to file a notice of claim as required by § 893.80(1), STATS.

BACKGROUND

The building at 802 East Gorham Street was converted from a residence to an office in 1943 for the headquarters for the Seventh Day Adventists. In 1976, the new owners received approval from the zoning administrator to convert the building into an attorney's office with the understanding that the building, as a professional office, was a non-conforming use under the then-existing R5 zoning classification and could not be expanded.

In 1985, the same owner applied for an amendment to the zoning ordinance to change the zoning for the property from R5 to OR. At the time, a prospective buyer of the property was an advertising firm. Zoning Administrator George Carran reviewed the rezoning application and concluded that the advertising firm would be considered a "business office" and rezoning would be necessary for it to occupy the building. Carran recommended approval of the rezoning application.

The application was referred to the City Planning Department.[3] The planning department's report disagreed with Carran's conclusion that rezoning was necessary to the operation of a business office, because a business office was a conditional use in a landmark building located in a R5 residential district. *See* MADISON, WIS., ZONING CODE §§ 28.08(6)(c)1 and 28.08(5)(c)4.b (1996). The report recommended approval of a conditional use, but added that if the plan commission chose to support the rezoning, a deed restriction was advisable "to retain the residential character and to avoid the O.R. side effects." After being notified that rezoning was not necessary, the owner agreed to withdraw the rezoning request and to pursue the conditional use process.

On May 5, 1986, the owner submitted a second petition to rezone the property to OR, but this time another advertising firm, the Hiebing Group,

(..continued)
Because of our conclusion that laches is a bar to that claim, we do not address this issue.

[3] The City Planning Department is now called the Department of Planning and Development. We will refer to it as the planning department.

was the prospective purchaser. The planning department repeated its conclusion that rezoning would not be necessary to allow a business office to operate on the property. Again, the planning department recommended a conditional use procedure rather than rezoning. After a public hearing, the plan commission voted to support the rezoning to OR "subject to a deed restriction limiting the use to business and professional offices and single-family homes." On June 17, 1986, the common council enacted an ordinance to rezone the property from R5 to OR. Although the ordinance was adopted subject to the deed restriction, the deed restriction was not referred to in the ordinance.[4] After the ordinance was enacted, the Hiebing Group purchased the property and recorded the deed, but without the deed restriction. This occurred through oversight by city personnel.

In the spring of 1993, MHCDC began to explore the property at 802 East Gorham Street as a site for the Yahara House, which was then operating in another location in Madison. The Yahara House is described by its executive director as a psychiatric rehabilitation facility that provides job training and placement services for persons with long-term mental illnesses, who are called "members." The functions that take place at the Yahara House include: administration of HUD apartments located elsewhere; administration of a resale store located elsewhere and at which members work; and administration of job placement in the community. Psychiatric and medical services are provided to members at the Yahara House and there is a cafeteria for members. Members receive skill training at the Yahara House by helping perform the office and cafeteria tasks.

On or about May 17, 1993, MHCDC entered into a purchase agreement with the Hiebing Group for the purchase of the property. Before MHCDC signed the purchase agreement, Carran and Thomas Akagi, of the planning department, toured the then-current location of Yahara House at the request of MHCDC. Carran indicated that "the operations were best described

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[4] It appears that the common council members had before them the planning commission's recommendation including the recommended deed restriction. However, the minutes of the common council meeting show only that an ordinance was adopted "rezoning 802 E. Gorham Street from R5 to OR." All parties assume or agree that the ordinance was adopted subject to the deed restriction recommended by the plan commission.

as offices that provide vocational and job placement in the community," which would be a permitted use in the OR zoning district. In response to architect Arlan Kay's request for written confirmation that MHCDC could operate the Yahara House on the property, Carran sent Kay a letter on June 1, 1993, stating: "The property located at the subject address is located in the OR District. Section 28.08 provides that an office for job placement is listed as a permitted use in the OR district."

Linda Grubb, Neighborhood Preservation Supervisor of the planning department, sent a more detailed letter to MHCDC on July 22, 1993, confirming that the Yahara House came within the OR classification. Grubb stated that the OR classification lists as permitted uses "Offices, business and professional, including but not limited to accessory uses such as restaurants, gift shops, drugstores, valet shops, beauty shops, and barbershops," MADISON, WIS., ZONING CODE § 28.08(8)(b)3, and that this zoning category was reflective of the primary functions of Yahara House. Grubb described the Yahara House as "a mix of office, including training functions, cafeteria and a small percentage of care mostly in an area similar to a nurse's station." She noted that the department had previously determined that Yahara House was an office when it moved into its present location.

Fran Ingebritson is a neighborhood resident whose residence is located 250 feet from the property. She has lived there since 1980 and purchased the property in 1984. Ingebritson has been involved in zoning issues regarding the property since the first petition in 1985.

On June 3, 1993, Ingebritson filed an appeal with the ZBA challenging Carran's decision, asserting that Yahara House functioned as a clubhouse and therefore did not meet the conditions for the OR zoning classification. The ZBA considered Ingebritson's appeal on July 22, 1993. Ingebritson and other residents of the neighborhood voiced their concerns that allowing Yahara House to operate on the property would negatively affect the neighborhood because of the activities and the number of persons involved. They challenged its characterization as an office, asserting that it had other functions as well, such as day care, social club and recreational activities. The executive director of MHCDC and director of Yahara House described the

various functions of Yahara House. The alderperson for the district spoke in favor of the City's position.

After hearing the presentations, asking questions and after a lengthy discussion, the ZBA denied Ingebritson's appeal. It concluded that Yahara House was not a recreation center or clubhouse and did meet the definition of office in OR. Ingebritson did not appeal the ZBA's July 22 decision. By letter dated July 29, 1993, MHCDC waived all remaining contingencies under the purchase agreement and provided the seller with a $50,000 line of credit as the remainder of the earnest money, in addition to a $5,000 check already provided.

Sometime in September 1993, while looking through the City's files on the 1986 rezoning, Ingebritson discovered that the rezoning was subject to the deed restriction, which had never been recorded. Ingebritson notified city officials, and on September 22, 1993, the planning department sent a letter to the Hiebing Group demanding a deed restriction that limited the use of the property to "business and professional offices and/or single family residential uses." The Hiebing Group prepared a deed restriction which was executed and recorded on November 17, 1993, after approval by city personnel. The restrictive covenant provided:

> 1. The Property shall be restricted in use to business and professional offices and single-family homes.
>
> 2. This covenant is placed upon the Property for the benefit of the City of Madison (the "City") and may be enforced by a suit by the City for injunctive relief and/or damages, and shall be binding on all present and future owners, heirs and assigns.
>
> 3. This covenant shall run with the land and may be released or modified only with the consent of the Common Council of the City pursuant to a then-existing ordinance of the City.

On October 1, 1993, Ingebritson petitioned Carran for a rehearing of the zoning board's July 22, 1993 decision based on her discovery of the deed restriction and other information about the 1986 rezoning. Carran denied her petition as untimely because it was not filed within ten days of the board's action as required by the ZONING BOARD OF APPEALS PROCEDURE MANUAL ¶ D.4 (1982). The city attorney's office confirmed in a letter to Ingebritson that the rehearing request was untimely. That letter explained that the deed restriction was not new evidence because the deed restriction contemplated certain permitted uses under OR--"offices, business and professional, including but not limited to accessory uses such as ..."--and the ZBA had decided that Yahara House fit within those uses. Grubb wrote to Ingebritson at the same time, stating that it was the position of the zoning administrator that the deed restriction limited use of the property to all but business and professional offices and accessory uses, as itemized in the OR zoning classification (as well as single-family residences). Grubb advised Ingebritson that although her request for reconsideration of the ZBA's July 22, 1993 decision had been denied as untimely, Ingebritson could appeal the department's decision interpreting the deed within fifteen days. Ingebritson did.

On November 18, 1993, the ZBA heard Ingebritson's appeal of the zoning administrator's interpretation of the deed. Ingebritson and other neighbors opposing the department's interpretation of the deed restriction appeared, as did representatives of MHCDC. Ingebritson moved for a suspension of the rules so that her appeal of the decision that Yahara House was an office could be reheard. The members of the ZBA discussed whether they should suspend the rules for that purpose. The motion to do so failed on a 2-2 vote. The ZBA unanimously approved the determination that the deed restriction allows accessory uses associated with the office category in the OR classification.

Ingebritson filed this action seeking a declaratory ruling on the validity of the 1986 rezoning from R5 to OR, a declaratory ruling on the authority of the zoning administrator or staff to construe the deed restriction and construction of the deed restriction, and review by certiorari of the November 18, 1993 decisions of the ZBA.

## STANDING

The defendants argue that Ingebritson has no standing to seek a declaratory judgment regarding the 1986 rezoning because her pleadings do not allege facts that show she is aggrieved by that action. They also appear to argue that she has no standing to appeal the November 18, 1993 decision of the ZBA. We reject both of these contentions.

In its motion to dismiss based on lack of standing, the City asserted that Ingebritson had not alleged in her amended complaint her address, taxpayer status, that she was aggrieved, or that there was an injury to any interest the law protected. In response, Ingebritson filed a second amended complaint in which she alleged that she resides approximately one-half block from the property located at 802 East Gorham Street, that she is a taxpayer, that she is aggrieved by the decisions of the ZBA and that the actions of the defendant described in the complaint will cause her injuries that will be redressed by a favorable decision.[5] The trial court permitted Ingebritson to file the second amended complaint and denied the motion to dismiss for lack of standing as moot, because of the allegations just recited. The City did not renew a motion to dismiss claiming that the allegations in the second amended complaint were inadequate, nor did it include lack of standing as a ground in its summary judgment motion.

The narrow issue we decide here is whether the second amended complaint is sufficient to allege standing for the illegal spot zoning claim and the certiorari review.[6] We conclude that it is. On a motion to dismiss, we take the allegations as true, construe the complaint liberally and dismiss only when it is clear that the plaintiff cannot recover. ***Evans v. Cameron***, 121 Wis.2d 421,

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[5] At the same time Ingebritson filed an affidavit detailing her past rental and current ownership of her residence, its exact location in relation to 802 East Gorham Street, and the ways in which the rezoning from R5 to OR and the operation of Yahara House will adversely affect her. We do not consider this affidavit in resolving the standing challenge because the City raised the issue only in a motion to dismiss, and it appears the trial court decided the motion based only on the second amended complaint.

[6] We address the question of standing to request a declaration construing the deed restriction later in this opinion.

426, 360 N.W.2d 25, 28 (1985). Whether a complaint is sufficient to withstand a motion to dismiss is a question of law which we review de novo. ***Watts v. Watts***, 137 Wis.2d 506, 512, 405 N.W.2d 303, 306 (1987).

In order to have standing to seek a declaratory ruling regarding the rezoning, Ingebritson must have a legally protectable interest or right at stake. *See* ***City of Madison v Town of Fitchburg***, 112 Wis.2d 224, 228, 332 N.W.2d 782, 784 (1983). The declaratory judgment statute specifically contemplates its use to determine the construction or validity of any municipal ordinance when a person's rights are affected by it. Section 806.04(2), STATS. We have recognized and approved its frequent use to test the validity of municipal legislation, and have held that town residents have standing to seek a declaratory ruling on the validity of a town zoning ordinance. ***Weber v. Town of Lincoln***, 159 Wis.2d 144, 147-48, 463 N.W.2d 869, 870 (Ct. App. 1990).

When a zoning action affects an adjoining or nearby property owner, that property owner is generally considered to have an interest sufficient to confer standing to challenge zoning decisions relating to another's property. *See* RATHKOPF, ARDEN H. AND RATHKOPF, DAREN A., RATHKOPF'S THE LAW OF ZONING AND PLANNING §§ 43.03[2] and 43.04[1]. Liberally construed in her favor, Ingebritson's allegation that she lives one-half block from the property, together with the allegations describing how the property was used in the past and could be used in the future under the rezoning and the City's interpretation of the deed restriction are sufficient to show that her interest as a nearby property owner is or will likely be adversely affected by the rezoning.

With respect to the certiorari action, "any person aggrieved" by the decision of the zoning administrator may appeal to the ZBA. Section 62.23(7)(e)4, STATS. Any "person ... aggrieved" by any decisions of the ZBA may, within thirty days after the filing of the decision, seek the judicial remedy available by certiorari. Section 62.23(7)(e)10. We have held that area residents, even though not parties to a ZBA proceeding, were aggrieved by the grant of a conditional use permit authorizing construction of a large egg-laying facility. ***Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustments***, 125 Wis.2d 387, 389-91, 373 N.W.2d 450, 451-52 (Ct. App. 1985). The allegations in the second amended complaint, liberally construed, are sufficient to show that Ingebritson was aggrieved by the ZBA's decisions on November 18, 1993.

LACHES--1986 REZONING

The City and MHCDC argue that the trial court erred in concluding that laches did not bar any remedies Ingebritson might have based on her challenge to the 1986 rezoning as illegal spot zoning. Laches is an equitable defense and the elements are: (1) unreasonable delay, (2) knowledge of and acquiescence in the course of events, and (3) prejudice to the party asserting laches. ***In the Matter of the Estate of Lohr***, 174 Wis.2d 468, 477, 497 N.W.2d 730, 733 (Ct. App. 1993). The facts are undisputed, both sides having moved by cross-motion for summary judgment, *see* ***Streiff v. American Family Mutual Ins. Co.***, 114 Wis.2d 63, 64-65, 337 N.W.2d 186, 187 (Ct. App. 1983), *rev'd on other grounds*, 118 Wis.2d 602, 348 N.W.2d 505 (1984). We therefore review this issue to determine which party is entitled to summary judgment as a matter of law. *See* ***id.***[7] We conclude, based on the undisputed facts, that each element of laches is met.

The following facts relate to the first two elements--unreasonable delay and acquiescence with knowledge. Ingebritson was a member of the Market Neighborhood Association in 1986 and knew about the request to rezone the property at 802 East Gorham Street. She spoke with and attended meetings with representatives of the owner of the property at that time when they came before the neighborhood association to discuss the rezoning request. The association approved the first rezoning request, which was not pursued by the owner. Ingebritson was aware at the time that a letter was sent on behalf of the neighborhood association to the zoning commissioners stating: "[on January 9, 1986] [w]e unanimously voted to unconditionally back the zoning change from R5 to OR necessary for Reed Design Inc. to purchase and occupy East Gorham Street." The association also approved the second rezoning

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[7] We have previously noted that there is authority supporting two different standards of review for a trial court's decision on laches: deference to the trial court's decision on reasonableness because it is a question of law intertwined with factual findings, or review for erroneous exercise of discretion. ***Estate of Lohr***, 174 Wis.2d at 478, 497 N.W.2d at 734. We need not decide which is correct because in this case the facts are undisputed. Therefore the reason for deferring to the trial court--question of law intertwined with factual findings--is absent. There is only a question of law. Were a discretionary standard applicable, a misapplication of the law to undisputed facts would be an erroneous exercise of discretion. *See* ***Berg v. Marine Trust Co.***, 141 Wis.2d 878, 887-92, 416 N.W.2d 643, 647-49 (Ct. App. 1987).

request, which ultimately resulted in the rezoning. The vote on the second request was unanimous, and Ingebritson voted for the rezoning.

The trial court concluded that the delay of seven years was not unreasonable because there was no material change in the use of the property until the proposals to relocate the Yahara House to the property in the spring of 1993. The trial court also concluded that the City's assertion of Ingebritson's acquiescence is not convincing because "there was more than one irregularity in the 1986 rezoning process." The court does not specify what those are as they relate to the defense of laches, but we assume the court is referring to the deed restriction, which was not recorded at the time and was not mentioned to the neighborhood association or in the public notice of the rezoning. Ingebritson argues on appeal that she and the neighborhood association believed when they approved the rezoning that it was for a "technical" reason and would not change the use of the property, and that she was misled in this regard and did not know all the facts until 1993 when she discovered the deed restriction and other information in the City's file.

We fail to see how Ingebritson's lack of knowledge of the deed restriction bears on the reasonableness of her actions and her acquiescence to the 1986 rezoning. The deed restriction imposes a significant restriction on the use of the property compared to that otherwise permitted in OR. Ingebritson does not explain how knowledge of this restriction would have affected her approval of the rezoning or would have induced her to object to the rezoning prior to 1993. She and the neighborhood association gave their approval of a rezoning from R5 to OR without any deed restrictions.

We have carefully considered Ingebritson's argument that she was misled in 1986, but the undisputed facts do not provide a basis for a reasonable belief that the rezoning would not affect the use of the property in the future. It is true the rezoning was presented as necessary to permit Reed Design to use the property, and Ingebritson and the neighborhood association did not have any objection to that use. However, we see nothing in the record indicating that Ingebritson was advised by a representative of the City or the property owner that rezoning to OR would not have an effect on possible future uses of the property. From a reading of the two classifications, it is obvious that a number of uses are permitted in OR that are not permitted in R5. In the absence of a commitment that a reasonable person would rely on to believe that use of the

property in the future would not be governed by the OR classification in spite of rezoning to that classification, we conclude such a belief is not reasonable.

Ingebritson also points out that she did not know until 1993 that the planning department staff had concerns about the OR classification and had recommended against it. However, there was public notice of the plan commission meeting at which the recommendation was presented. We reject Ingebritson's claim that she was misled because the neighborhood association was not provided with all the information that members could have had if they had attended publicly-noticed hearings on the rezoning.

The trial court agreed with Ingebritson's argument that her interests were not adversely affected until the Yahara House proposal in 1993. We do not agree with the underlying premise that it is reasonable for a nearby property owner to wait until she disagrees with the application of a rezoned classification to a particular facility before challenging the rezoning. Ingebritson had a procedure, which she made use of, to challenge the determination that the Yahara House was permitted in OR. She could not reasonably anticipate the way in which the City would enforce the rezoning in particular cases, but she had the opportunity to challenge the particular determination. However, she should reasonably have concluded that if the property was rezoned OR, uses permissible under OR, but not under R5, would be permitted in the future. We conclude it was unreasonable for her to wait for seven years, until she objected to a particular proposed use, to challenge the rezoning. We also conclude that she acquiesced in the rezoning with knowledge of these events.

The third element of laches is prejudice. The trial court concluded that the City had not demonstrated any prejudice, and that MHCDC had not either because this suit challenging the validity of the 1986 rezoning was filed in December 1993, before MHCDC closed on the property in April 1994. We agree with the trial court that there is no evidence, or reasonable inferences from evidence drawn in the City's favor, that the City was prejudiced by Ingebritson's failure to challenge the 1986 rezoning earlier. However, we conclude that the undisputed evidence shows that MHCDC was prejudiced because it was bound under a non-contingent purchase agreement prior to learning that Ingebritson was challenging the 1986 rezoning.

The City argues in general terms that the passage of time has hampered its ability to defend the illegal spot zoning claim and it is thereby prejudiced. However, it offers no specific instance of prejudice. Carran and Grubb are still employed by the City. William Roberts, the planning department staff member who was assigned responsibility for the report of the 1985 and 1986 rezoning requests, holds the same position now and was extensively deposed. He brought the planning department case file from the 1985-86 process to his deposition, and the City does not tell us that any records or files were missing or had been destroyed.[8]

Roberts deposed that the head of the planning department at that time, Charles Dinauer, wrote the recommendation and the portion of the report expressing concerns about the OR side effects, after discussion with Roberts and others in the department. Dinauer has since retired and lives out of state. But the City does not explain how it is hampered in its defense by Dinauer's retirement.

The City also makes the general argument that it is important to the zoning process as a whole that there be stability and predictability, and that allowing Ingebritson's claim after seven years is antithetical to those interests. However, the City does not provide us with any authority for the proposition that those general interests substitute for a specific showing of prejudice in the application of laches.

In contrast, MHCDC has presented undisputed evidence of prejudice to it. After Carran's June 1, 1993 letter stating his opinion that the Yahara House was a permissible use in OR, Ingebritson appealed the decision that Yahara House was primarily an office within the meaning of the OR classification. That was the issue at the hearing before the ZBA on July 22, 1993--not whether the rezoning to OR was valid.

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[8] The City argues in its brief on appeal that "the record of the very meeting that addressed those issues [spot zoning] has been lost to the passage of time." However, there is no citation to the record, and we are unable to discover anything in the record indicating that a record pertinent to the spot zoning claim once existed but no longer exists.

After the ZBA denied the appeal on July 29, 1993, MHCDC waived all remaining contingencies under the purchase agreement and provided the seller with a $50,000 line of credit as the remainder of the earnest money, in addition to a $5,000 check already provided. At that time, MHCDC had reason to know that Ingebritson might appeal the ZBA's determination, but there is no evidence giving rise to a reasonable inference that MHCDC had reason to know that Ingebritson would challenge the validity of the OR zoning classification.

Ingebritson has presented no evidence that MHCDC could have avoided financial loss had it decided not to go ahead with the purchase of the property once it learned, through her filing of the suit on December 16, 1993, that she was challenging the validity of the OR classification in addition to the ZBA's interpretation of the classification. Although we must draw all reasonable inferences from the evidence in Ingebritson's favor when deciding the opposing party's motion for summary judgment, *see* ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980), we conclude that the only reasonable inference from the evidence is that MHCDC would suffer substantial financial loss if it breached the non-contingent purchase agreement.

Since each element of laches is met, Ingebritson is barred by laches from seeking remedies based on the 1986 rezoning.

REOPENING JULY 22, 1993 ZBA DECISION

We address next Ingebritson's petition for review by certiorari of the ZBA's decision on November 12, 1993, not to reopen its July 22, 1993 decision that the Yahara House was an office within the meaning of the OR classification. The trial court concluded that the ZBA acted arbitrarily and capriciously in doing so, but did not remand because it considered this issue moot. Because we have concluded that the 1986 rezoning to OR cannot be challenged due to laches, the issue whether the ZBA acted arbitrarily and capriciously in declining to reopen its decision interpreting the OR classification is not moot. We therefore review that decision by the ZBA.

We review the ZBA's decision, not that of the trial court, and apply the same standard of review as the trial court. *See* ***State ex rel. Cox v. DHSS***, 105

Wis.2d 378, 380, 314 N.W.2d 148, 149 (Ct. App. 1981). Our review is limited to determining whether: (1) the ZBA kept within its jurisdiction; (2) whether it proceeded under a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable; and (4) whether the evidence was such that it might reasonably make the determination in question. ***Snyder v. Waukesha Co. Zoning Board***, 74 Wis.2d 468, 475, 247 N.W.2d 98, 102 (1976). We accord a presumption of correctness and validity to the ZBA's decision. ***Arndorfer v. Sauk County Board of Adjustment***, 162 Wis.2d 246, 253, 469 N.W.2d 831, 833 (1991). If any reasonable view of the evidence would sustain the ZBA's determination, we affirm. *See* ***Nufer v. Village Bd. of Village of Palmyra***, 92 Wis.2d 289, 301, 284 N.W.2d 649, 655 (1979). Applying these standards to ZBA's decision not to reopen its July 22, 1993 decision, we conclude it should be affirmed.

The ZBA rules provide that requests for hearing (except for persons denied a variance) must be submitted within ten calendar days of the board's action and no such request shall be entertained "unless substantial new evidence is submitted which could not reasonably have been presented at the previous hearing or which causes a reasonable belief that evidence at the prior meeting was materially inaccurate or incomplete." ZONING BOARD OF APPEALS PROCEDURE MANUAL ¶ D.4 (1982). Ingebritson's request for a reconsideration on October 1, 1993, was well past the ten-day time period and was denied for that reason. The denial was confirmed by a letter to Ingebritson from an assistant city attorney, and that letter dealt specifically with her reasons for requesting a reconsideration. That letter explained that the existence of the deed restriction--which the ZBA as well as Ingebritson was apparently unaware of at the time of the July 22, 1993 hearing--was not material to the ZBA's determination that Yahara House fit within the term "office" in the OR classification.

However, because the interpretation of the deed restriction had not been addressed at the July 22 hearing, Ingebritson was advised she could appeal the zoning administrator's interpretation of the deed restriction, which she did. Her appeal addressed only the issue of the interpretation of the deed restriction, and did not request a reopening of the July 22, 1993 ZBA decision. At the November 18, 1993 hearing on that appeal, in the midst of presentation and discussion on the interpretation of the deed restriction, Ingebritson asked the ZBA to suspend its rules and to rehear her appeal challenging its determination that the Yahara House was an office. The board members moved

and seconded a discussion on that request. They heard extensive argument on the request from Ingebritson, neighbors, MHCDC representatives and planning department officials. They had before them all the material that Ingebritson considered pertinent to their July 22, 1993 decision which was not presented then. There was lively discussion among the board members, with two expressing views that some of the "new evidence" warranted a reopening, and two others expressing views that they had already made the decision and should not reopen since two months had passed and the Yahara House had relied on their decision. The vote was 2-2, which meant that Ingebritson's request failed, since four votes were needed to suspend the rules.

Ingebritson has not provided us with the rule that permits the ZBA to suspend its own rules, but we assume for purposes of argument there is one and that it applies to the rule on reconsideration. We conclude that, since there is a specific ten-day deadline for a reconsideration request, and specific criteria that a request made within that time period must meet, the ZBA can reasonably deny a request to set aside this rule in the absence of a showing of compelling circumstances. The ZBA could reasonably conclude that Ingebritson had not made such a showing.

Even if we assume that the deed restriction could not reasonably have been discovered before the July 22, 1993 hearing, the board members could reasonably conclude that the deed restriction would not have altered its interpretation of "office" in the OR classification. The board could also reasonably conclude that additional information about the Yahara House and the planning staff's recommendation in 1986 either could have been presented at the July 22 hearing, would not have made a difference to their decision, or both. We conclude that the ZBA did not act arbitrarily or capriciously in denying Ingebritson's request to reopen, and that a reasonable view of the evidence supports its decision.

INTERPRETATION OF DEED RESTRICTION

The City and MHCDC argue that the trial court erred in concluding that the zoning administrator and the ZBA exceeded their authority in interpreting the deed restriction. Ingebritson responds that the court was correct in this ruling because the deed restriction was not mentioned in the ordinance and so should be interpreted by the court as any private deed restriction would be. She contends, however, that the court's construction of the deed restriction was erroneous. The parties agree that the rezoning ordinance was passed subject to the deed restriction and that the deed restriction was intended to exclude certain uses that are permissible under the OR classification, although they disagree over what uses were meant to be excluded. No party is challenging the validity of the deed restriction or the authority of the City to pass a rezoning ordinance conditioned on the deed restriction.[9] It is undisputed that the deed restriction was not referenced in the rezoning ordinance due to an oversight on the part of the City, and that the City, also through oversight, failed to see that the deed restriction was recorded promptly upon the rezoning.

We have difficulty reconciling Ingebritson's position that the deed restriction was intended to protect against certain side effects of the OR rezoning with her position that the deed restriction should be interpreted by the court, not by the zoning administrator, in the manner of any deed restriction between private parties. Moreover, Ingebritson does not explain how she has standing to request a declaratory judgment on the construction of the deed restriction. Only a party in privy to a deed can enforce a restrictive covenant in the deed, except that another purchaser of property in the same tract may enforce the covenant if there is evidence to show that the original grantor inserted the covenant to carry out a general plan or scheme of development. ***Crowley v. Knapp***, 94 Wis.2d 421, 425, 288 N.W.2d 815, 817-18 (1980). Ingebritson is not in privy and the "general plan or scheme of development rule" does not apply.

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[9] A municipality may properly adopt an ordinance providing that rezoning of particular property becomes effective when certain conditions are met within a specified time period. ***Konkel v. Common Council, City of Delafield***, 68 Wis.2d 574, 579, 229 N.W.2d 606, 609 (1975). *See also* ***Zupancic v. Schmenz***, 46 Wis.2d 22, 30, 174 N.W.2d 533, 538 (1970).

Although the deed restriction provides that it is for the benefit of the City of Madison, we do not see how that provision gives standing to Ingebritson to seek construction or enforcement of the covenant. Ingebritson has provided us with no authority, and we have been able to discover none, that would support her position that she has standing to seek a judicial declaration on the construction of this deed restriction, if we consider it a deed restriction between two private parties for the benefit of the City.[10]

The parties appear to agree that if the rezoning ordinance had contained an express condition relating to the deed restriction, as it should have, the zoning administrator could have construed the deed restriction in the context of construing the ordinance to determine if the operations of the Yahara House were permitted by the ordinance. In that event, the ZBA would have had the authority to determine whether the zoning administrator erred in that construction. Under § 62.23(7)(e)7, STATS., the ZBA has the authority to hear appeals alleging error in "any determination made by an administrative official in the enforcement of an ordinance adopted pursuant to [this section on zoning]."

The City argues that the zoning administrator and the ZBA have the same authority even though the deed restriction was not mentioned in the ordinance as it should have been. If we reject this argument, Ingebritson is left with no opportunity to seek either enforcement or construction of the deed restriction. We conclude that under these unique circumstances, the better approach is to treat the deed restriction as part of the rezoning ordinance, as it should have been, with the result that the zoning administrator had the authority to construe the deed restriction when requested by Ingebritson and she had standing to appeal that determination to the ZBA, as she did.

Since Ingebritson's complaint, as an alternative form of relief, seeks review by certiorari of the ZBA's November 12, 1993 decision to affirm

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[10] It may be that if the City had a clear legal duty to enforce the covenant, the City could be compelled to do so if the other conditions for a mandamus were met. *See* ***State ex rel. Ryan v. Pietrzykowski***, 42 Wis.2d 457, 462, 167 N.W.2d 242, 245 (1969). We see no source for such a clear legal duty unless it derives somehow from the rezoning ordinance, which, again, points to the necessary relationship between the rezoning ordinance and the deed restriction.

Grubb's interpretation of the deed restriction, we undertake that review now. We have outlined above the general standard of our review by certiorari. Because we are treating the deed restriction as part of the rezoning ordinance, we look to the rules of construction and review applicable to the interpretation of zoning ordinances in certiorari proceedings. A court is not bound by a zoning board's interpretation of a zoning ordinance, but that interpretation is generally entitled to some weight. ***Hansman v. Oneida County***, 123 Wis.2d 511, 514, 366 N.W.2d 901, 903 (Ct. App. 1985). The degree of deference appropriate depends on the circumstances. *See* ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 33, 498 N.W.2d 842, 850 (1993), citing ***West Bend Educ. Assn. v. WERC***, 121 Wis.2d 1, 11-12, 357 N.W.2d 534, 539 (1984).

We do not agree with Ingebritson's contention that the meaning of the deed restriction is unambiguous. We conclude, like the trial court, that it is ambiguous because it is susceptible to more than one reasonable interpretation. Since all parties agree that the purpose of the deed restriction is to accommodate the concerns of the planning staff and/or the planning commission at the time of the rezoning, we conclude that we should defer to the ZBA's interpretation of the deed restriction if it is reasonable. In deciding whether it is reasonable, we consider also these general precepts for construction of restrictions contained in both zoning ordinances and deeds: Such restriction must be strictly construed to favor the unencumbered and free use of property, and a provision in either which purports to operate in derogation of the free use of property must be expressed in clear, unambiguous and preemptory terms. ***Crowley***, 94 Wis.2d at 435, 288 N.W.2d at 822.

We conclude that interpreting the deed restriction to include uses described as accessory uses for professional and business offices in the OR classification is reasonable. The ZBA heard extensive argument on the proper construction of the deed restriction. It discussed at length Ingebritson's position that the 1986 planning staff report demonstrated that the intent was to preserve the residential character of the neighborhood and protect against the side effects of OR zoning. In Ingebritson's view that report shows that the deed restriction was not intended to include accessory uses, but only professional or business offices themselves, as well as single-family residences.

However, although the 1986 planning staff report recommended a deed restriction, it did not specify the contents. The wording of the deed

restriction was contributed by the planning commission, but there is no information in the record as to what the planning commission intended. The ZBA recognized this. It was persuaded by the zoning administrator's interpretation, which was based on an analysis of the OR classification. There were three categories of permitted uses in the OR classification at the time of the rezoning: Any use permitted in R6-General Residence District; hotels and motels, including accessory uses; and offices, professional and business, including accessory uses. MADISON, WIS., ZONING CODE § 28.08(8)(b)3 (1996). The zoning administrator decided that the deed restriction was intended to eliminate completely the use for motels and hotels, restrict residential use to single family dwellings, and permit professional and business offices as contemplated by the OR classification. The zoning administrator reasoned that had the planning commission meant to exclude accessory uses for offices it would have said so, because accessory uses are included in the permitted office use under OR. This is in contrast to accessory uses for single family residences, which are treated as separate permitted uses. *See* MADISON, WIS., ZONING CODE § 28.08(2)(b)8.[11]

While Ingebritson's interpretation of the deed restriction is a reasonable one, the ZBA's interpretation is also reasonable. Considering, in addition, the rule favoring a strict construction of limitations on use of property, we conclude that ZBA's interpretation of the deed restriction should be affirmed.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

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[11] MADISON, WIS., ZONING CODE § 28.08(23)(b)8 provides in relevant part:

Permitted uses....

1. Single-family detached dwellings....

....

8. Accessory uses, including but not limited to the following:....