COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 12, 1995

NOTICE

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.

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

No. 95-1897-FT

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

CLEMENS V. HEDEEN, JR.,

Plaintiff-Appellant,

v.

COUNTY OF DOOR and DOOR COUNTY BOARD OF ADJUSTMENT,

Defendants-Respondents.

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

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Clemens Hedeen, Jr., appeals an order dismissing his motion to enjoin the Door County Board of Adjustment (BOA) from reviewing the Door County Resource Planning Committee's (RPC) grant of a conditional use permit.[1] The BOA changed the standard it uses to review the RPC's decisions from deferential to de novo seven days before it was scheduled to review the RPC's grant of a permit to Hedeen. The issue is whether Hedeen had a vested right that prevented application of the BOA's rule amendment to

[1] This is an expedited appeal under RULE 809.17, STATS.

him. Because we conclude that Hedeen had no vested right in a particular procedural standard of review, we affirm.[2]

The facts are undisputed. Hedeen applied to the RPC for a conditional use permit. After public testimony and debate, the RPC granted Hedeen the permit. Two Door County groups that opposed Hedeen's planned use of the land appealed the RPC's decision to the BOA pursuant to § VIII, C. 1., of the Door County Zoning Ordinance. The BOA's former rule provided a deferential review of the RPC decision.

Hedeen obtained a temporary restraining order in the circuit court to prevent the BOA from reviewing his case until the court heard his motion for an injunction. The court subsequently denied Hedeen's motion for a temporary injunction and sua sponte dismissed his action for a permanent injunction and declaratory relief. Hedeen appeals on the grounds he had vested rights that precluded the BOA from changing its standard of review and also alleges that the circuit court erred by dismissing the action for a permanent injunction prior to a trial on the merits.

We use the same rules of construction to interpret municipal ordinances and rules as we use to interpret state statutes. *See* ***County of Sauk v. Trager***, 113 Wis.2d 48, 55, 334 N.W.2d 272, 275 (Ct. App. 1983). We conclude that the same test applies to the BOA's rule change as we apply to a statutory change by the state legislature.

Generally, statutes are to be construed prospectively, not retroactively. ***Gutter v. Seamandel***, 103 Wis.2d 1, 17, 308 N.W.2d 403, 411 (1981). However, if a statute is procedural or remedial rather than substantive, the statute is given retroactive application unless retroactive application

[2] Door County argues for the first time on appeal that the BOA has no authority to review an RPC decision. In order to decide that the BOA has no authority to review the RPC's decision, we would have to modify the circuit court's order that affirmed the BOA. A respondent who seeks such a remedy must file a cross-appeal. Section 809.10(2)(b), STATS. The County did not file a cross-appeal; therefore, we will not address its argument. Hedeen concurs in his reply brief that the BOA has no power to review the RPC's decision. We need 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, 145-46 (1980).

disturbs a contract or vested rights. ***Id.*** Whether a statute has retroactive or prospective application is a question of law that we review de novo. ***Salzman v. DNR***, 168 Wis.2d 523, 528, 484 N.W.2d 337, 339 (Ct. App. 1992).

The BOA's rule change regarding its standard of review is procedural:

> If a statute simply prescribes the method—the 'legal machinery'—used in enforcing a right or a remedy, it is procedural. If, however, the law creates, defines or regulates rights or obligations, it is substantive—a change in the substantive law of the state.

City of Madison v. Town of Madison, 127 Wis.2d 96, 102, 377 N.W.2d 221, 224 (Ct. App. 1985) (citation omitted). Changing a standard of review only changes the "legal machinery" by which Door County enforces its zoning ordinances because it does not affect the underlying substantive law regulating the type of structures that can be built on a particular piece of property.[3]

Because we conclude that the BOA's rule was procedural, the change has a retroactive application unless it disturbs a contract or vested rights. Hedeen argues that he had a vested right in the conditional use permit granted by the committee, citing ***Lake Bluff Housing Partners v. City of South Milwaukee***, 188 Wis.2d 230, 525 N.W.2d 59 (Ct. App. 1994). In that decision, we held that a developer gained vested rights through its reasonable reliance on existing zoning law and its discussions with city officials. ***Id.*** at 252-53, 525 N.W.2d at 68.

[3] We also note that the rule at issue was contained in the BOA's "Rules of Procedure."

First, ***Lake Bluff*** was recently reversed. ***Lake Bluff Housing Partners v. City of South Milwaukee***, No. 94-1155 (Wis. Nov. 20, 1995). Our supreme court held that the developer "obtained no vested rights, because it never submitted an application for a building permit conforming to the zoning and building code requirements in effect at the time of the application." ***Id.*** at 24.

We distinguish ***Lake Bluff*** on its facts because the ordinance in that case changed substantive zoning laws. The rule changed in this case was procedural. We perceive no inequity in giving the reviewing body de novo review. The underlying zoning code, its purposes and substance remain unchanged. The de novo rule does not undermine Hedeen's underlying substantive right to develop the project under the zoning laws that existed at the time he began his project.

Finally, Hedeen had no basis for reasonable reliance on the procedural rule. A landowner in a zoning dispute may not rely upon expenditures as a basis to usurp the appellant's right to an appeal. *See* ***State ex rel. Brookside Poultry Farms Inc. v. Jefferson Cty. Bd. of Adj.***, 131 Wis.2d 101, 108-10, 388 N.W.2d 593, 595-96 (1986). Absent a change in the substantive provisions of the County's zoning ordinance, Hedeen's expenditure of funds prior to resolution of the appeal is not relevant.

Next, Hedeen argues that the trial court erred by dismissing all his claims with prejudice when only a motion for a temporary injunction was before it. In order for Hedeen to succeed on his claim for a permanent injunction or declaratory relief, he would have to prove that he reasonably relied on the prior standard to obtain a vested right that precluded the BOA's rule change from applying to him. We have concluded that Hedeen had no such vested right. Therefore, dismissal sua sponte was appropriate. *See* ***Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.***, 92 Wis.2d 709, 720-21, 285 N.W.2d 891, 898 (Ct. App. 1979).

By the Court. – Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.