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DISTRICT II

October 14, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2374 Growth Management Corporation v. Walworth County Board of Adjustment (L.C. #2013CV885)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

The Walworth County Board of Adjustment appeals from a circuit court order determining on certiorari review that the Board erred when it determined that the periodic rental of two single-family homes owned by Growth Management Corporation and Vista Pointe, LLC (the owners) violated the single-family dwelling zoning district in which the homes were located. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We agree with

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the circuit court that the Board erred when it determined that rental of the homes violated the zoning district. We affirm the circuit court's decision reversing the Board.

Growth Management and Vista Pointe own single-family homes in a Delavan, Wisconsin single-family dwelling zoning district. WALWORTH COUNTY, WIS., CODE OF ORDINANCES § 74-181 (2015). A single-family dwelling is "a structure containing one dwelling unit, which is designed or arranged for use as living quarters for one family." ***Id.***, § 74-263.

It is undisputed that the owners rent the two homes periodically. In March 2013, the Walworth county zoning code enforcement officer notified the owners that renting the homes to the "transient public" constituted use as a hotel/motel or boarding/lodging house, uses prohibited in the R-2A single-family dwelling zoning district. The owners appealed the zoning violations to the Walworth County Board of Adjustment.

Citing the evidence before it, the Board agreed that renting the homes violated the applicable zoning. The Board found that the homes were rented for five months of the year, and the owners evinced a business intent vis-à-vis the homes when they received special licensing to facilitate rental of the homes or operate a rooming house. The Board noted that a single-family dwelling is "to be used as a living quarters for one family" and "a dwelling shall not include boarding or lodging houses, motels or hotels." The Board found that the rental of the homes

constituted a business and the rental activity satisfied the definition of a "lodge,"[2] a prohibited use in the single-family dwelling zoning district.

The owners sought certiorari review of the Board's decision that the home rentals violated the zoning ordinance. The circuit court reversed the Board after concluding that the Board acted arbitrarily and unreasonably and its decision was not based on the facts before it. The court observed that while the owners were cited for renting to the "transient public," the zoning code did not define "transient." In addition, the court concluded that the single-family dwelling zoning district, WALWORTH COUNTY, WIS., CODE OF ORDINANCES § 74-181, did not offer guidance to a property owner about when a home rental would violate the single-family dwelling zoning district. For example, the zoning ordinance does not limit the length of single-family home rentals, does not specify when a rented home becomes a "lodge," or specify how much profit must be made from a home rental to qualify as a rental business. The court concluded that in the absence of such guidance, the Board lacked a legal standard for evaluating the evidence presented about the use of the homes and arbitrarily determined that the home rentals violated the single-family dwelling zoning ordinance. The circuit court reversed the Board. The Board appeals.

"On certiorari, we review the decision of the Board, not the circuit court." ***Heef Realty & Inv. v. City of Cedarburg Bd. of Apps.***, 2015 WI App 23, ¶4, 361 Wis. 2d 185, 861 N.W.2d 797, *review denied*, 2015 WI 78, ___ Wis. 2d ___, 865 N.W.2d 503. Our review is limited to whether

[2] A "lodge" is "a building or group of buildings under single management containing both rooms and dwelling units available for rental to transient individuals or families." WALWORTH COUNTY, WIS., CODE OF ORDINANCES § 74-263 (2015). A "lodging house" is "a building other than a hotel, where lodging is provided for compensation, for five or more persons not members of a family." ***Id.***

the Board "acted according to law," "did not act arbitrarily or unreasonably," and "made a decision based on evidence one might reasonably use to make the determination in question." ***Id.*** (citation omitted).

On appeal, the Board argues that it reasonably determined that the home rentals violated the zoning ordinance. The Board's arguments are largely premised on its view that the evidence shows that the owners were conducting a prohibited rental or lodge business in a single-family dwelling district. These arguments overlook the threshold inquiry: what uses of a single-family dwelling are limited by Walworth county's zoning ordinances? *See* ***id.***, ¶7.

Zoning ordinances "are to be construed in favor of the free use of private property" and "must be clear and unambiguous." ***Id.*** Walworth county's R-2A zoning permits single-family dwellings.[3] WALWORTH COUNTY, WIS., CODE OF ORDINANCES § 74-181. The proper focus is the "language of the ordinance, which is about the use of the property, not the duration of that use." ***Heef Realty***, 361 Wis. 2d 185, ¶11. Like the ordinance in ***Heef Realty***, ***id.***, ¶14, the ordinance in this case does not set out any required occupancy periods by a single family or by an owner to avoid being deemed to be operating a rental business or a "lodge."[4] The Board did not act according to law when it interpreted the R-2A single-family dwelling zoning district to preclude rental for five months of the year "even though the [o]rdinance did not clearly and unambiguously prohibit" rental of a single-family home for any period. ***Id.*** If Walworth County

[3] Walworth county's R-2A zoning also permits accessory and conditional uses not relevant here. WALWORTH COUNTY, WIS., CODE OF ORDINANCES § 74-181.

[4] Interpretation of a zoning ordinance presents a question of law that we decide independently. ***FAS, LLC v. Town of Lake Bass***, 2007 WI 73, ¶9, 301 Wis. 2d 321, 733 N.W.2d 287. The plain language of the ordinance controls. *See* ***Bruno v. Milwaukee Cty.***, 2003 WI 28, ¶7, 260 Wis. 2d 633, 660 N.W.2d 656.

desires to restrict periods of nonowner occupancy or rentals of single-family homes, the county must do "by enacting clear and unambiguous law." ***Id.***

The foregoing deficiency in the single-family dwelling zoning ordinance also defeats the Board's argument that the homes were "lodges" or constituted a rental business. As written, the single-family dwelling zoning ordinance addresses "residential use, not the duration of the use. The words 'single-family' … and 'dwelling' do not operate to create time restrictions that the legislative body did not choose to include in the ordinance." ***Id.***, ¶12. A zoning board cannot "arbitrarily impose time/occupancy restrictions in a residential zone where there are none adopted democratically by the" municipality. ***Id.***, ¶13.

We conclude that the Board did not act according to law when it interpreted the single-family dwelling zoning ordinance to preclude periodic rental of the owners' single-family homes. We affirm the circuit court's order reversing the Board's decision.[5]

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[5] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").