COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2008

David R. Schanker
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 No. 2007AP314 **Cir. Ct. No. 2005CV2365**

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

CHRISTINE OLTMAN,

PLAINTIFF-APPELLANT,

V.

TOWN OF PRIMROSE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Christine Oltman appeals from an order affirming a decision of the Town of Primrose. She contends that the Town acted unlawfully and unreasonably in denying her a driveway permit. We affirm.

FACTS

¶2 Since 1976 Oltman has owned 99 acres of agricultural land connected to a public road by a 66-foot-wide strip of land. However, Oltman has never used that strip for access, instead permissively using an adjacent owner's driveway. In 2004, because potential renters or buyers could not rely on the permissive access she used, she applied for a permit to construct her own driveway, either on the 66 foot strip she owned or, alternatively, on a separate strip offered for the purpose by the adjacent owner.

¶3 A series of hearings culminated in a decision to deny her a permit, the principal reason being that both of Oltman's proposed driveways would disturb slopes greater than 25%. A Town driveway ordinance bars construction of driveways that would disturb a slope exceeding 25%. TOWN OF PRIMROSE DRIVEWAY ORDINANCE § 1.07(1). The Town did not waive the slope requirement for Oltman's proposed driveways and denied her a permit. On appeal of that decision Oltman raises seven issues. We identify and address each issue in the remainder of this opinion.

DISCUSSION

¶4 Certiorari review of a municipality's decision addresses whether the municipality: (1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) was not arbitrary, oppressive or unreasonable; and (4) heard sufficient evidence such that it could reasonably make the determination in question. ***Manthe v. Town Bd. of Windsor***, 204 Wis. 2d 546, 551, 555 N.W.2d 167 (Ct. App. 1996). While this standard of review is deferential with regard to factual findings, the interpretation of ordinances is a question of law on which the

reviewing court owes no deference. *See* ***State v. Ozaukee County Bd. of Adjustment***, 152 Wis. 2d 552, 559, 449 N.W.2d 47 (Ct. App. 1989).

¶5 Issue 1. Was a permit to construct a driveway even necessary? The Town's permit requirement for driveways does not apply to "field roads," which are roads used only for agricultural purposes. TOWN OF PRIMROSE DRIVEWAY ORDINANCE §§ 1.04(1) & (2). Oltman contends that her planned driveway was actually a "field road," and the Town therefore exceeded its jurisdiction in requiring a permit to construct it. Oltman presents this argument for the first time on appeal, and we therefore deem it waived. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). Additionally, Oltman's permit application sought the Town's "approval of a driveway permit, land division, and site plans for primary farm residences." In other words, her permit application states a clear intent to develop her property, not continue its use for agriculture.

¶6 Issue 2. Was the permit decision subject to review as a zoning decision? Oltman contends that the Town made a "zoning type" determination, subject to review as to whether the decision unreasonably prevents the owner from using the property for a permitted use. In her case, the permitted use is construction of a primary farm residence. However, "'[z]oning is governmental regulation of the uses of land and buildings according to districts or zones.'" ***Town of Clearfield v. Cushman***, 150 Wis. 2d 10, 19, 440 N.W.2d 777 (1989) (quoting 8 MCQUILLAN, MUNICIPAL CORPORATIONS § 25.01, at 6 (3rd ed. 1983)). An ordinance that does not regulate the use of property by establishing zones or districts is not a zoning ordinance. ***Id.*** at 19-20. Consequently, the decision under the driveway permit ordinances was not subject to review as a zoning decision.

¶7 Issue 3. Is the Town's slope disturbing limitation superseded by county ordinance? A Dane County ordinance requires an erosion control permit for any construction on a slope greater than 12%. DANE COUNTY ZONING ORDINANCE § 14.45(2). If a local ordinance differs or conflicts with the county ordinance, the more restrictive ordinance applies. DANE COUNTY ZONING ORDINANCE § 14.44(4). Oltman contends that the Dane County ordinance is more restrictive, apparently because it has a 12% restriction rather than a 25% restriction. Therefore, in her view, the Town erred by applying its own ordinance to deny the permit. We disagree, because the Town's ordinance is plainly more restrictive if a slope exceeds 25%. The Town bars construction on slopes greater than 25%, and the County does not. The County's ordinance merely requires a permit in such cases.

¶8 Issue 4. Did the Town's refusal to waive its slope disturbing limitation impose an unnecessary hardship on Oltman? The Town, in its discretion, may waive the 25% slope restriction if it determines that the restriction would impose an unnecessary hardship. TOWN OF PRIMROSE DRIVEWAY ORDINANCE § 1.07(13). Oltman contends that she cannot build a residence on her property without a driveway to access it. In her view, this problem establishes unnecessary hardship such that the Town essentially had no choice but to issue the permit. However, the hardship might better be defined as her inability to sell the property to someone else for the purpose of building on it. There was no evidence that Oltman cannot access the property by the same means she has used since 1976. Under those circumstances, the Town reasonably refused to grant a waiver.

¶9 Issue 5. Was the Town's decision reasonable considering all of the reasons given for it? In denying Oltman a permit the Town Board members mentioned other concerns with her driveway proposal, not necessarily related to

the slope restriction. For example, one member noted that the proposed driveways crossed agricultural land. Oltman argues that the evidence demonstrates that these concerns were unfounded, and that the Town's decision was therefore unreasonable. It is not our function to closely analyze each and every factor in the Town's decision. The primary factor in the decision was plainly the slope restriction, and Oltman does not argue otherwise. There was also no dispute that the driveways crossed slopes greater than 25%. We will interfere with a municipality's exercise of its police power only where it is clearly unreasonable. ***Lac La Belle Golf Club v. Lac La Belle***, 187 Wis. 2d 274, 280-81, 522 N.W.2d 277 (Ct. App. 1994). It was not clearly unreasonable for the Town to enforce its slope restriction ordinance in this case.

¶10 Issue 6. Should the trial court have engaged in certiorari review fact finding under WIS. STAT. § 62.23(7)(e)10? This section allows the court on review to hold an evidentiary hearing and find facts, and Oltman contends that the trial court should have applied it. However, it only applies to reviews of zoning decisions, and we have already concluded that the Town's decision on the permit was not a zoning decision. WISCONSIN STAT. § 68.02 provides that a municipality's decision on a permit is reviewable under WIS. STAT. ch. 68, which does not grant courts the power to hold hearings and find facts.

¶11 Issue 7. Did the Town apply the wrong legal standards? Oltman contends that the Town failed to make determinations required by a land division ordinance, a building permit ordinance, and a separate driveway ordinance, all three requiring the Town to consider the impact of a proposed land division, building or driveway on agricultural land. However, Oltman fails to adequately explain why the Town's purported omissions mattered. None of the ordinances she cites have anything to do with the slope requirements that she failed to meet.

None had any bearing on the issue of hardship. Additionally, the Town had no need to consider building or land division issues until after the driveway permit was issued. Oltman informed the Town that the planned division of the land and construction of residences were contingent on permission to build a driveway, and she would not proceed without that permission.

By the Court.—Order affirmed.

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