COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 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. 2007AP2513 **Cir. Ct. No. 2007CV39**

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

CRAIG DOUBEK, JOE PAVLAS AND RAY STACY,

PLAINTIFFS-RESPONDENTS,

V.

ZONING BOARD OF APPEALS OF THE TOWN OF ROME,

DEFENDANT-RESPONDENT,

DONALD ANDERSON, JENSINE ANDERSON, JOSEPH BELLOCCHIO, JOHN BINDER, MARY BINDER, DONALD CAIN, SUZANNE CAIN, PAUL CARTER, JOAN CARTER, ROBERT DAVENPORT, AUDREY DAVENPORT, CHRIS DAVENPORT, ANNE DAVENPORT, DAVIDSON AND DAVIDSON, LLC (DALE AND SANDY DAVIDSON, MEMBERS), JACK EGERSTAFFER, NANCY EGERSTAFFER, MICHAEL GROSS, MARY GROSS, JEFFREY KANTER, DEBBIE KANTER, RITA LEIBHAM, JOHN LINDBLADE, REBECCA LINDBLADE, STEVEN LIPPELT, GERRY LIPPELT, ELIZABETH PETERSON, MICHAEL SINDORF, NANCY SINDORF, JOHN SINDORF, ELIZABETH SINDORF, DAVID SINDORF, COLLEEN SINDORF, THOMAS STEINKE, SHARON STEINKE, RICHARD TOFTE, KAREN TOFTE, HERBERT TUTKOWSKI, KATHLYN TUTKOWSKI, KEVIN WHITE, SANDRA WHITE, MARVIN WREGE AND JENNIFER WREGE,

APPELLANTS.

APPEAL from a judgment of the circuit court for Adams County: CHARLES A. POLLEX, Judge. *Reversed and cause remanded.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. The appellants, landowners in the Town of Rome, appeal from a judgment of the circuit court declaring invalid the nonconforming use permits they received from the Town's Zoning Board of Appeals. For the reasons stated in this opinion, we reverse.

¶2 A town ordinance enacted in August 2005 permits landowners to maintain one camping unit on properties in single family residential zoning districts (R-1). The appellants, who own R-1 lots, applied for nonconforming use permits to place two camping units on their properties. In a series of hearings between July 2006 and January 2007 the appellants, and others, presented the Zoning Board of Appeals with evidence that they had maintained two camping units on their properties in prior years, as permitted by the covenants governing use of their lots.[1] The appellants all received the nonconforming use permits they requested.

¶3 Craig Doubek, Joe Pavlas and Ray Stacy commenced this action in February 2007, within thirty days of the last permit hearing. They alleged that the Town's ordinances before August 2005 had also limited R-1 property owners to one camping unit per lot, and argued that the permits must be rescinded under the

[1] We recently held that these covenants expired July 1, 1999. *See* ***Barker v. Lake Camelot Property Owner's Association, Inc.***, No. 2007AP2007, unpublished slip op. ¶¶1-3 (WI App Apr. 3, 2008).

principle that a lawful prior use is the prerequisite to a nonconforming use permit. *See* ***Foresight, Inc. v. Babl***, 211 Wis. 2d 599, 602, 565 N.W.2d 279 (Ct. App. 1997).

¶4 The appellants were not named as defendants in the action and the trial court denied the Zoning Board's motion to join the appellants as parties. The circuit court agreed with the plaintiffs that the Town's prior ordinances permitted no more than one camping unit per lot, and granted the relief requested in the complaint. The court also denied the Zoning Board's motion to dismiss the action as untimely with regard to all permits issued before January 2007. On appeal the appellants contend that the action was timely only as to Chris and Anne Davenport, Steven and Gerry Lippelt, and Marvin and Jennifer Wrege, who received their permits as a result of the January 2007 hearing.

¶5 WISCONSIN STAT. § 62.23(7)(e)10. (2005-06)[2] provides that a person aggrieved by a zoning board decision must file a circuit court review within thirty days of the decision. Consequently, the complaint, filed in February 2007, was timely only as to the six appellants named above. The action was not timely as to the remaining appellants, all of whom received their permits between July 2006 and November 2006.

¶6 The circuit court held that the WIS. STAT. § 62.23(7)(e)10. limitation did not apply because the Zoning Board acted illegally when it issued the permits. In support of its decision the court cited ***Goldberg v. City of Milwaukee Board of Zoning Appeals***, 115 Wis. 2d 517, 522-23, 340 N.W.2d 558 (Ct. App. 1983),

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

which holds that the thirty-day limitation does not apply to decisions that are void because they exceed the zoning board's authority. In ***Goldberg***, the board issued a permit and then revised it without notice to the permit holder. ***Id.*** at 519. By failing to give notice, the board exceeded its authority. ***Id.*** at 522-23. Here, the Zoning Board undisputedly had authority to make the permit decisions in the manner it did, and the only question is whether the decisions were correct under the law. Even if the Board's interpretation of the law was incorrect, that fact would not render its decisions immune from the § 62.23(7)(e)10. limitation. To hold otherwise would render the limitation meaningless, because every petition would have to be decided on the merits regardless of when it was filed.

¶7 As to Chris and Anne Davenport, Steven and Gerry Lippelt, and Marvin and Jennifer Wrege, neither the Zoning Board nor Doubek, Pavlas and Stacy have filed a brief in this appeal. On February 21, 2008, we issued a delinquency notice stating that if the respondents did not file their briefs within five days, or show good cause for an extended briefing deadline, "the judgment or order appealed from will be disposed of summarily and may be summarily reversed …." On March 5, 2008, we issued an order noting the respondents' failure to file briefs or otherwise respond to our February 21 notice, and declared that we would only consider the appellants' brief when deciding the appeal. We conclude that by failing to file briefs, the Zoning Board and Doubek, Pavlas and Stacy have conceded that the appellants' brief correctly argues that the trial court erred by declaring the non-conforming use permits void. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted). On remand we direct the circuit court to enter judgment dismissing the complaint of Doubek, Pavlas and Stacy.

By the Court.—Judgment reversed and cause remanded.

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