COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2809 **Cir. Ct. No. 2006CV103**

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

RONALD J. FUGIEL, SR., LUANN FUGIEL, WALTER PIKORZ, CHARLOTTE PIKORZ, GERALD BRENNECK AND PENNY BRENNECK,

PETITIONERS-RESPONDENTS,

V.

PHIL MCLAUGHLIN, ADAMS COUNTY BOARD OF ADJUSTMENT AND ADAMS COUNTY,

RESPONDENTS,

MIDWEST PROPERTY MANAGEMENT,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Adams County: JAMES MILLER, Judge. *Affirmed*.

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

¶1 DYKMAN, P.J. Midwest Property Management (MPM) appeals from a circuit court order vacating the March 15, 2006 decision of the Adams County Board of Adjustment (BOA) granting MPM a special exception permit to develop a condominium resort on its property. MPM argues first that this appeal is moot, because the March 2006 decision of the BOA granted MPM the same rights that the BOA granted to MPM in December 2004.[1] Alternatively, MPM contends that the petitioning landowners (collectively, the Fugiels) did not timely file this certiorari action, depriving the circuit court of competency to proceed. Finally, MPM contends that the BOA acted properly on the law and the evidence before it in granting MPM the March 2006 special exception permit. We conclude that only the March 2006 permit is within the scope of our review; that this action was properly filed; and that the record does not demonstrate the BOA's reasoning in issuing the special exception permit to MPM. Accordingly, we affirm.

Background

¶2 The following undisputed facts are taken from the BOA hearing. MPM owns land on the shore of Lake Mason in the town of New Haven, Adams County. The property is accessible only through an easement over a private road. In August 2004, MPM applied for a special exception permit under ADAMS COUNTY ZONING ORDINANCE (ACZO) § 3-2.02 (1999) to develop its property despite the fact that the property does not abut a public road.[2] MPM also applied

[1] The BOA's December 2004 decision and its March 2006 decision are not identical, but both purport to grant MPM the right to develop a condominium resort on its property. Because the specific differences between the decisions are not relevant to this appeal, we will not set them forth at length.

[2] ACZO § 3-2.02 provides: "All lots shall abut upon a public street, and each lot shall have a minimum frontage of 33 feet."

(continued)

for a special exception permit under ADAMS COUNTY SHORELAND PROTECTION ORDINANCE (ACSPO) § 10.41 (1990) to allow it to develop a condominium resort on its property.[3] The BOA held a hearing on MPM's applications on December 15, 2004. At the conclusion of the hearing, the BOA granted MPM's requests. It then issued a written order granting the special exception permits to MPM.

¶3 In a letter dated January 7, 2005, the Adams County Zoning Administrator informed MPM that the December 15, 2004 BOA hearings were not properly noticed.[4] The letter stated that "[a]ll petitions heard on December 15th must be re-noticed and again heard by the Board of Adjustment."

All references to the ACZO are to the 1999 version.

[3] ACSPO § 10.4 provides:

> Special Exceptions. The following uses are permitted upon issuance of a Special Exception Permit according to the procedure set forth in Section 13.4 of this ordinance. Unless otherwise specified in the Special Exception Permit, any structure shall be set back at least seventy five (75) feet from a property line.
>
> 10.41. Hotels, *resorts*, taverns, and private clubs ….

(Emphasis added.) All references to the ACSPO are to the 1990 version.

[4] ACSPO § 13.44 provides:

> Notice of Public Hearing:
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> Before passing upon an application for Special Exception Permit, the Board of Adjustment shall hold a public [h]earing. Notice of such public hearing specifying the time, place and matters to come before the board shall be given in the manner specified in Section 13.53 of this ordinance, including mailed notice to the district and area offices of the Department of Natural Resources at least ten (10) days prior to the hearing.

ACSPO § 13.53 provides, in pertinent part:

(continued)

¶4 On January 14, 2005, the Fugiels filed a petition for certiorari review of the BOA's December 15, 2004 decision to grant special exception permits to MPM. On January 28, 2005, MPM filed a request for a variance from ACZO § 3-2.02, to allow MPM to develop its property despite the lack of road frontage.[5] The BOA held hearings on MPM's requests in March, April and May 2005. At the conclusion of the May 2005 hearing, the BOA denied MPM's requests. Believing that they had won, in June 2005 the Fugiels voluntarily dismissed their January 2005 certiorari action.

¶5 In November 2005, MPM filed another set of applications with the BOA. The November 2005 applications included an application for a variance from ACZO § 3-2.02, to develop the property despite the lack of road frontage, and an application for a special exception under ACSPO § 10.41, to develop a condominium resort. The BOA held a hearing on March 15, 2006, on MPM's applications. At the conclusion of the hearing, the BOA voted to grant MPM's requests. In a written decision, the BOA granted MPM's request for a special

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> 1. The Board of Adjustment shall fix a reasonable time for the hearing …; give public notice and such notice to be published in the official newspaper of the County by publishing a class two (2) notice thereof as defined in Section 985 of the Wisconsin Statutes, as well as due notice to the parties in interest, including mailing notice to the district and area offices of the Department of Natural Resources at least ten (10) days prior to the hearing. Such notice shall specify the date, time and place of the hearing and matters to come before the Board.

[5] The Zoning Administrator explained at the first hearing on MPM's variance request that he had advised MPM that it needed to file an application for a special exception to operate a resort and a variance to develop property not abutting a public road, rather than two special exception requests.

exception permit, and stated that "no action was taken in regard to the variance request as this is still under debate."

¶6 On April 11, 2006, the Fugiels filed this certiorari action challenging the BOA's March 15, 2006 decision. On April 28, 2006, MPM filed another set of applications with the BOA, one for a variance and one for a special exception. On May 17, 2006, the BOA held another hearing on MPM's applications. At the conclusion of the hearing, the BOA granted part of MPM's applications and denied part of its applications. On June 7, 2006, the Fugiels filed an amended complaint, again seeking review of the BOA's March 15, 2006 decision.

¶7 On August 7, 2008, the circuit court issued a decision in this action, finding that the BOA did not provide sufficient reasoning for its March 2006 decision. On September 22, 2008, the court filed a final order vacating the special exception permit the BOA granted to MPM on March 15, 2006, and vacating any action the BOA took following the filing of this action on April 11, 2006. The court remanded to the BOA for reconsideration. MPM appeals.

Standard of Review

¶8 On certiorari review, we consider whether the board acted within its jurisdiction; whether it acted according to a correct theory of law; whether its action was arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and whether its determination was reasonable based on the evidence before it. ***Mills v. Vilas County Bd. of Adjustments***, 2003 WI App 66, ¶11, 261 Wis. 2d 598, 660 N.W.2d 705.

Discussion

¶9 MPM argues first that this action is moot, asserting that it may act on its permits from December 2004 to build a resort condominium on its property, rendering the March 2006 permits unnecessary. Alternatively, it argues that the Fugiels have not properly commenced this certiorari action, or that if they have, we must affirm the BOA decision because the record establishes that the BOA acted properly in granting MPM the March 2006 special exception permit. We reject each of these contentions.

¶10 First, we do not agree with MPM that this action is moot based on the permits the BOA granted to MPM in December 2004. An appeal is moot when an appellate decision "is no longer needed or makes no difference as to the resolution of a controversy." ***Appel v. Halverson***, 50 Wis. 2d 230, 233,184 N.W.2d 99 (1971). Here, MPM has appealed from the circuit court order vacating the BOA's March 15, 2006 decision. The controversy in this case, then, is the BOA's March 15, 2006 decision, not its December 2004 decision. Because this is a certiorari action, resolution of this controversy requires that we review the March 15, 2006 decision to determine whether the BOA acted within its jurisdiction, on a proper interpretation of the law, on its judgment rather than its will, and reasonably on the evidence, in granting the March 2006 permit. *See* ***Mills***, 261 Wis. 2d 598, ¶11. This involves an analysis of both the BOA's written decision and the record before the BOA at the March 15, 2006 proceedings. *See* ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals***, 2005 WI 117, ¶¶25-35, 284 Wis. 2d 1, 700 N.W.2d 87.

¶11 MPM argues that we need not review the March 15, 2006 proceedings because the BOA granted it the right to develop a condominium resort

in the December 15, 2004 proceedings. Following MPM's argument to its logical conclusion, however, we are left with the question of why MPM filed the applications in this case if it believed it had already obtained the rights it now seeks. Ultimately, MPM has not explained why it believes that we must review the BOA's December 2004 decision granting MPM the right to develop a condominium resort on its property in order to determine whether the BOA acted properly in granting that right to MPM in the March 15, 2006 proceedings on a different set of applications. Because our decision on appeal will resolve the controversy in this case—whether the BOA properly granted a special exception permit to MPM on March 15, 2006—we conclude that this appeal is not moot.[6]

¶12 Next, MPM argues that the circuit court did not have competency to proceed in this action because the Fugiels did not timely file their certiorari petition. Under WIS. STAT. § 59.694(10) (2007-08),[7] "[a] person aggrieved by any decision of the board of adjustment … may, within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari." MPM argues that the BOA did not render a decision in this action until May 17, 2006, and that therefore the Fugiels' April 11, 2006

[6] Because we conclude that only the March 2006 action is before us based on our standard of review, we need not address the parties' arguments concerning the December 2004 permits or whether MPM is barred from raising those arguments based on the statute of limitations or equitable estoppel.

Additionally, we note that MPM is the appellant in this case, and that it is unusual for an appellant to argue that an appeal is moot. If MPM believed its appeal was unnecessary, it was free to voluntarily dismiss this appeal.

[7] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

certiorari petition was premature and did not vest jurisdiction in the circuit court. We disagree.

¶13 On March 15, 2006, the BOA granted MPM's special exception request to build a condominium resort, by written order. The Fugiels filed this action on April 11, 2006, within thirty days of that decision. To circumvent this fact, MPM argues that the Fugiels' actions following the BOA's March 15, 2006 decision preclude them from arguing that the March 15, 2006 BOA decision was final and thus subject to certiorari review. Specifically, MPM asserts that when the Fugiels initiated conversations with MPM regarding holding a rehearing to correct errors at the March 15, 2006 proceedings, they conceded that the March 15, 2006 BOA decision was not final.

¶14 The problem with MPM's argument, however, is that WIS. STAT. § 59.694(10) allows a party to petition for certiorari review within thirty days of a decision by the BOA, not within thirty days of when the parties agree that a BOA decision is final. Thus, whether or not the Fugiels "conceded" to MPM that it believed the March 15, 2006 decision was not final is irrelevant under § 59.694(10). The Fugiels filed this case within thirty days of the BOA's March 15, 2006 decision, and thus it was timely filed.

¶15 MPM also argues, however, that equitable estoppel bars the Fugiels from asserting that they properly commenced this action. *See* ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶33, 291 Wis. 2d 259, 715 N.W.2d 620. It contends that it relied on the Fugiels' representation that the March 15, 2006 proceedings needed to be redone. However, it does not explain how it relied on that representation to its detriment. It therefore has not established that equitable estoppel bars the Fugiels from asserting that they

properly filed this certiorari action.[8] *See* ***id.*** (equitable estoppel claim requires showing one relied on representation of another to one's detriment).

¶16 Finally, MPM argues that the BOA properly granted it the March 2006 permit on the evidence before it. It points to the following evidence from the March 15, 2006 hearing:[9] Charles Sweeney, counsel for MPM, explained the benefit of planned rain gardens on sedimentation; and Roger Lippitt, owner of MPM, explained that MPM's current plan for four condominium units was the same plan they had previously proposed when they applied with the BOA to develop twelve condominium units, and that the Department of Natural Resources had approved that plan.

¶17 The Fugiels respond that the BOA failed to comply with the ACZO and ACSPO and Wisconsin law in granting the March 15, 2006 special exception permit to MPM. First, the Fugiels cite ACSPO § 10.41 as requiring the BOA to evaluate MPM's petition for a special exception permit to develop a condominium resort "according to the procedure set forth in Section 13.4 of this ordinance." The Fugiels then cite § 13.42 as listing nine standards which the BOA is required to consider, and which the Fugiels assert the BOA did not evaluate at the March 15,

[8] MPM also argues that the Fugiels' certiorari action must fail because the Fugiels did not appeal from the BOA's May 17, 2006 decision. The Fugiels point out that they filed an amended complaint within thirty days of the BOA's May 17, 2006 decision. However, the BOA's May 17, 2006 decision is not before us on this appeal. This action arises from the Fugiels' certiorari petition following the BOA's March 15, 2006 decision, which was commenced on April 11, 2006. Any action by the BOA on the petitions in this case after that date is void, as jurisdiction had vested in the circuit court. *See* ***Mills v. Vilas County Bd. of Adjustments***, 2003 WI App 66, ¶15, 261 Wis. 2d 598, 660 N.W.2d 705.

[9] MPM also points to evidence presented at BOA hearings on its previous petitions. Because those hearings are not part of the record we review on this appeal, we do not consider that evidence. Additionally, we note that MPM does not point to any reasoning of the BOA at the previous hearings that would support its decision.

2006 proceedings or in its written order. The Fugiels also assert that the BOA decision cannot stand because there is no indication in the record of the BOA's reasoning process, as required under ***Lamar***, 284 Wis. 2d 1, ¶¶25-35 ("The decision of the board must contain reasons for the action taken." (citation omitted)).[10]

¶18 We conclude that the BOA's decision does not comport with ***Lamar*** or ACSPO because it does not provide any reasoning for its decision. As the Fugiels assert, and MPM does not dispute, the BOA's March 15, 2006 written decision and the transcript of the March 15, 2006 proceedings provide no reasoning for the BOA's decision to grant MPM a special exception permit under ACSPO § 10.41. While there was lengthy testimony and discussion regarding objections from homeowners in the area and MPM's attempts to address those concerns, there was no explanation by the BOA as to why it ultimately decided to grant MPM a special exception permit for a resort on its property. The BOA

[10] The Fugiels also argue that the BOA's May 17, 2006 decision was erroneous. However, as we have explained, that decision is not before us in this action. Additionally, the Fugiels contend that even if the BOA properly granted MPM a special exception permit to build a resort under ACSPO § 10.41, MPM may not act on that permit because it still needs to comply with ACZO § 5-12.00, which prohibits resorts in the district in which MPM's property is located, thus necessitating a variance. MPM replies that it does not need a special exception permit under ACSPO § 10.41 or a variance under ACZO § 5-12.00 because it will only be building single family residences, not a resort, on its property. Our review, however, is limited to the BOA's decision to grant a special exception permit to MPM to build a resort condominium under ACSPO § 10.41. Because the parties' arguments on these extraneous issues extend beyond the scope of our review, we decline to address them. We note, however, that MPM's permit applications state that it applied for permits for a "condominium resort," and that it is difficult to follow MPM's argument that it does not need the permits that have been the subject of years of BOA proceedings.

decision is therefore insufficient under ***Lamar*** and the ACSPO.[11] Accordingly, we affirm the circuit court order remanding to the BOA for further proceedings.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[11] MPM also argues that WIS. STAT. § 703.27 prohibits zoning ordinances from discriminating against condominiums. However, MPM does not explain how that statute is implicated by the facts of this case. We therefore will not address that argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).