COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1754-FT

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

STATE OF WISCONSIN EX REL. HOEY OUTDOOR ADVERTISING, INC.,

PLAINTIFF-APPELLANT,

V.

POLK COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Polk County: ROBERT H. RASMUSSEN, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Hoey Outdoor Advertising, Inc., appeals a judgment affirming the Polk County Board of Adjustment's determination that a land use ordinance requires that no sign greater than ninety-six square feet may be

placed in a commercial district without a variance approval.[1] Hoey first contends that the board did not act according to law because it acted under an erroneous interpretation of the ordinance. We conclude that the land use ordinance covering sign size is ambiguous. Because the board's interpretation of the ordinance is consistent with the ordinance's legislative purpose and the history of its application and because the board's interpretation is entitled to deference, we conclude the board's interpretation is reasonable and that it acted according to law. Hoey also contends that the board's action was not based on the evidence and was therefore arbitrary and capricious. We disagree and affirm the trial court's judgment affirming the board's determination.

Hoey sought to place a billboard in excess of ninety-six square feet upon commercially-zoned land. The zoning administrator advised Hoey that it needed to secure a variance from the board to build a sign larger than ninety-six square feet. Hoey contended that the zoning administrator had misinterpreted the applicable zoning ordinances and appealed the administrator's interpretation to the board. In its appeal to the board, Hoey contended that the applicable ordinances do not restrict the size of signs placed in commercial districts. The board concluded that the ninety-six-square-foot restriction was applicable to commercially zoned districts, and accordingly, supported the administrator's interpretation of the applicable ordinances. Hoey sought certiorari review of the board's determination. The circuit court affirmed the board's determination.

As a preliminary matter we note that the circuit court considered evidence outside of the return without objection by either party. The parties did

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

not address the nature of the certiorari review (as statutory or common law certiorari review) or the court's authority to consider evidence outside of the return. Because this issue is not raised, we do not address it. ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992).

Section 59.694(10), STATS. (formerly § 59.99, STATS.), provides for statutory certiorari review of board of adjustment decisions. When conducting statutory certiorari judicial review, our standard of review of the circuit court decision is de novo. ***State ex rel. Hippler v. City of Baraboo***, 47 Wis.2d 603, 616, 178 N.W.2d 1, 8 (1970). When reviewing a decision by statutory certiorari, we accord a presumption of correctness and validity to the decision of the board. ***Arndorfer v. Sauk County Bd. of Adjust.***, 162 Wis.2d 246, 253, 469 N.W.2d 831, 833 (1991). The scope of our inquiry is limited to whether: (1) the agency kept within its jurisdiction; (2) the agency acted according to law; (3) its action was arbitrary, oppressive and unreasonable, representing its will and not its judgment; and (4) the evidence was such that the agency might reasonably make the determination that it did. ***Id***. at 254, 469 N.W.2d at 834. The board's findings will not be disturbed if any reasonable view of the evidence sustains them. ***Snyder v. Waukesha County Zoning Bd. of Adjust.***, 74 Wis.2d 468, 476, 247 N.W.2d 98, 103 (1976).

On appeal, Hoey contends: (1) the board did not act according to law; and (2) the board's action was not based on the evidence and was therefore arbitrary and capricious representing its will and not its judgment.

Hoey first maintains the board did not act according to law because it acted under an erroneous interpretation of the ordinance. Hoey argues that the ninety-six-square-foot sign limitation applies only to signs in residential districts

and that the Polk County land use ordinances do not restrict the size of signs displayed in commercially-zoned districts. The board contends that it acted according to law because a reasonable person could conclude that the land use ordinance in question limits signs in commercial districts to ninety-six square feet.

Ordinarily, interpretation of an ordinance is a question of law we review de novo. ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996). The purpose of ordinance interpretation is to give effect to the intent of the legislative body that passed the ordinance. ***Zimmerman v. DHSS***, 169 Wis.2d 498, 504, 485 N.W.2d 290, 292 (Ct. App. 1992). If the meaning of the ordinance is plain from the language, then we apply the ordinance to the facts. ***Village of DeForest v. County of Dane***, 211 Wis.2d 804, 807-08, 565 N.W.2d 296, 299 (Ct. App. 1997). Only when the ordinance is ambiguous do we resort to legislative history and matters extrinsic to the language of the ordinance. ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 32-33, 498 N.W.2d 842, 850 (1993). The rules of statutory construction apply to the interpretation of ordinances. ***Id***. On review, we are not bound by the board's interpretation, but in certain situations we may defer to it. ***Id***.

POLK COUNTY, WI, COMPREHENSIVE LAND USE ORD. § XVIII (rev. 1993), provides:

> A. Signs in Residential districts will be limited to resident identification and Professional business identification.
>
> 1. Signs in this district would be limited to 2 square feet total area. Signs in Recreation areas will be allowed only on adjacent lands to business advertised.
>
> 2. No sign in this district will be larger than 96 square feet. Signs in Forestry and Conservancy districts by Conditional Use Permits only. Signs allowed in all districts of Agricultural, Restricted Commercial,

> Commercial and Industrial providing they meet the requirements of the Ordinance.

We conclude that the ordinance is ambiguous. The test of ambiguity is whether the ordinance is capable of being construed in more than one way by reasonable people. ***Wagner Mobil, Inc. v. City of Madison***, 190 Wis.2d 585, 592, 527 N.W.2d 301, 303 (1995). First, we note that the subject of section A of the ordinance is "signs in residential districts." The first sentence of subsec. 1 refers to "this district" and limits sign size to two square feet total area. The second sentence refers to recreation areas. The first sentence of subsec. 2, however, again refers to "this district" and contains the restriction of ninety-six square feet. The subsequent sentences of subsec. 2 contain references to forestry, conservancy, agricultural, restricted commercial, commercial and industrial districts. If both broad references to "this district" apply to residential districts referred to in section A, the ordinance is inherently contradictory because it would limit sign size in residential districts to both two square feet and to no larger than ninety-six square feet. If, however, the restriction of ninety-six square feet does not refer to residential districts, then use of the phrase "this district" in subsec. 2 is confusing because it precedes the discussion of commercial districts but follows discussion of residential districts and recreation areas. The object of the phrase "this district" in subsec. 2 is ambiguous. Based upon the contradictions and lack of clarity within the ordinance, we conclude that provisions of the ordinance are ambiguous and must therefore be subject to interpretation.

We next examine the scope, history, context, subject matter and object of the ordinance to ascertain the intent of the legislative body that passed it. ***Tahtinen v. MSI Ins. Co.***, 122 Wis.2d 158, 166, 361 N.W.2d 673, 677 (1985).

While the ordinance is ambiguous, its purpose is clearly identified to: promote the health, safety, comfort, prosperity and general welfare of Polk County. POLK COUNTY, WI, COMPREHENSIVE LAND USE ORD. § I a. Thus, preserving aesthetic areas from unsightly billboards and signs is a legitimate construction in furthering the legislative purpose of this ordinance. A size restriction implicates traffic safety considerations as well because large signs can be distractions to drivers and can potentially obstruct vision. An interpretation that permits sign placement without any restriction on size is inconsistent with the overall legislative purpose in adopting an ordinance that attempts to limit the size of signs in at least some districts.

The history of the application of this ordinance is also consistent with the zoning administrator's and board's interpretation limiting sign size. The history discloses that signs larger than ninety-six square feet had to specifically be approved by the board of adjustment in petitioning for a variance. Indeed, the City of Amery sought and received permission to erect a larger sign in an agriculturally- zoned district. The board also permitted a sign larger than ninety-six square feet in a commercially used zone when an application for a variance was filed. This history is consistent with the board's current interpretation of the meaning and effect of this ordinance.

Further, while questions of statutory construction are questions of law we generally review de novo, we can accord great weight to a reasonable construction and interpretation of an ordinance by the body charged with the responsibility of its application. ***Schmidt v. Employe Trust Funds Bd***., 153 Wis.2d 35, 40, 449 N.W.2d 268, 270 (1990). Also, reviewing courts accord a decision of a board of adjustment a presumption of correctness and validity. ***Snyder***, 74 Wis.2d at 476, 247 N.W.2d at 103. Under § 69.694(7), STATS., the

board is expressly charged with the responsibility of hearing and deciding appeals alleging that administrative officials erred in administering, applying and enforcing decisions or determinations made in the enforcement of planning and zoning issues under § 59.69, STATS. If the board reached a reasonable interpretation of the ordinance it is charged with enforcing, we will affirm. ***Kannenberg v. LIRC***, 213 Wis.2d 373, 385, 571 N.W.2d 165, 171-72 (Ct. App. 1997). Considering the presumption of correctness, the board's statutorily granted authority and experience considering these matters, and our de novo interpretation of the ordinance, we conclude that the board's interpretation is reasonable and that it acted according to law.

Hoey further contends that the board's judgment was not based on the evidence presented and was, therefore, arbitrary and capricious, representing its will and not its judgment. The sufficiency of the evidence controls whether the board's judgment was arbitrary and capricious. ***State ex rel. Harris v. Annuity & Pension Bd.***, 87 Wis.2d 646, 652, 275 N.W.2d 668, 671 (1979). On certiorari review, we apply the substantial evidence test to ascertain whether the evidence before the board was sufficient. ***Clark v. Waupaca County Bd. of Adjust.***, 186 Wis.2d 300, 304, 519 N.W.2d 782, 784 (Ct. App. 1994). Substantial evidence is such evidence that reasonable persons could reach the same decision as the board. ***Id***. "If any reasonable view of the evidence would sustain the board's findings, they are conclusive." ***Id***. at 304-05, 519 N.W.2d at 784.

The issue identified on Hoey's application for appeal was the zoning administrator's determination that Hoey needed a special use permit or variance to erect a sign larger than ninety-six square feet on commercially-zoned property. The only issue before the board, therefore, was an interpretation of the ordinance. Hoey's contention that there is nothing in the record to support the board's

decision is without merit. The board had before it Hoey's application to erect a sign larger than ninety-six square feet, the entire comprehensive land use ordinance and the zoning administrator's interpretation. In addition, Hoey's attorney offered his interpretation of the ordinance at the appeal hearing. The board could also consider its past experience with property owners seeking to erect signs larger than ninety-six square feet. Based upon this evidence, it was reasonable for the board to conclude that signs in all districts except residential districts are restricted to ninety-six square feet or smaller and that to exceed this standard would require a variance. Accordingly, we conclude the board's decision was supported by substantial and credible evidence and was not arbitrary and capricious.

Because we conclude that the board acted according to law and that the board's action was not arbitrary or capricious, we affirm the board's determination that the sign size limitation applies to commercial districts. The circuit court's judgment affirming the board's decision is therefore affirmed.

By the Court.—Judgment affirmed.

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