COURT OF APPEALS DECISION DATED AND FILED

September 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0196-FT

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

PATRICK M. CURRAN AND BETTY A. CURRAN,

PETITIONERS-RESPONDENTS,

V.

LANGLADE COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Reversed*.

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. The Langlade County Board of Adjustment appeals from a circuit court judgment reversing its decision relating to property owned by Patrick and Betty Curran. The issue is whether the board correctly determined that the Currans were required to apply for a zoning variance. We reverse the circuit court and, therefore, affirm the board's decision.[1]

¶2 The Currans applied for a building permit to add to the living space of their house near a lake in Langlade County. Under the county zoning ordinance as it existed at the time, the house was already a nonconforming structure because of its short distance from the lake. One of the requirements for adding on to a structure of this type is that "expansion is limited to a maximum 1,500 square feet of enclosed space (total of existing and proposed construction)." LANGLADE COUNTY, WIS., ORDINANCES, § 17.12(3)(c)2.b.(3) (1998). The zoning administrator denied the permit because, by her calculation, the total area of enclosed space would exceed 1,500 square feet.

¶3 The Currans next petitioned the Board of Adjustment for a variance from that ordinance. The board denied the petition. The Currans then filed for certiorari review of the board's decision under WIS. STAT. § 59.694(10) (1999-2000).[2] Once in circuit court, the Currans changed their tack and argued that no variance was required because the total area would be less than 1,500 square feet. In response, the board argued that the Currans were now seeking review of the zoning administrator's decision, but the time for doing so had passed under a county ordinance and § 59.694(4). The court concluded that the issue was whether the ordinance phrase "enclosed space" is applicable to the Currans'

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[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000).

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

basement.[3] The court believed the record was insufficient to resolve this issue, and it remanded to the board.

¶4 On remand, the board held a further proceeding and again denied the petition. The board meeting included testimony from Patrick Curran describing the nature and use of the structure and a site visit by the board to the property. Although the board members did not appear to expressly arrive at a mutually agreed on definition of "enclosed space," the discussion shows that the four of the five members who spoke on the subject believed the Currans' basement was enclosed space. In describing the basement after their visit, they noted that a significant portion of the basement was finished with carpeting, drywall, paint, wallpaper, lighting, and hardwood molding.

¶5 The case returned again to circuit court. The court addressed one issue—whether the total area would be more than 1,500 square feet. The court concluded that the Currans' basement is not included in the term "enclosed space." The court wrote:

> The [c]ourt could disregard the basement entirely if it is only an area used as a temporary overflow for children and grandchildren and not for any daily living purposes on a year round basis such as a basement which is used as a lower level of the home.
>
> In this situation, the Zoning Administrator should have disregarded the basement as it is used on a temporary basis, similar to a non-finished basement which had beds for temporary overflow, two or three times per year.

[3] The court actually used the phrase "enclosed dwelling space," but that phrase is not used in the ordinance.

> Thus, the square footage is under 1500 square feet and the Zoning Office will grant a building permit on Plaintiff's request.

¶6 On appeal, the board again emphasizes that we should review the decision of the board to deny the variance, and not the zoning administrator's decision as to whether a variance is necessary because the structure would exceed 1,500 square feet. However, in the current posture of the case, we believe the question of the structure's area is properly before us. When the circuit court remanded for the board to state its view as to why the phrase "enclosed space" applied to the basement and its calculation of the area, the court was essentially ordering the board to treat the matter as if it were an appeal from the zoning administrator's decision. The board did not challenge the circuit court's remand order by appealing to this court, and the propriety of that order is not before us in this appeal from the later order. *See* WIS. STAT. RULE 809.10(4) (appeal brings before this court only prior *nonfinal* orders or judgments) and ***Bearns v. DILHR***, 102 Wis. 2d 70, 76, 306 N.W.2d 22 (1981) (circuit court order remanding to agency is final and appealable as a matter of right). Therefore, regardless whether the circuit court's earlier order was correct in remanding for that purpose, we will treat the matter as the board itself did on remand, by reviewing whether the Currans' structure would exceed the allowed area.

¶7 The parties also disagree about whether we should review the decision of the board, as opposed to the decision of the circuit court. The parties agree that in traditional common law certiorari we would review the decision of the agency, not the circuit court. However, the Currans argue that in this case we should review the circuit court's decision because the court took additional evidence, as allowed by WIS. STAT. § 59.694(10). That statute provides in relevant part: "If necessary for the proper disposition of the matter, the court may take evidence, … which shall constitute a part of the proceedings upon which the determination of the court shall be made."

¶8 The Currans argue that the court took evidence in two forms. First, they argue that when the record of the board's additional proceeding on remand was forwarded to the court, that was the taking of evidence under WIS. STAT. § 59.694(10). They cite no authority for this argument, and we reject it. The forwarding of an agency record cannot reasonably be described as the taking of evidence by the court. The Currans also argue that the court took evidence at its first hearing, before remanding to the board, in the form of exhibits. We reject this argument for several reasons. First, when counsel for the board objected to the submission of material outside the board record, counsel for the Currans stated that the exhibits were intended to be "visual aids to assist the court." Second, little of the material was of a factual nature. It consisted of copies of papers already in the record, ordinances, counsel's descriptions of material in the record, and citations to case law. Finally, to the extent that any of this material could fairly be described as evidence, it went to the court's first order remanding to the board, and that is not before us in this appeal. In the court's preparation of the order now before us, issued after the remand, the court did not take evidence. We therefore review the decision of the board.

¶9 On the merits of the appeal, the issue is the same in this court as in the circuit court: does the Currans' proposed structure exceed 1,500 square feet? To answer this question, it is necessary to determine which parts of the structure qualify as "enclosed space." The Currans argue, and the board does not dispute, that this term is not defined in the ordinance. The Currans argue that the term is ambiguous and an ambiguous zoning ordinance should be interpreted in favor of unencumbered free use of property.

¶10 Contrary to what the Currans imply, however, their cited case law does not hold that when an ordinance is ambiguous, the property owner automatically prevails and is entitled to make whatever use of the property is desired, without regard to any reasonable reading of the ordinance. The case law demonstrates that the court should choose the *interpretation of the ordinance* that allows for the freer use of property. *See, e.g.,* ***Cohen v. Dane County Bd. of Adjustment***, 74 Wis. 2d 87, 92, 246 N.W.2d 112 (1976) (stating "an ambiguous term in a zoning ordinance must be construed in favor of the free use of private property, and unless this court can be satisfied that [Cohen's use of the property] … is unambiguously a 'truck terminal,' it is not a prohibited use"); ***Bur v. Schwarten***, 83 Wis. 2d 1, 8, 264 N.W.2d 721 (1978) (stating that when ordinance is silent, "the interpretation allowing for the greater use of the land must be followed").

¶11 We agree that the ordinance is ambiguous. "Enclosed space" might literally include garages, sheds, unheated porches, or unfinished basements. Or, it might also be reasonably read as limited to space that is ordinarily thought of as habitable. The zoning administrator adopted a limited definition. She testified that she viewed "enclosed space" as including space "which is used for daily living activities on a year round basis." This phrase was also used by the trial court in its decision. On appeal, the Currans never expressly state their own interpretation of the ordinance. However, they appear to support the trial court's application of the administrator's language, and therefore we will review that analysis.

¶12 In the proceedings before the board, Patrick Curran stated that the basement beds were used only on three holidays during the year. As we quoted more fully above, the circuit court concluded that the basement should not be included because “it is only an area used as a temporary overflow for children and grandchildren and not for any daily living purposes on a year round basis such as a basement which is used as a lower level of the home.”

¶13 The circuit court’s view apparently is that the phrase “daily living activities” means that the activities must occur in the basement on a daily basis, as the space is now used by the current owner. This is not a reasonable interpretation. It is unreasonable because it focuses on the owner’s actual current use of the space, rather than on what the space is capable of being used for, either by this owner in the future or by another owner. It is not reasonable to focus on the current owner’s current use because either the use or the owner may change in the future. Furthermore, to put the focus on the owner’s current use means that the factual record may consist primarily of the applicant’s own description of the use, which may be unreliable because it is self-serving.[4] A far more reasonable interpretation is to focus on the physical qualities of the space, which can be independently observed and are less easily changed. Therefore, we regard “daily living activities” to be a general description of the types of activities for which the space is suitable, such as eating, socializing, sleeping, and other ordinary indoor activities that often occur on a daily basis.

¶14 The only remaining question is whether the board correctly determined the amount of space that it believed was “enclosed.” The Currans argue that the board’s decision was arbitrary and capricious because the board did

[4] We note in this case that although the Currans said the bedrooms were used only on three holidays per year, and describe that evidence as uncontested, one of the board members, following the site visit on May 15, 2000, stated that one of the bedrooms “appeared to be a lived in bedroom.”

not state on the record how it calculated square footage and which areas of the Curran residence were included. We disagree. After the site visit, board members discussed the measurements taken during the site visit. One member stated that the upstairs was measured as 1,046 square feet, and the basement, not including the bathroom, was measured at 718 square feet. The Currans did not object at the hearing to these measurements or ask for further clarification. The board counted all of this as enclosed space. This process was not arbitrary or capricious. Accordingly, we reverse the circuit court's judgment reversing the board's decision.

By the Court.—Judgment reversed.

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