COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1703 **Cir. Ct. No. 98-CV-308**

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

JOHN HAHN AND GLORIA HAHN,

PLAINTIFFS-RESPONDENTS,

V.

TOWN OF TRENTON ZONING BOARD OF APPEALS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Reversed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 SNYDER, J. The Town of Trenton Zoning Board of Appeals (Board) appeals from an order of the circuit court reversing the Board's decision to deny John and Gloria Hahn's application for a building permit. The Board argues that substantial evidence exists to support its denial of the permit

application, that its findings and inferences are sound and reasonable, and that the circuit court erred in ruling otherwise. We agree and reverse the order of the circuit court.

FACTS[1]

¶2 The Hahns own an approximately 20-acre parcel of land in the Town of Trenton. The Hahns lease approximately 12 acres to a tenant; approximately 1 to 2 acres of the property contain fruit trees and the remainder of the land is low-lying swamp. The Hahns also store a variety of farm machinery, large construction implements, other building materials and miscellaneous items on the property. The Hahns have received multiple citations by the Town of Trenton for junk storage and John Hahn has sold farm machinery from his property.

¶3 On November 27, 1997, the Hahns filed an application for a building permit to construct a pole barn on the property. The property was zoned EA Exclusive Agricultural District at the time of the application for the building permit. The zoning administrator denied the Hahns' request for a building permit. The Hahns appealed to the Board, which affirmed the zoning administrator's

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[1] The Board's factual recitation does not contain appropriate record citations. The Board fails to provide citations to the record's numerical references and instead merely references its own appendix or simply cites "Transcript" with a page number. The Hahns' brief statement of the case does not contain any record citations. WISCONSIN STAT. RULE 809.19(1)(d) and (3) (1999-2000) of the rules of appellate procedure requires parties to set out facts "relevant to the issues presented for review, with *appropriate references to the record*." (Emphasis added.) An appellate court is improperly burdened where briefs fail to appropriately cite to the record. ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). We therefore hold both parties to the facts as set forth in the briefs.

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

decision to deny the building permit on May 2, 1998; the Board concluded that under the applicable ordinance, an accessory structure could not be built on the property unless a principal residence was first constructed.

¶4 The Hahns filed a petition for certiorari review of this decision on June 18, 1998. On March 15, 1999, the circuit court held that the Board erred in its interpretation of the applicable ordinance in that agriculture is the primary use in an Exclusive Agricultural District and therefore no residence need be present before an accessory structure can be built. The circuit court remanded the matter back to the Board for a hearing on the issue of whether the proposed structure was consistent with agricultural use.

¶5 During the course of this litigation the Town of Trenton re-codified its zoning code. As part of that process, the Hahns' property was rezoned to Country Estates District 10, which specifically provides that a principal dwelling must exist before any other permitted or accessory uses or structures are allowed. In addition, accessory buildings are limited to a maximum of 1400 square feet.

¶6 After repeated requests for a new hearing, the Hahns filed a mandamus action to compel the Board to hold the remanded hearing. Hearings were held on December 9, 2001, and January 9, 2002, after which the Board again denied the Hahns' application, concluding that the Hahns' proposed use of the structure was inconsistent with agriculture. The Hahns filed a second petition for certiorari review and the circuit court reversed the Board's decision, holding that it was arbitrary and based upon an incorrect theory of law. The Board appeals.

DISCUSSION

¶7 The Hahns filed this certiorari action pursuant to WIS. STAT. § 62.23(7)(e)10.[2] Statutory certiorari review is not for resolving disputes; rather, it exists only to test the validity of agency decisions. ***Winkelman v. Town of Delafield***, 2000 WI App 254, ¶3, 239 Wis. 2d 542, 620 N.W.2d 438. The scope of certiorari extends to all questions of jurisdiction, power and authority of the inferior tribunal to do the action complained of and all questions relating to the irregularity of the proceedings. ***Id***. at ¶5. In its essence, circuit court review is supervisory in nature. ***Id***.

¶8 The scope of certiorari review is limited to whether the agency: (1) kept within its jurisdiction, (2) acted according to law, (3) did not act arbitrarily or unreasonably or according to its will and not its judgment, and (4) made a decision based on evidence one might reasonably use to make the

[2] WISCONSIN STAT. § 62.23 addresses city planning; para. (7)(e) specifically addresses zoning and the board of appeals. Section 62.23(7)(e)10 states:

> Any person or persons, jointly or severally aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board of appeals, commence an action seeking the remedy available by certiorari. The court shall not stay proceedings upon the decision appealed from, but may, on application, on notice to the board of appeals and on due cause shown, grant a restraining order. The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof. If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review.

determination in question. ***Id***. at ¶3. Statutory certiorari review can only be brought by a party affected by an agency decision for the purpose of testing the validity of that decision. ***Id.***

¶9 In certiorari proceedings, we review the decision of the agency, not the circuit court. ***Tateoka v. City of Waukesha Bd. of Zoning Appeals***, 220 Wis. 2d 656, 663, 583 N.W.2d 871 (Ct. App. 1998). Generally, the review standards of common law certiorari apply in a statutory certiorari case, like the one before us, if "a circuit court is empowered under the statute providing for certiorari to take evidence on the merits of an administrative decision but takes no such evidence ...." ***Hoepker v. City of Madison Plan Comm'n***, 209 Wis. 2d 633, 643, 563 N.W.2d 145 (1997) (citation omitted). While WIS. STAT. § 62.23(7)(e)10 allows the circuit court to take additional evidence, there is nothing in this record to indicate, nor have the parties asserted, that the circuit court did, in fact, take additional evidence. Thus, under common law certiorari, "the findings of the [approving authority] may not be disturbed if any reasonable view of the evidence sustains them ...." ***Hoepker***, 209 Wis. 2d at 643 (citation omitted).

¶10 Agency fact-finding is viewed through the substantial evidence test; "[s]ubstantial evidence does not mean a preponderance of the evidence." ***Madison Gas & Elec. Co. v. PSC***, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982). The test for substantial evidence is whether reasonable minds could arrive at the same conclusion as reached by the agency after considering all of the record's evidence. *See* ***Robertson Transp. Co. v. PSC***, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968). An agency's fact-finding may be supported by substantial evidence even though it is contrary to the great weight and clear preponderance of the evidence. *See* ***id***. Only if a reasonable person could not have made the finding from the evidence

will agency fact-finding be set aside. *See* ***Daly v. DNR***, 60 Wis. 2d 208, 220, 208 N.W.2d 839 (1973).

¶11 The Board argues that substantial evidence exists to support its denial of the Hahns' application and that its findings of fact are sound and reasonable and therefore the circuit court erred in ruling otherwise. The Hahns, agreeing with the circuit court's conclusion, argue that the Board applied an incorrect theory of law and its decision was arbitrary and unreasonable. We agree with the Board.

¶12 The Board denied the Hahns' application for a building permit because it concluded that the Hahns' proposed structure was inconsistent with the zoning ordinances applicable at that time. Section 10-1-10 of the Town of Trenton zoning ordinances addresses jurisdiction and general provisions; section 10-1-10(a) states that the jurisdiction of the chapter applies to all structures, lands, water and air within the Town of Trenton. Section 10-1-11 addresses use regulations and states, in relevant part:

> (a) **Principal/Permitted Uses**. Only those principal uses specified for a district (sometimes referred to as a permitted use), their essential services and the following uses shall be permitted in that district.
>
> (b) **Accessory Uses**. Accessory uses and structures are permitted in any district but not until their principal structure is present or under construction. Residential accessory uses shall not involve the conduct of any business, trade or industry, except home occupations and professional home offices as defined in this Code.

¶13 Section 10-1-20 establishes zoning districts. At the time the Hahns applied for the building permit, their property was zoned EA, Exclusive Agricultural. Section 10-1-22 addresses the Exclusive Agricultural District and states:

> **(a) Purpose**. The EA Agricultural District is intended to maintain, enhance and preserve agricultural lands historically utilized for crop production and the raising of livestock. The district is further intent upon preventing the premature conversion of agricultural land to scattered residential, commercial and industrial uses. Uses permitted in the EA Agricultural District shall be consistent with those uses permitted by Sec. 91.75[3] of the Wisconsin Statutes, as may be amended from time to time. (Footnote added.)

Principal permitted uses include apiculture, dairy farming, floriculture, grazing and pasturing, livestock raising, orchards, plant nurseries, poultry raising and egg production, raising of grain, grass, mint and seed crops, raising of tree fruits, nuts and berries, sod farming, vegetable raising, viticulture and general farm buildings, including barns, manure storage facilities, silos, sheds and storage bins. Sec. 10-1-22(b).[4]

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[3] **91.75 Ordinance standards.** A zoning ordinance shall be deemed an "exclusive agricultural use ordinance" if it includes those jurisdictional, organizational or enforcement provisions necessary for its proper administration, if the land in exclusive agricultural use districts is limited to agricultural use and is identified as an agricultural preservation area under any agricultural preservation plans adopted under subch. IV and if the regulations on the use of agricultural lands in such districts meet the following standards which, except for sub. (4), are minimum standards:

....

(3) No structure or improvement may be built on the land *unless consistent with agricultural uses*. (Emphasis added.)

WIS. STAT. § 91.75.

[4] Permitted accessory uses include supporting agricultural practices associated with the agricultural uses listed, private garages, home occupations, a roadside stand for selected farm products produced on the premises, forest and game management, ponds for private recreational purposes, satellite dish antennas, roof-mounted solar collectors and permitted accessory buildings. Sec. 10-1-22(c). The Hahns argue that the proposed structure would fall under the principal use category. The Board's January 30, 2002 decision never addressed the principal versus accessory use issue. Our analysis therefore focuses on principal permitted uses.

¶14 The question before the Board, then, was whether the Hahns' proposed building was a principal permitted use. The Hahns argue that their proposed structure, a pole barn, falls under the principal permitted use of general farm buildings, such as barns, manure storage facilities, silos, sheds and storage bins. Sec. 10-1-22(b)(14). However, the Hahns' label of the structure as a pole barn is not dispositive.

¶15 The key phrase in this ordinance is not "barns, manure storage facilities, silos, sheds and storage bins" but instead "general farm buildings." Use of the phrase "such as barns, manure storage facilities, silos, sheds and storage bins" indicates this list is illustrative of possible general farm buildings and is not meant to be an exhaustive list of general farm buildings. The purpose and intended use of the structure is what controls. *Cf.* ***State v. Okray Produce Co.***, 132 Wis. 2d 145, 151, 389 N.W.2d 825 (Ct. App. 1986) (identification of vehicle as "farm truck" is determined not by label or how vehicle looks but how it is used). The question then becomes is the Hahns' proposed structure a general farm building?

¶16 A "farm" is defined as

> a piece of land held under lease for cultivation ... any tract of land whether consisting of one or more parcels *devoted to agricultural purposes* generally under the management of a tenant or the owner ... any parcel or group of parcels of land cultivated as a unit ... a plot of land devoted to the raising of domestic or other animals.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 824 (3d ed. 1993) (emphasis added). We have used a nearly identical definition of "farm" in the past. *See* ***Dobberke v. Buser***, 8 Wis. 2d 40, 45, 98 N.W.2d 425 (1959). Thus, the

proposed structure is only a "general farm building" if it is used for agricultural purposes.

¶17 To determine whether the Hahns' proposed structure constitutes a general farm building, we must examine the findings of fact made by the Board. Again, the Board's factual findings may not be disturbed if any reasonable view of the evidence sustains them. *See* ***Hoepker***, 209 Wis. 2d at 643. The Board made the following findings of fact.

¶18 John Hahn testified that the parcel in question consists of approximately 20 acres, 12 of which are currently worked as cropland by his tenant. Approximately 6 acres are swamp and lowland and the remaining 1.5 to 2 acres are comprised of an apple and pear orchard. Hahn purchased the property from Gloria's father in 1976. The two-year lease with the tenant expires in November 2003 and John testified that he and his wife will grow crops themselves if they do not have a tenant. Gloria Hahn testified that the cropland had never been worked prior to or after 1995 and was only worked in 1995 when they took the hay off the cropland. The hay was sold at a loss approximately one year later.

¶19 John testified that there are approximately ten apple trees on the property and seven to eight pear trees and that he never sold any of the fruit picked off the trees but instead gave the fruit to friends and family. Hahn quit spraying the trees in 1997 because the spray became too expensive and the fruit crop was dormant, failing to produce any fruit the previous year.

¶20 Hahn further testified that none of the farm equipment located on the property is newer than the 1950s and none of the equipment has been used since 1995 or 1996. The plow was last used in 1995, the hay mowers were last used in 1994-95 and the tractor was used in 1995-96. The potato digger has never been

used by the Hahns but Gloria testified that she keeps it for sentimental value because it was owned by her father. Of the fifty-five gallon oil drum on the property, John testified that he has used approximately ten gallons of oil since 1994 or 1995 when the drum first was located on the property. The riding lawn mowers and tool trailer are currently used to maintain the property.

¶21 Although there were once bicycles on the property, John testified they have been removed. In 1994 and 1995, the bicycles were located near the side of the road with a "For Sale" sign. A "Wood For Sale" sign was removed from the property in summer 2001. There is also one 1962 collector car located on the property that is covered with a tarp. In addition, there is irrigation piping that has been located on the property for approximately five years; the pipes are ten to twelve feet in length and have not been used by the Hahns on the property. John testified that he has sold farm machinery from the property, specifically that he sold plows off the property, but no sales have occurred within the last five years.

¶22 The only disputed facts centered on whether the equipment and machinery on the property were operational and whether some or all of the equipment was related to farming and agriculture.

¶23 The Board concluded that the Hahns' request for the pole barn was not based upon the fact that the barn was "necessary and incidental" or even consistent with the principal use of the property, i.e., agricultural. The Board concluded that the uncontested evidence indicated that the portion of the property currently being used for agricultural purposes, the 12 acres leased to the tenant, had nothing to do with the Hahns' request for the barn and, in fact, the only way the cropland is impacted by the construction of the pole barn is the pole barn will actually decrease the amount of cropland available to the tenant.

¶24 Furthermore, the uncontested evidence demonstrates that none of the equipment on the property, with the possible exception of some chain saws, is necessary for the orchard located on the property. The Board concluded that the requested pole barn will serve as a storage facility to store all of the machinery and equipment on the property, none of which has anything to do with the current or future agricultural use of the property. Pursuant to the lease with the tenant, the Hahns could not start working the property themselves until 2004. While Hahn began digging a pond in 1992, no work had been done on the pond for ten years. The irrigation pipes had not been used in five years and no evidence was presented that they will be necessary in the future. Hahn testified that the one time they did harvest crops on the property, it took them approximately one year to sell the hay and they did so at a loss. The Board concluded that farming of the property is not a necessity to the Hahns.

¶25 The Board further found that the caterpillar and dragline located on the property were not related or incidental to farming. Furthermore, the Board concluded that the barn requested by the Hahns is "wholly disproportionate" to the amount of farming that is occurring or has ever occurred on the property. The Hahns applied to build a 3200 square foot pole barn at a cost of more than $32,000 for the purpose of storing equipment that has never been used on the property or has not been used in many years. The tenant who is currently using the property signed a lease to continue to use the property with the understanding that there is no barn. The Hahns have done no farming on the property in over twenty-five years with the exception of one hay crop which was unsalable for approximately one year. John testified that he will no longer pay for spray for the orchard; however, he wishes to build a barn to store the sprayer. The Board concluded that

the Hahns' request was for a storage building rather than an agricultural or farm-related building.

¶26 Hahn argues here, as he did before the Board, that some, if not all, of the items and machinery to be stored in the barn are farming-related and most farms have storage barns in which the farming equipment is stored; thus, as a matter of law, the use of the barn is incidental to and consistent with the agricultural use of the property. The Board conceded that while some of the equipment to be stored in the shed is agriculturally-related, none of the equipment has been used by the Hahns for farming purposes in more than one farming season in over twenty-five years. Much of the equipment has not been used since 1996 and some has never been used at all. The Board concluded that the Hahns' argument placed "form over substance" in that the only real represented use for the barn is storage of machinery and equipment.

¶27 In essence, the Board concluded that the Hahns' request for an agriculturally-related pole barn was disingenuous and that the only intended use of the proposed building was for the storage of outdated and unused machinery and equipment. A reasonable view of the evidence supports the Board's factual findings. *See* ***id.*** The Board therefore concluded that the proposed building was not consistent with agricultural uses and therefore not a general farm building, as farm is defined, generally understood and required by Town of Trenton zoning ordinance Sec. 10-1-22(b)(14). We conclude that the Board's conclusions are neither arbitrary nor unreasonable. We further conclude that the conclusions are supported by the evidence adduced at the hearing and that the Board's decision was consistent with the applicable zoning ordinances.

CONCLUSION

¶28 Substantial evidence exists to support the Board's denial of the Hahns' building permit application and its findings and inferences are sound and reasonable. We accordingly reverse the order of the circuit court and reinstate the Board's decision.

By the Court.—Order reversed.

Not recommended for publication in the official reports.