COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2158 **Cir. Ct. No. 02CV000662**

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

MEE BELLEVUE, LLC,

PLAINTIFF-APPELLANT,

V.

WINNEBAGO COUNTY AND WINNEBAGO COUNTY ZONING BOARD OF ADJUSTMENT,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. MEE Bellevue, LLC was denied a conditional use permit to construct a multi-family apartment development in the town of Menasha. MEE appeals from an order affirming the decision of the Winnebago County Zoning Board of Adjustment. We do not address MEE's initial argument that the

county's procedure for approval of conditional uses is statutorily flawed because it is a claim raised for the first time on appeal and without notice to the attorney general's office. We conclude that the town board, and in turn the board of adjustment, acted within its jurisdiction and according to the law, and its decision was not arbitrary, oppressive or unreasonable. We affirm the circuit court's order.

¶2 MEE owns vacant land in Menasha which is zoned R-5 under the Winnebago Town/County Zoning Ordinance. Multiple family dwellings are a permitted conditional use in the R-5 district. On September 5, 2001, MEE applied for a conditional use permit to construct a multi-family apartment complex of over 100 units on its property. A revised plan for 106 units was recommended for approval by the town's planning staff and the town planning commission. When the Menasha Town Board considered MEE's application, a petition signed by 234 residents opposed approval. The town board denied the application at its October 29, 2001 meeting and denied a permit for a modified proposal at its November 26, 2001 meeting. MEE's application was referred to and denied by the Winnebago County Planning and Zoning Committee.

¶3 MEE appealed to the Winnebago County Zoning Board of Adjustment. After taking testimony and evidence at a public hearing and reviewing the entire record before the town board, the board of adjustment remanded the application to the town board "with the direction that they provide appropriate, specific findings of fact based upon the record." In response, on May 28, 2002, the town board adopted a resolution embodying its specific findings of facts as to the denial of MEE's application. After receipt of the town board's specific findings, the board of adjustment affirmed the town board's denial of the application. MEE appealed the board of adjustment's decision by this certiorari action.

¶4 We review the decision of the board of adjustment. ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis. 2d 300, 303-04, 519 N.W.2d 782 (Ct. App. 1994). Our review is limited to "(1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably issue the order or make the determination in question." ***Id.*** at 304.

¶5 MEE first claims that the county's zoning ordinance makes a statutorily unauthorized delegation of a quasi-judicial function to the town board by allowing the town to step into the conditional use permit process at will.[1] MEE acknowledges that the issue was not raised in the circuit court and argues that the issue should be addressed despite waiver because it raises important constitutional and statutory questions of law. Although the issue presents a question of law, we do not have the benefit of the circuit court's ruling on the potentially complex constitutional issue. *See* ***Bloomer Housing v. City of Bloomer***, 2002 WI App 252, ¶12, 257 Wis. 2d 883, 653 N.W.2d 309 (despite de novo review, we benefit from

[1] The zoning ordinance requires the county zoning office to notify the appropriate town of the conditional use permit application. The ordinance provides:

> Approval of conditional uses may be by the County Planning and Zoning Committee alone, if the Town Board fails to take a position before, at, or by the end of any due extension of time after the hearing. Denial may be by the vote of either the County Planning and Zoning Committee or, if timely done, by the Town Board. The Town Board, however, shall not have the power to approve or disapprove conditional uses in any areas such as shorelands, where applicable statutes of the State of Wisconsin give such power exclusively to the County Board and the State of Wisconsin.

GENERAL CODE OF WINNEBAGO COUNTY, § 17.25(3)(a).

the circuit court's analysis). Further, there has been no notification to the attorney general's office regarding the constitutional issue and we have not had input from that office. *See* ***Midwest Mut. Ins. Co. v. Nicolazzi***, 138 Wis. 2d 192, 202-03, 405 N.W.2d 732 (Ct. App. 1987); WIS. STAT. § 806.04(11) (2001-02).[2] Thus, we do not address MEE's claim that the town board lacked proper authority to deny its conditional use permit because it is raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶6 MEE argues that by applying a certiorari standard of review, the board of adjustment did not apply the correct standard of review to the town board's denial. It claims that a de novo standard of review is applicable under the ordinance's provision that with respect to permits the board of adjustment "may reverse, affirm wholly or partly, modify the requirements appealed from, and may issue or direct the issue of a permit." GENERAL CODE OF WINNEBAGO COUNTY, § 17.32(4)(g). It contends that the board of adjustment, despite the evidence and testimony presented directly to it, unconditionally deferred to the findings of fact adopted by the town board.

¶7 We reject MEE's claim. MEE ignores that the board of adjustment is designated to hear an appeal; it acts as an appellate body and without specific authorization, an appeal does not involve a de novo determination on any matter but a question of law. That the board of adjustment may be authorized to take additional testimony and receive evidence does not convert its appellate function to de novo review. In a certiorari review, a circuit court may take additional

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

testimony and other evidence and yet is still bound by the certiorari standard of review. *See* ***Browndale Int'l Ltd. v. Board of Adjustment***, 60 Wis. 2d 182, 194, 208 N.W.2d 121 (1973); WIS. STAT. § 59.694(10).

¶8 We are not convinced that the board of adjustment merely deferred to the town board's decision.[3] The board of adjustment discussed the appropriate standard of review and upon concluding that the town board had not made the required specific findings, remanded the matter to the town board. The board of adjustment then reviewed the findings to assure that they were supported by evidence and supported the denial of the application. We conclude the board of adjustment conducted its review under the proper legal criteria.[4]

¶9 We turn to MEE's contention that the town board's denial of its conditional use permit was arbitrary, oppressive and unreasonable, and in turn the board of adjustment's decision should be reversed. The town board indicated that the overall density of the project was not in compliance with the comprehensive plan, not compatible with the surrounding area, and not within the capacity of the community's public service; that the project's design was not in harmony with the surrounding area and would be detrimental to the character of the neighborhood; that the proposed park had not been approved by the park commission; and that

[3] We reject Winnebago County's argument that the board of adjustment was merely reviewing the decision of the Winnebago County Planning and Zoning Committee and was limited, as that committee was, to deferring to the town board's action. To so hold would render the appeal to the board of adjustment meaningless.

[4] We need not address MEE's argument that a newly adopted provision that the board of adjustment's standard of review shall be "strictly substantive," GENERAL CODE OF WINNEBAGO COUNTY, § 17.32(4)(j), is ambiguous and that this court should construe it to permit the board of adjustment to act without any deference to the town board.

the additional traffic caused by the development would cause unsafe pedestrian and vehicular traffic conditions.

¶10 The town board found that the project had a density of eleven units per acre when most recent projects only had a density of around nine units per acre. MEE contends that the town board's calculation of the density is flawed because the board excluded the proposed park in determining the total acreage and that the real density is nine units per acre. The town board was free to adopt the density calculation (and the corresponding traffic trips per day) it deemed credible. There was evidence in the record to support the eleven units per acre density calculation. Using that determination, the town board's comparison of the density of MEE's project to the surrounding uses was not arbitrary or unreasonable.

¶11 There was evidence that the surrounding roads were inadequate to support both increased vehicular and pedestrian traffic. Although one road was designated for reconstruction, there was no indication when that would be undertaken. Thus, the town board's conclusion that the development would cause unsafe traffic conditions was supported by evidence and not unreasonable.

¶12 The town board's decision reflected its desire that the development include duplexes to serve as a buffer along the boundaries adjoining single family housing. MEE argues that the requirement is arbitrary since no other development project required such a buffer. We reject any implication that the buffer requirement was per se arbitrary because it may not have been imposed in other developments. A case-by-case analysis is required. *See* ***State ex rel. Skelly Oil Co. v. Common Council***, 58 Wis. 2d 695, 700-01, 207 N.W.2d 585 (1973) (conditional use permits are "flexibility devices, which are designed to cope with situations where a particular use, although not inherently inconsistent with the use

classification of a particular zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone"); ***Miswald v. Waukesha County Bd. of Adjustment***, 202 Wis. 2d 401, 412, 550 N.W.2d 434 (Ct. App. 1996) (variance request permits a discretionary call on a case-by-case basis). In assessing the overall impact of MEE's proposal, the town board was free to consider the effect on the character of the neighborhood.

¶13 It was also proper for the town board to consider that the park commission had not approved the dedicated park. There was evidence that there was no money budgeted for the development of a new park and that there were unresolved issues about the size, public accessibility, and maintenance of the proposed new park.

¶14 We conclude that the town board's decision was not arbitrary, oppressive and unreasonable. It was a decision based on findings supported by the record before it and made according to the law. In turn, the board of adjustment's decision is not subject to reversal.

By the Court.—Order affirmed.

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