COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2154 **Cir. Ct. No. 2007CV2156**

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

EZMONEY WISCONSIN, INC.,

PLAINTIFF-APPELLANT,

V.

CITY OF WAUWATOSA BOARD OF ZONING APPEALS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. EZMONEY Wisconsin, Inc., appeals from a circuit court order affirming a decision of the City of Wauwatosa Board of Zoning Appeals (hereafter, "Board") denying EZMONEY's applications for building and occupancy permits. We affirm.

BACKGROUND

¶2 In June 2005, the City of Wauwatosa Common Council approved the creation of trade district zoning along a section of North Avenue. The governing ordinances are found in WAUWATOSA, WIS., CODE (hereafter, "Wauwatosa Code") ch. 24.22 (2005). Wauwatosa Code § 24.22.005 defined the purpose of the trade district:

> The purpose of the trade district is to encourage and support the *development of areas of small businesses and retail stores that are compatible in scale and type with the surrounding residential neighborhoods*. These are uses that *do not generate large amounts of traffic* and primarily *serve the needs of local residents*.

(Emphasis added.) Under the zoning ordinances, there are permitted, conditional and prohibited uses. Permitted uses include: "[o]ffices and retail businesses, except those requiring a conditional use or prohibited herein." *See* Wauwatosa Code § 24.22.010. The code as it existed in September 2005 also provided the following list of prohibited uses: automobile sales and leasing, automobile storage services, check cashing establishments, gun shops, outdoor storage of materials and pawnbrokers. *See* Wauwatosa Code § 24.22.040.

¶3 In early 2006, representatives from EZMONEY and the City of Wauwatosa began communicating about EZMONEY's interest in opening a business in the trade district. In March 2006, EZMONEY provided the City with a business description for the city attorney's review. The description stated that EZMONEY is licensed as a loan company and offers short-term, non-collaterized loans to its customers. The description explained that EZMONEY does not cash checks and does not hold customers' checks for payment. In the email accompanying the business description, EZMONEY again asserted that it was not

a check casher and, therefore, would not be prohibited from operating at the proposed location. *See* Wauwatosa Code § 24.22.040.

¶4 On March 24, 2006, the Wauwatosa Director of Community Development, Nancy Welch, responded to EZMONEY's business description in an email in which she stated: "Based upon the description submitted, your business does not fall under the category of 'Check Cashing,' which is a prohibited use in the Trade District along North Avenue. It would be classified as an office use, which is a permitted use in the Trade District." Following Welch's initial determination, EZMONEY applied for and, on March 27, 2006, received a permit to erect two signs at the proposed location.[1] In May 2006, EZMONEY entered into a five-year commercial lease agreement with Marbe, LLC, which owned the building in which EZMONEY planned to operate.

¶5 In June 2006, Haden Construction submitted a building permit application for the proposed EZMONEY location. In addition, EZMONEY put up signs at its location, advertising the fact that it would be moving in. Wauwatosa aldermen and area residents noticed the signs and reacted negatively.

¶6 On July 26, 2006, Welch sent EZMONEY a letter advising that the Common Council had expressed concern about EZMONEY's signs and "made clear that their intention in listing 'check cashing' businesses as a prohibited use in the Trade District was to prevent businesses such as EZMONEY from locating on North Avenue." Welch's letter also informed EZMONEY that a building permit

[1] The record suggests the permit may have actually been issued to Marbe, LLC, which owns the building in which EZMONEY planned to operate. All indications are that Marbe's actions were taken in concert with EZMONEY to help EZMONEY secure the necessary permits to open its business in the space EZMONEY rented from Marbe.

would not be issued until the Common Council's intent in prohibiting check cashing establishments was clarified.

¶7 On August 7, 2006, the Wauwatosa Plan Commission held a public meeting and discussed proposed amendments to clarify the intent of the ordinance in referring to "check cashing establishments." Over one hundred and twenty residents of the area appeared or emailed to express their support for clarifying the ordinance; no resident opposed clarifying the ordinance. After the meeting, the City Buildings and Safety Division issued a Revised Notice of Noncompliance, revoking the sign permit. The Notice stated that "[s]ubsequent review by the City has determined that this business use is not permitted under the zoning code, and therefore the signs are not in conformance with the sign code." (Some capitalization omitted.) Later, the Buildings and Safety Division Chief Inspector advised EZMONEY's construction company that the building permit application had been denied because the Common Council had "clarified that EZMONEY is not a permitted use in the Trade District."

¶8 Thereafter, on October 27, 2006, EZMONEY applied for an occupancy permit. On November 7, 2006, before any action was taken on the occupancy permit, the Common Council adopted the clarification amendment, which had been approved by the Plan Commission. The clarification language substituted for "check cashing establishments" the term "convenient cash businesses," which was defined as:

> Convenient cash business, also referred to as a payday loan business, title for cash business, check cashing business, deferred presentment service provider or similar enterprise licensed pursuant to Wis. Stat. sec. 218.05, or a person licensed pursuant to Wis. Stat. sec. 138.09, who accepts a check or title, holds the check or title for a period of time before negotiating or presenting the check or title for

> payment, and pays to the issuer an agreed-upon cash, or who refinances or consolidates such a transaction.

Wauwatosa Code § 24.22.040 (revised November 7, 2006). The occupancy permit was denied on December 20, 2006.

¶9 EZMONEY appealed the denial of both the building permit and the occupancy permit. It asserted that the City's initial decision that EZMONEY was a permitted use under the ordinance, which it communicated to EZMONEY through Welch in March 2006, was correct and should be upheld, while the subsequent permit denials should be overturned.

¶10 The Board held a hearing on the appeal on January 25, 2007. No transcript was made of the hearing and no written decision was issued but detailed minutes were created. The minutes reflect that the Board heard from EZMONEY's counsel, the City's counsel, City officials and the public. The members of the Board in attendance discussed the issues they considered relevant to EZMONEY's appeal and they asked questions. The minutes reflect the following facts that support the Board's conclusion:[2]

- The Board heard a summary of the adoption of the trade district zoning ordinance and the recent amendments to the ordinance.
- The Board also heard a summary of EZMONEY's applications for building and occupancy permits.
- Two residents opposing EZMONEY said they do not want this type of business in that location of Wauwatosa, which they said

[2] The minutes reflect that a variety of matters were discussed. Only those most relevant to the issues on appeal by certiorari are summarized. We do not include statements in support of EZMONEY's appeal because our standard of review of facts on certiorari is limited to whether facts support the Board's conclusion, even if other facts might have supported a different conclusion. *See* ***Sills v. Walworth County Land Mgmt. Comm.***, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878.

needs restaurants and retail shops instead. They said they believe that the City Council intends to protect the neighborhood and not allow businesses like EZMONEY or pawn shops.

- The residents said they would like to see businesses like EZMONEY located in other areas of the City.

- The residents said EZMONEY's fees are exploitive.

- Counsel for EZMONEY indicated that it provides short-term unsecured loans geared towards when the person gets paid. He said EZMONEY charges interest at the rate of $22 per $100 for the short term-loans. Counsel acknowledged that the name of the company "conjures up the image of taking advantage of people who can't afford it."[3]

- Common Council members' immediate reaction to the erection of the EZMONEY signs reflected their views that such businesses were intended to be included in the prohibition of check cashing establishments.

- An Alderman who attended the hearing expressed concern that the EZMONEY business would attract criminals.

- A Board member inquired about the amount of cash kept on the premises, and was told by counsel for EZMONEY that "there was not a large amount of money" and that "as the handling of money changes to credit there will be less incentive for crime" but counsel was unable to say how crime prevention would be handled.

- A Board member expressed concern about traffic as EZMONEY would be located on a very busy street.

- A Board member stated that businesses like this have an effect on the values of nearby properties, and that the business did not "fit in with the vision for the area."

- A Board member stated "that EZMONEY is not the kind of business the city is looking for to help build the area" and described the specific area as "in a fragile state … improving and growing."

[3] The quoted language from the hearing is taken from the written minutes. As noted, there is no transcript of the hearing in the record.

¶11 Toward the end of the hearing, counsel for the Board framed the question to be decided as whether the business that EZMONEY was proposing was a permitted use under the ordinance. One Board member then said she thought that the City's "later decision to deny the building and occupancy permits was correct according to the intent of the ordinance … to preserve the nature, character and safety of the neighborhood." She stated that EZMONEY "didn't fit under the definition of a retail use or an office use" and, therefore, the Community Development Director's initial decision had been incorrect. At the end of the hearing, the motion adopted by the Board[4] was:

> Moved by Ms. Esswein, seconded by Mr. Dumville to deny the appeal stating that the Community Development Director's original decision was in error. The denial of the building and occupancy permits upheld the original intent of the ordinance that EZMoney was not a permitted use and would not be compatible with the vision for the North Avenue Trade District or the surrounding neighborhood.

No separate written decision was issued by the Board.

¶12 EZMONEY filed an action in the circuit court seeking certiorari review of the Board's decision. The circuit court affirmed the decision of the Board.[5] This appeal follows.

[4] The vote was 3-1. The Board member who cast the dissenting vote had earlier moved to issue the permits but the motion failed for lack of a second.

[5] Because we review the decision of the Board and not the circuit court, we will not provide details of the circuit court's decision. However, we have reviewed the decision and would like to acknowledge the helpful nature of the circuit court's thoughtful, well-reasoned opinion.

DISCUSSION

¶13 On appeal from a circuit court order on certiorari, we review the record of the Board, not the decision of the circuit court, *see* ***Hillis v. Village of Fox Point Bd. of Appeals***, 2005 WI App 106, ¶6, 281 Wis. 2d 147, 699 N.W.2d 636, although we benefit from the circuit court's analysis. The standard of review dictates that we consider the following issues:

> (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on the correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the Board might reasonably make the order or determination in question, based on the evidence.

State v. Waushara County Bd. of Adjustment, 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514 (citations omitted).

I. Did the Board keep within its jurisdiction?

¶14 Zoning boards are created by and governed by statute. WISCONSIN STAT. § 62.23(7)(e)7. (2007-08)[6] gives the Board, as material here, the power: "To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this section or of any ordinance adopted pursuant thereto.…" On appeal, we presume the Board's decision is correct and valid; we do not substitute our discretion for that of the Board. *See* ***State ex rel. Ziervogel v. Washington County Bd. of Adjustment***, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. Thus, our review is deferential. ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals of the City of Milwaukee***, 2005 WI 117, ¶25, 284 Wis. 2d 1, 700 N.W.2d

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

87. We must uphold the Board's decision so long as it is supported by substantial evidence, "even if there is also substantial evidence to support the opposite conclusion." *See* ***Sills v. Walworth County Land Mgmt. Comm.***, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878.

¶15 EZMONEY argues that because it did not appeal from the Department of Community Development's initial conclusion that it was an "office" under the ordinance, but only appealed from denial of the permits, the Board had jurisdiction only to review denial of the permits. According to EZMONEY, the Board therefore exceeded its jurisdiction when it determined that it was not a permitted use as an "office." EZMONEY is incorrect.

¶16 EZMONEY's statement of appeal advised the Board that "[t]he Buildings and Safety Division has improperly categorized [EZMONEY] as a 'check cashing establishment' as that term is defined in the Trade District Ordinance, and *the initial determination of the Director of Community Development is correct* and should be upheld." (Emphasis added.)

¶17 EZMONEY's analysis ignores WIS. STAT. § 62.23(7)(e)8.,[7] which gives the Board "all the powers of the officer from whom the appeal is taken." Thus, regardless of how EZMONEY chooses to frame its appeal, resolution of this

[7] WISCONSIN STAT. § 62.23(7)(e)8. provides:

> In exercising the above mentioned powers such board may, in conformity with the provisions of such section, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken, and may issue or direct the issue of a permit.

appeal required the Board to first determine whether EZMONEY's business was a permitted use before it could decide whether the permits were properly denied. Whether to grant or deny building and occupancy permits necessarily depends on the applicant's use being permitted under the ordinance. "A permit issued for a use prohibited by a zoning ordinance is illegal per se." ***Foresight, Inc. v. Babl***, 211 Wis. 2d 599, 605, 565 N.W.2d 279 (Ct. App. 1997).

¶18 EZMONEY cannot, by the phrasing of its appeal, prohibit the Board from overruling an interpretation of an ordinance by a city employee, here the Director of Community Development. Erroneous acts of public officials "cannot result in the estoppel of a municipality from asserting that there has been a violation of its zoning ordinance." ***Village of Hobart v. Brown County***, 2005 WI 78, ¶26, 281 Wis. 2d 628, 698 N.W.2d 83 (representation of village chairman did not prohibit enforcement of county zoning laws contrary to the chairman's representation).

¶19 Thus, we conclude that EZMONEY could not deprive the Board of certain aspects of its jurisdiction by parsing the phrasing of its appeal. We hold that the Board properly acted within its jurisdiction.

II. Did the Board proceed on the correct theory of law?

¶20 As noted, Wauwatosa Code § 24.22.005 states that the purpose of the North Avenue Trade District is: "to encourage and support the development of areas of small businesses and retail stores that are compatible in scale and type with the surrounding residential neighborhoods. These are uses that do not generate large amounts of traffic and primarily serve the needs of local residents." Any ordinance adopted pursuant to the authority of WIS. STAT. § 62.23, as this ordinance was, "shall be liberally construed in favor of the city and *as minimum*

requirements adopted *for the purposes stated*." *See* § 62.23(7)(a) (emphasis added). Because Wisconsin statutes instruct that the ordinance reflects "minimum requirements" to achieve the "purposes stated," there must necessarily be room for a Board to implement the intent of the ordinance by imposing reasonable additional requirements to achieve those purposes.

¶21 "[A] written decision is not required as long as a board's reasoning is clear from the transcript of its proceedings." ***Lamar***, 284 Wis. 2d 1, ¶31. Because we are aware of no statute requiring that a transcript be made of all proceedings before boards of zoning appeals, and because the court in ***Lamar*** did not specifically require a transcript in all future board proceedings, we interpret ***Lamar***'s reference to a "transcript" to include whatever record is made. ***Lamar*** dealt with a zoning variance appeal. The law surrounding the standard for variances had become confusing, and perhaps inconsistent, until the court announced revised standards. *See* ***id.***, ¶2 n.1. More particularized findings may have been necessary to understand the reasoning of boards when WIS. STAT. § 62.23(7)(e)9. required a supermajority vote when a board dealt with requested variances from existing ordinances. At the time ***Lamar*** was decided, § 62.23(7)(e)9. also required a specific statement of the grounds for a board's decision. *See* ***Lamar***, 284 Wis. 2d 1, ¶15. Section 62.23(7)(e)9. was repealed, effective August 30, 2005,[8] shortly after the ***Lamar*** decision was released. We therefore conclude that we must review the available record[9] of the Board

[8] *See* 2005 Wis. Act 34, § 6.

[9] We note that although a Board is not expected to produce the equivalent of a written judicial opinion, it would be helpful for purposes of review for a Board to make specific written findings of fact, either in the minutes or separately, if it does not choose to create a transcript of the hearing.

proceedings to determine, if we can, whether its findings, express or implied, support the conclusions to which it came.

¶22 The Board had to first reasonably determine whether EZMONEY's business was consistent with the purpose spelled out in Wauwatosa Code § 24.22.005. To do so, it considered whether EZMONEY's business was so similar to a specific prohibited use (a "check cashing establishment") as to be inconsistent with the purpose of the ordinance. The minutes show that the Board applied the stated purpose of the Trade District ordinance when it concluded that EZMONEY's business was not the type of business included in that purpose. The Board heard evidence that supports its conclusion, including:

- Residents said they did not want this type of business in the East Town Trade District, which has an atmosphere the City needs to protect.
- Residents said the District needs more restaurants and retail shops, not this type of business.
- Residents raised concerns about the need to protect the Trade District atmosphere.
- An Alderman was concerned that the EZMONEY business would attract criminals. Counsel for EZMONEY was unable to say how crime prevention would be handled.
- A Board member expressed concerns about traffic on this "very busy street."
- A Board member stated that businesses like EZMONEY have an effect on the values of nearby properties, and that the EZMONEY business "would not fit in with the vision for the area."
- A Board member described the specific area as "in a fragile state … improving and growing" and said that "EZMONEY is not the kind of business the city is looking for to help build the area."
- There was no evidence that EZMONEY's business served the needs of the local residents, another purpose of the Trade District.

¶23 The Board reasonably concluded that EZMONEY's business was not compatible with the surrounding neighborhood—the stated purpose of the ordinance—and thus was not a permitted use in the Trade District.

III. Was the Board action arbitrary, oppressive or unreasonable or did it represent its will and not its judgment?

¶24 As noted, our review of the Board's decision is deferential and we will not disturb the Board's findings if they are supported by any reasonable view of the evidence. *See* ***Lamar***, 284 Wis. 2d 1, ¶25; *see also* ***State v. Outagamie County Bd. of Adjustment***, 2001 WI 78, ¶25, 244 Wis. 2d 613, 628 N.W.2d 376 (appellate court accords "a presumption of correctness and validity" to a board's decision).

¶25 Wauwatosa's trade district zoning ordinance differs from others of which we are aware in that it contains a detailed statement of purpose. Thus application by the Board of the stated purpose to the facts before it differs significantly from a decision that might have been based on arbitrary factors unrelated to the purpose of a zoning ordinance such as, by way of example, personal animus toward the applicant. *See* ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶45, 235 Wis. 2d 610, 612 N.W.2d 59 ("[W]hen a party may have been denied a building permit because of 'impermissible political animus,' the party may claim a violation of substantive due process.") (citation omitted); *see also* ***Town of Rhine v. Bizzell***, 2008 WI 76, ¶29, 311 Wis. 2d 1, 751 N.W.2d 780 (An action is arbitrary in a constitutional sense when it has "no substantial relation to the public health, safety, morals or general welfare.") (citations and internal quotation marks omitted).

¶26 The Board concluded that "[t]he denial of the building and occupancy permits upheld the original intent of the ordinance that EZMONEY was not a permitted use and would not be compatible with the vision for the North Avenue Trade District or the surrounding neighborhood." The expressed intent of the ordinance was "development of … small businesses and retail stores that are compatible in scale and type with the surrounding residential neighborhoods" and that "primarily serve the needs of local residents." Wauwatosa Code § 24.22.005. As we have explained, *see* ¶¶22-23 above, there was evidence at the hearing from which the Board could reasonably reach that conclusion. We do not repeat that discussion here.

¶27 We conclude that parties may not avoid the stated purpose of a city's zoning ordinance by proposing a business which, though not specifically prohibited, is so similar to a prohibited use that the Board may reasonably conclude the proposed business is prohibited. We decline to so drastically limit the power of the Board to interpret and apply zoning ordinances, which WIS. STAT. § 62.23(7)(a) describes as the "minimum requirements for the purpose stated." Such limitation would eliminate the deference courts generally accord to zoning interpretations by Boards of Zoning Appeals. *See* ***Miswald v. Waukesha County Bd. of Adjustment***, 202 Wis. 2d 401, 408, 550 N.W.2d 434 (Ct. App. 1996) (board's decision is accorded a presumption of validity and correctness); *see also* ***Roberts v. Manitowoc County Bd. of Adjustment***, 2006 WI App 169, ¶16, 295 Wis. 2d 522, 721 N.W.2d 499 (board is entitled to a degree of deference in its interpretation and application of zoning ordinance).

¶28 We conclude that the Board action was neither arbitrary, oppressive nor unreasonable. The Board's conclusion was an expression of its judgment about application of the stated intent of the ordinance to the facts before it.

IV. Could the Board reasonably make the determination it did based on the evidence?

¶29 The Board is the sole judge of weight and credibility to accord all the evidence presented. *See* ***Sills***, 254 Wis. 2d 538, ¶11 ("'The weight to be accorded the facts is for the board to determine rather than the courts.'") (citation omitted). We will uphold a board's decision "so long as it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion." *See* ***id.*** "Substantial evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." ***Id.*** Applying these standards here, we must recognize that the Board was not required to accept EZMONEY's evidence rather than that offered by the community.

¶30 As we have explained, *see* ¶¶22-23 above, there was sufficient evidence before it to permit the Board to reasonably make the determination it made. We do not repeat the analysis here.

CONCLUSION

¶31 For the foregoing reasons, we conclude that the Board kept within its jurisdiction; proceeded on the correct theory of law; did not act in a way that was arbitrary, oppressive or unreasonable that represented its will and not its judgment; and made a determination that was reasonable, based on the evidence. *See* ***Waushara County Bd. of Adjustment***, 271 Wis. 2d 547, ¶12. Therefore, we affirm the decision of the circuit court affirming the Board's decision.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.