COURT OF APPEALS DECISION DATED AND FILED

February 18, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP3182

Cir. Ct. No. 2005CV1158

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STEVE OTTMAN AND SUE OTTMAN,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF PRIMROSE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

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

¶1 DYKMAN, P.J. Steve and Sue Ottman appeal from a circuit court order that dismissed their petition for certiorari review and affirmed a decision by the Town of Primrose to deny the Ottmans' application for building and driveway permits. The Ottmans argue first that we should reframe our common law

certiorari review of local government decisions to align with certiorari review of administrative agency decisions, determining our level of deference based on the circumstances surrounding the governmental decision. The Ottmans then contend that we should accord no deference to the Town's decision because it was based on errors of law. We conclude that we are required to apply the well-settled law for certiorari review of local government decisions, and we affirm under that standard of review.

Background

¶2 The following undisputed facts are taken from the record before the Town Board. In September 2004, the Ottmans filed a preliminary permit application with the Town of Primrose Planning Commission and Board. In the September 2004 application, the Ottmans requested Town approval to build a residence and driveway on their farm, which they were developing into a Christmas tree farm. The proposed site for the residence was the highest point on the property, approximately seventy-five feet north of their agricultural accessory building and adjacent to a field road running from the Town road, through the center of the farm, and to the top of the hill.[1] The Ottmans requested permission to convert their current field road into a driveway to access the proposed residence.

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[1] The parties dispute whether the Town "recommended" that the Ottmans build their agricultural accessory building close to the Town road as opposed to on top of the hill. However, it is undisputed that the Ottmans have a field road running through the center of their farm to the top of the hill, and that the agricultural accessory building is located near the end of the field road, at the top of the hill. The Town does not contest the Ottmans' right to place their field road and agricultural accessory building in their current locations. The dispute, rather, is whether the Town properly denied the Ottmans' request to convert the field road to a driveway and build a residence on top of the hill. We therefore need not address the parties' dispute regarding the Ottmans' decision as to the location of their field road and agricultural accessory building.

¶3 After extensive proceedings, the Town denied the Ottmans' request to convert their existing field road into a driveway and to build a residence at the top of the hill. The Town determined that the Ottmans had not met the requirements under the Town of Primrose Land Use Plan or Town of Primrose Ordinances, because they failed to meet the minimum income requirements and because their proposed residence and driveway location would not have the "least impact" on the Ottmans' agricultural land. The Ottmans filed a petition for certiorari review, and the circuit court affirmed the Town's decision. The Ottmans appeal.

Discussion

¶4 The Ottmans argue, first, that we should reexamine our basis for according deference to decisions by local governments on certiorari review. They contend that a blanket presumption of correctness as to each prong of common law certiorari review of local government decisions has no valid basis, and that we should clarify the law by adopting the guidelines for deference in certiorari review of administrative agency decisions. *See*, *e.g.*, ***Racine Harley-Davidson, Inc. v. DHA***, 2006 WI 86, ¶¶12-20, 292 Wis. 2d 549, 717 N.W.2d 184 (explaining the three levels of deference accorded to agency decisions and the basis for applying each level depending on "the comparative institutional qualifications and capabilities of the court and the administrative agency").

¶5 The Ottmans' argument, however, is misplaced. We are an error-correcting court, and we may not "overrule, modify or withdraw language from a published opinion" of this court or an opinion of the supreme court. ***Cook v.***

Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We therefore will apply the well-settled common law certiorari standard of review in this case.[2] *See* ***Keen v. Dane County Bd. of Supervisors***, 2004 WI App 26, ¶3, 269 Wis. 2d 488, 676 N.W.2d 154 (presuming decision by board was valid and correct, and limiting review to whether board acted within its jurisdiction, according to law, in an oppressive or unreasonable manner, and reasonably on the evidence before it).

¶6 Because this is an appeal from a circuit court order entered on a petition for certiorari review, we review the record before the Town Board, not the decision of the circuit court. *See* ***Klinger v. Oneida County***, 149 Wis. 2d 838, 845 n.6, 440 N.W.2d 348 (1989). Further, when, as here, the court does not take any new evidence, our review is limited to "(1) whether the board kept within its jurisdiction; (2) whether it proceeded on a 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 evidence was such that it might reasonably make

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[2] The Ottmans also argue that the Town's driveway ordinance improperly affects zoning, and that the Town's decision should be subject to certiorari review as a zoning decision under WIS. STAT. § 62.23(7)(e)10. (2007-08). The Town responds that its driveway ordinance is a valid exercise of its authority to regulate land development under WIS. STAT. §§ 61.34(1) and 236.45, and does not impermissibly affect zoning. The Ottmans then reply that they agree that the Town had authority to enact the driveway ordinance under §§ 61.34(1) and 236.45. They state that their appeal "is entirely about the Town's making the factual determinations required by its Ordinances and applying those facts to the Ordinances." However, they again argue that our review should be under WIS. STAT. § 62.23(7)(e)10. because of "the Town's engagement in direct regulation of the use of land." Under § 62.23(7)(e)10., as in common law certiorari, our review is limited to whether the Town acted within its jurisdiction, on a correct theory of law, in an arbitrary or oppressive manner, and reasonably on the evidence before it. *See* ***"K" Care, Inc. v. Town of Lac Du Flambeau***, 181 Wis. 2d 59, 64-65, 510 N.W.2d 697 (Ct. App. 1993). Because the Ottmans have not explained how our review would differ if we proceeded under § 62.23(7)(e)10., we need not address this argument further.

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

the order or determination in question." ***Id.*** at 843 (citation omitted). Moreover, we "presume a board decision is correct and valid."[3] ***Id.*** at 492-93. The Ottmans do not assert that the Town acted outside its jurisdiction; rather, they contend that the Town proceeded on an incorrect theory of law by misinterpreting its driveway and building ordinances, and that its decision was both arbitrary and unreasonable because the Town refused to accept clear evidence that the Ottmans met the requirements for building and driveway permits and based its decision on invalid assumptions. We disagree.

¶7 The Town's building ordinance, TOWN OF PRIMROSE BUILDING ORDINANCE § 1.06 (1997), provides:

> The Town Clerk shall issue or re-issue a Building Permit in the Town of Primrose only if all of the following conditions are satisfied as determined in the discretion of the Town Board:

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[3] The Ottmans argue that case law on the presumption of correctness and validity is limited to board of adjustment decisions regarding variances, which require an exercise of discretion on the part of the board. The Town replies that the presumption has not been limited to variance cases, citing ***Keen v. Dane County Board of Supervisors***, 2004 WI App 26, ¶¶3-6, 269 Wis. 2d 488, 676 N.W.2d 154 (according presumption of validity and correctness to board decision upholding committee's granting conditional-use permit, but refusing to presume "basic fact" that board considered required factors under ordinance), and ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (1990) (applying "substantial evidence test" on certiorari review of action by prison adjustment committee, which asks "whether reasonable minds could arrive at the same conclusion the committee reached," and holds that "facts found by the committee are conclusive if supported by any reasonable view of the evidence, and we may not substitute our view of the evidence for that of the committee" (citation omitted)). The Ottmans then reply that they agree with both ***Keen*** and ***Whiting***, which they contend do not support a blanket presumption of validity, but rather require review under the "substantial evidence" and "reasonableness" standards. If there is a difference between "a presumption of correctness and validity," and upholding a decision "if supported by any reasonable view of the evidence," that is a distinction we need not explore in this case, as the Town's decision withstands either standard. Moreover, the holding in ***Keen*** that we will not presume "basic facts" is not relevant here, as the Town has not requested that we presume any "basic facts" not in the record, only that we accord the presumption of validity and correctness to its decision based on the facts in the record.

> (1) The construction project will not interfere with or fail to comply with the goals, standards, and policies set forth in the Town of Primrose Land Use Plan.
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> (2) The construction project will not adversely impact agricultural land unless the Town Board finds that the parcel upon which the dwelling or building is constructed is capable of producing at least $6000.00 of gross income per year. The Town Board shall always choose a building site that has the least impact on agricultural land.

¶8 The Town's driveway ordinance, TOWN OF PRIMROSE DRIVEWAY ORDINANCE § 1.10 (1997), provides:

> No driveway shall be approved in the Town of Primrose if the Town Board finds that the driveway will adversely impact productive agricultural land, unless the Town Board finds that the driveway is necessary to enhance the agricultural productivity of an adjacent parcel or the person requesting the permit can show that the parcel to be served by the driveway is capable of producing at least $6000 of gross income per year. Under any circumstance, the Town Board shall approve a driveway with the least impact on agricultural land.

¶9 In addition, a building permit is contingent on an approved driveway under TOWN OF PRIMROSE DRIVEWAY ORDINANCE § 1.05(9), which provides that "[n]o Building Permit for new residential construction will be issued until the driveway is constructed according to the specifications of the ordinance."

¶10 Here, the Town found that the Ottmans did not meet the driveway ordinances' income or least impact requirements. Therefore, it denied the Ottmans' permit requests.

¶11 The Ottmans argue that the Town erred in finding that their proposed building site and driveway location would not have the "least impact" on the Ottomans' agricultural land because (1) the Town based its decision on an unfounded assumption that the shortest driveway would necessarily have the least

impact on agricultural land, and (2) the Town failed to consider evidence the Ottmans offered as to each of the seven listed factors under the definition of "agricultural land" in the Town's Land Use Plan. The Ottmans also argue that the Town misinterpreted the $6000 income requirement to mean that an applicant must show that level of current income. According to the Ottmans, the correct test is whether the farm is *capable* of producing more than the minimum required amount. We conclude that the Town properly determined the Ottmans' driveway request did not meet the "least impact" requirement. Because the "least impact" requirement must be met before the town will approve a driveway, this issue is dispositive, and we do not reach the Ottmans' "income requirement" argument.

¶12 The Town explained its decision as to least impact as follows:

> **PART I. THE SITE PLAN**
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> 5. The Ottmans maintain that the construction of the residence at the top of the hill adjacent to the agricultural accessory building will minimize impacts to productive agricultural land due to the fact that there are less productive soils at the top of the hill than land closer to Primrose Center Road.
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> 6. All 47 acres of the Ottman farm are productive agricultural lands that are zoned exclusive agricultural under the Dane County zoning ordinance. The Ottmans currently use their farm for growing conifer trees of varying species planted on approximately 18 acres and rent a portion of the property (less than 20 acres) for the purpose of growing corn.
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> 7. All of the current agricultural land use practices employed on the parcel including growing trees, and renting some of the remaining land for row crops are in accordance with the Primrose Land Use Plan. Soil test reports submitted at the July 26, 2006 public hearing indicate that all 47 acres of land owned by the Ottmans are capable of growing conifer trees as well as other crops.
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> ….

16. … [B]uilding a residence at the top of the hill where it is proposed and constructing a driveway to that residence … would not have the least impact on productive land as required by the Ordinances.

PART II. THE DRIVEWAY PERMIT

17. The Ottmans' proposed site plan requires an access driveway. The field road on the property was approved by a previous Town Board as a "field road only, to pursue agricultural activities," and cannot serve as a residential driveway.

18. The proposed driveway would cross agricultural land and effectively fragment a larger, agriculturally productive parcel into several smaller parcels that would negatively impact the agricultural productivity of the farm.

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20. The width, rise, and ditch distance of the Ottman[s'] current field road do not meet the driveway criteria and would need significant changes to be brought into compliance….

21. The Ottmans propose to upgrade the existing field road for the driveway and have committed to meet the requirements of the Driveway Ordinance, but the extensive excavations needed may cause other compliance problems. Currently the field road slopes steeply onto the Town Road, which allows erosion of gravel and debris in to the public right of way. This creates a potential safety hazard. To avoid this problem, the Ordinance requires a driveway to have a dip constructed just before the culvert at the entrance to the Town Road. To accomplish this, the current field road would have to be scraped back to lower the grade at its intersection with the Town Road. This would require further extensive excavation to build a driveway to the top of the hill which may exceed the 25% maximum slope requirement of the Driveway Ordinance….

22. Constructing a residential driveway to the top of the hill would also require extensive excavation including widening, mounding of the center of the driveway and the construction of drainage waterways on either side of the driveway to meet engineering criteria in the Ordinance ….

….

> 25 …. The proposed site and driveway do not meet the "least impact" requirements of the Ordinances or have the least impact among all the options available on the farm due to the fact that building a residence at the top of the hill will require a longer driveway that will needlessly consume a greater amount of agricultural land….

¶13 The Ottmans contend that the Town's findings as to "least impact" are based on errors of law.[4] They argue that the Town merely assumed that the shortest driveway would have the least impact on their agricultural land, disregarding their evidence of the variation in the quality of the soil on the top versus the bottom of the hill. They contend that the Town's decision also disregarded the fact that the proposed driveway location is already being used as a field road, and thus will not have any impact on the amount of land used for agricultural purposes. They also argue the Town merely assumed that breaking up their field into smaller parcels will adversely impact their agricultural land, with nothing in the record to support its finding. Finally, the Ottmans argue that the Town was required to consider the seven factors under the following definition of "agricultural land" in the Town's Land Use Plan: "Areas identified on the town plan as being the most appropriate for preservation as long-term farm agricultural use based upon soil type, historical use, owner commitment, degree of investment, natural features, parcel size, and adjacent land uses." We disagree.

¶14 The Town's written decision explains that it did not merely "assume" that a shorter driveway always has the least impact on agricultural land, regardless of quality and type of soil throughout a parcel of agricultural land.

[4] The Ottmans raise the same argument as to the Town's determination that their proposed building site and driveway would "adversely impact" their agricultural land. Our conclusion that the Town properly found that the Ottmans' proposed building site and driveway would not have the least impact also supports the Town's finding that the proposed building site and driveway would adversely impact the agricultural land.

Rather, the Town found that "[s]oil test reports submitted at the July 26, 2006 public hearing indicate that all 47 acres of land owned by the Ottmans are capable of growing conifer trees as well as other crops," and that "[a]ll 47 acres of the Ottman farm are productive agricultural lands." The transcript of the July 26, 2006 hearing reveals that the Town reviewed the results of soil tests conducted on the Ottmans' farm, which indicated that all of the soil on the Ottmans' farm was suitable for farming. At a subsequent hearing, a member of the Town Board stated that if the Ottmans placed their house in the corner of their property, near the Town road, the remainder of the agricultural land could remain intact for farming. This reasoning is reflected in the Town's written decision, which states that the longer driveway proposed by the Ottmans would use an additional amount of agricultural land on the farm.

¶15 The Town also specifically considered the fact that the Ottmans already had a field road in the location they proposed to put their driveway. The Town explained that the field road, as it existed, could not be used as a driveway, and converting the field road to a conforming driveway would have a negative impact on the agricultural land: "[T]he current field road would have to be scraped back to lower the grade at its intersection with the Town Road. This would require further extensive excavation to build a driveway to the top of the hill which may exceed the 25% maximum slope requirement of the Driveway Ordinance." Additionally, the Town found that "[c]onstructing a residential driveway to the top of the hill would also require extensive excavation including widening, mounding of the center of the driveway and the construction of drainage waterways on either side of the driveway to meet engineering criteria in the Ordinance."

¶16 The Town also considered significant the fact that the Ottmans proposed to construct a driveway through the middle of the farm to the top of the hill. It found that "[t]he proposed driveway would cross agricultural land and effectively fragment a larger, agriculturally productive parcel into several smaller parcels that would negatively impact the agricultural productivity of the farm." We disagree with the Ottmans' argument that this finding needs supporting evidence in the record; rather, it is common sense that dividing an agricultural parcel with the sort of paved and drained road required by the ordinances has a greater impact on the agricultural land than a field road. Further, as explained above, the Town relied on the evidence in the record to find that all of the soil on the farm was suitable for farming; thus, it was entitled to find that using a stretch of land down the middle of the field for a driveway, leaving two smaller parcels with an overall smaller amount of land, would not have the least impact on the Ottmans' agricultural land.

¶17 Finally, we reject the Ottmans' argument that the Town was required to consider the seven factors under the Town's Land Use Plan's definition of "agricultural land." It is undisputed that the Ottmans' farm is zoned agricultural, so it is not clear why the Ottmans believe an analysis of whether or not their farm meets the Land Use Plan's definition of "agricultural land" is relevant here. Moreover, nothing in the driveway ordinance indicates that the Land Use Plan's definition of "agricultural land" is relevant to the "least impact" determination. Accordingly, under our well-settled deferential standard of review, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.