

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 2016

Diane M. Fremgen
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. 2015AP896

Cir. Ct. No. 2014CV948

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MARK REINDERS AND SHERIDAN RYAN,

PETITIONERS-RESPONDENTS,

v.

**CITY OF DELAFIELD AND COMMON COUNCIL OF THE CITY OF
DELAFIELD,**

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. The City of Delafield and the Delafield Common Council (hereafter Delafield) appeal from a circuit court order granting a petition for a writ of certiorari and requiring Delafield to approve a certified survey map

(CSM) submitted by Mark Reinders and Sheridan Ryan (hereafter Reinders) to subdivide their residential lakefront lot into two lots. We agree with the circuit court that in declining to approve Reinders's CSM, Delafield proceeded on an incorrect legal theory and made an arbitrary and unreasonable decision that was not supported by the evidence. We affirm the circuit court's decision directing Delafield to undertake further proceedings necessary to approve the CSM.

¶2 Reinders owns residential property abutting Upper Nashotah Lake. In 2013, Reinders decided to subdivide the lot into two lots. The CSM accompanying Reinders's proposed division showed that both new lots had more than eighty feet of lake frontage required for lots in the RL-1A residential lake zoning district, but one of the new lots had less than 150 feet of lake frontage. Delafield declined to approve Reinders's CSM after concluding that the CSM did not comply with DELAFIELD, WIS., CODE OF ORDINANCES § 17.20, "Lake Access Restrictions."¹ Section 17.20 states in pertinent part: "Lake access shall be restricted to not more than one lot or dwelling unit for each 150' of lake frontage."

¶3 Reinders sought certiorari review under WIS. STAT. § 62.23(7)(e)10 (2013-14).² The circuit court reversed Delafield and required further proceedings necessary to approve Reinders's CSM. Further facts will be stated as we discuss the appellate issues.

¹ The Delafield, Wisconsin, Ordinances included in the record are undated and not bound.

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 We review Delafield’s decision, not the circuit court’s decision. *Driehaus v. Walworth Cty.*, 2009 WI App 63, ¶13, 317 Wis. 2d 734, 767 N.W.2d 343. “Whether [Delafield] acted in excess of its powers, applied an incorrect theory of law, or made an arbitrary, oppressive or unreasonable decision are each questions of law that this court reviews de novo.” *Id.*

¶5 The dispositive issue on appeal is which ordinance applies to Reinders’s CSM: DELAFIELD, WIS., CODE OF ORDINANCES § 17.20, “Lake Access Restrictions,” which requires 150 feet of lake frontage, or DELAFIELD, WIS., CODE OF ORDINANCES § 17.39(8)(h), Zoning Districts, which requires a minimum lake frontage of eighty feet at ordinary high water level.

¶6 DELAFIELD, WIS., CODE OF ORDINANCES § 17.20 provides in pertinent part: “Lake access shall be restricted to not more than one lot or dwelling unit for each 150’ of lake frontage, except where existing substandard lots are present which have less than 150’ of lake frontage or where lake access is specifically granted as part of the Planned Development....”

¶7 DELAFIELD, WIS., CODE OF ORDINANCES § 17.39(8)(h) states that in the RL-1A residential lake zoning district, where Reinders’s property is located, the minimum lake frontage is eighty feet from the ordinary high water level.

¶8 Delafield rejected Reinders’s CSM because DELAFIELD, WIS., CODE OF ORDINANCES § 17.20 creates a minimum lake frontage requirement for new lots and existing lots, and one of the new lots had less than 150 feet of lake frontage. In granting certiorari, the circuit court applied rules of construction and concluded that (1) Reinders’s CSM complied with the applicable ordinance, DELAFIELD, WIS., CODE OF ORDINANCES § 17.39(8)(h), which requires eighty feet

of lake frontage and (2) Delafield erroneously relied upon § 17.20 to require 150 feet of lake frontage.

¶9 The circuit court identified the following defects in Delafield's rejection of Reinders's CSM: when zoning ordinances are ambiguous or in conflict, ambiguity must be resolved in favor of the free use of private property; when ordinances conflict, the more specific ordinance, DELAFIELD, WIS., CODE OF ORDINANCES § 17.39, controls; Delafield did not demonstrate that DELAFIELD, WIS., CODE OF ORDINANCES § 17.20 had ever been interpreted as taking precedence over a properly zoned lot under § 17.39; and § 17.20, by its terms, applies to lake access and is a use restriction and is not relevant to dividing lots and plat approval. The court concluded that Delafield's application of § 17.20 nullified the eighty-foot lake frontage provision of § 17.39(8)(h), with which Reinders's two new lots complied.³

¶10 On appeal, Delafield argues that DELAFIELD, WIS., CODE OF ORDINANCES § 17.20 is the specific and controlling ordinance with regard to lake frontage. Delafield characterizes DELAFIELD, WIS., CODE OF ORDINANCES § 17.39(8) as a platting ordinance, not a lake frontage ordinance.

¶11 The rules governing the interpretation of ordinances and statutes are the same. *State v. Ozaukee Cty. Bd. of Adjustment*, 152 Wis. 2d 552, 559, 449 N.W.2d 47 (Ct. App. 1989). The meaning of an ordinance presents a question of law which we review de novo. *Id.* Where ordinances conflict, the more specific

³ The circuit court also reasoned that Delafield's construction and application of DELAFIELD, WIS., CODE OF ORDINANCES § 17.20 interfered with Reinders's riparian rights. We need not address this analysis to affirm the circuit court's decision.

ordinance controls. See *Emjay Inv. Co. v. Village of Germantown*, 2011 WI 31, ¶38, 333 Wis. 2d 252, 797 N.W.2d 844 (discussing the rule as applied to statutes). Zoning restrictions must be clearly expressed and are “strictly construed to favor unencumbered and free use of property.” *Crowley v. Knapp*, 94 Wis. 2d 421, 434-35, 288 N.W.2d 815 (1980) (citation omitted).

¶12 We agree with the circuit court that DELAFIELD, WIS., CODE OF ORDINANCES § 17.39(8)(h) is the more specific ordinance and controls on the question of the required lake frontage. Section 17.39(8)(h) establishes many requirements for lots in the RL-1A residential lake district, including permitted uses, minimum lot area and setbacks, and a minimum of eighty feet of lake frontage. In contrast, DELAFIELD, WIS., CODE OF ORDINANCES § 17.20 addresses only the number of lots for each 150 feet of lake frontage. Section 17.39(8)(h) is more specific to the approval of Reinders’s CSM than is § 17.20. There is no dispute that Reinders’s new lots satisfy § 17.39(8)(h). Delafield should have applied § 17.39(8)(h) to Reinders’s CSM.

¶13 We also agree with the circuit court that Delafield did not establish a persuasive prior interpretation resolving the conflict between DELAFIELD, WIS., CODE OF ORDINANCES §§ 17.20 and 17.39(8)(h) on the question of required lake frontage. Delafield rejected Reinders’s CSM based upon its alleged prior interpretation that all newly divided lake lots must have 150 feet of lake frontage. Delafield offered to the circuit court two instances of such a prior interpretation. In the first instance, the court considered the city attorney’s April 3, 2014 letter but found that the letter did not support Delafield’s contention that it had a longstanding interpretation; the letter offered no detail or supporting argument. In the second instance, the court considered Delafield’s arguments at the April 8, 2014 City of Delafield Common Council meeting asserting an

interpretation used in prior real estate developments. The court found that both real estate developments discussed at the April 2014 meeting involved lots with over 150 feet of lake frontage, which did not implicate the eighty-foot frontage requirement.⁴ The court found that the discovery in the case supported its determination that Reinders’s CSM was the first occasion on which Delafield had to address the conflict between § 17.20 and § 17.39. We agree with the circuit court that Delafield did not prove that it had a prior interpretation in the same scenario as presented in this case.

¶14 Delafield argues that the circuit court lacked authority to remand the matter to Delafield “for approval of the CSM.” Delafield cites no authority for this proposition. Therefore, we do not address it further. *Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990).

By the Court.—Order affirmed.

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

⁴ That Delafield may have required 150 feet of lake frontage on other occasions does not mean that in doing so Delafield was resolving any conflict between DELAFIELD, WIS., CODE OF ORDINANCES §§ 17.20 and 17.39(8)(h) if the lots at issue had 150 feet of lake frontage by design.

