COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2319 **Cir. Ct. No. 2015CV1437**

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

ST. RAPHAEL'S CONGREGATION,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

CITY OF MADISON,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: RHONDA L. LANFORD, Judge. *Affirmed*.

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

¶1 LUNDSTEN, P.J. St. Raphael's Congregation challenges the 2014 taxation of property the Congregation owns in downtown Madison. The property includes the site of the former St. Raphael's Cathedral, which was destroyed by an

arson fire in 2005. The Congregation seeks an exemption for this property under WIS. STAT. § 70.11(4)(a).[1]

¶2 For the exemption to apply, the property must meet several requirements. The parties dispute two of these requirements, namely, that: (1) the property must be "used exclusively" by a benevolent association or other qualifying entity listed in the statute, and (2) the property must be "necessary for location and convenience of buildings." *See* WIS. STAT. § 70.11(4)(a). The circuit court concluded that the Congregation satisfied the first of these, but not the second. Thus, the court dismissed the Congregation's challenge to the 2014 taxation of its property.

¶3 The Congregation argues that the circuit court erred in concluding that the property here was not "necessary for [the] location ... of buildings" as that phrase is used in the statute. However, we agree with the City that ***Deutsches Land, Inc. v. City of Glendale***, 225 Wis. 2d 70, 591 N.W.2d 583 (1999), compels the conclusion that the property did not satisfy this statutory "necessary-for-buildings" requirement, and therefore was not exempt, in the 2014 tax year. Specifically, ***Deutsches Land*** holds that, for property to be "necessary for location and convenience of buildings," the property must in fact have a building on it, something that was not true during the tax year at issue here. Accordingly, we affirm the circuit court's order dismissing the Congregation's challenge to the 2014 taxation of the property.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise indicated. We note that the parties have stipulated that the outcome for the 2014 tax year will control the outcome for the 2015 tax year as well.

¶4 The City cross-appeals, arguing an alternative ground for affirming the circuit court's bottom-line decision. The City disagrees with the circuit court's conclusion that the property met the exclusive-use requirement. That is, the City contends that the court could have and should have concluded that the property was not tax exempt for the additional reason that the property did not satisfy the exclusive-use requirement. We fail to understand why a cross-appeal was necessary to raise this alternative reason for affirming the circuit court's decision. Regardless, we need not reach this alternative argument because we agree with the City that the circuit court correctly dismissed the Congregation's challenge based on the necessary-for-buildings requirement. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

¶5 Before moving on, we note that the legal landscape changed after the 2014 tax year at issue here. The legislature recently enacted new language that, for churches and religious associations, modifies the necessary-for-buildings requirement in WIS. STAT. § 70.11(4)(a). We quote the new language in footnote 3 in our Discussion section.

Background

¶6 The parties submitted stipulated facts to the circuit court. We rely on those stipulated facts and on asserted facts, viewed most favorably to the Congregation, from other summary judgment submissions.

¶7 St. Raphael's Congregation is an incorporated Roman Catholic Congregation. The Congregation's property at issue here is a 1.31 acre parcel in the City of Madison near the Capitol Square. As noted, the property includes the

site of the former St. Raphael's Cathedral, a building that was destroyed by an arson fire in 2005.

¶8 In 2007, Bishop Robert Morlino announced that a new cathedral would be built on the site. The Congregation took steps toward the goal of building a new cathedral, but, as of the 2014 tax year, the Congregation was unable to raise sufficient funds to begin construction. Of the estimated $50 million needed to build the planned new cathedral, the Congregation had raised less than $3 million and had suspended fund raising.

¶9 In 2012, the Congregation placed a "Way of the Cross" on the property. The Way of the Cross, according to the parties' stipulation, contains "the traditional 14 [S]tations commemorating the 14 key [events] on the day of [Jesus Christ's] Crucifixion." Structurally, the Stations consist of stone crosses embedded in the ground with the front surfaces of the crosses face up at ground level. There are other features that we describe in more detail in the Discussion section below.

¶10 The Congregation sought a property tax exemption for the property for the 2014 tax year. After the City denied an exemption and other tax relief, the Congregation filed suit in the circuit court. The parties each moved for summary judgment. The circuit court granted summary judgment in favor of the City, agreeing with the City that the property was not necessary for the location of buildings in the 2014 tax year.

¶11 We reference additional facts as needed below.

Discussion

¶12 We review summary judgment de novo, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is proper when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* WIS. STAT. § 802.08(2) (2015-16). We view the evidence, and reasonable inferences from the evidence, in the light most favorable to the party against whom summary judgment is sought. *See* ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 565-67, 278 N.W.2d 857 (1979).

¶13 Here, we agree with the circuit court that there is no genuine issue of material fact. Rather, this case turns on the application of case law and statutory language to undisputed facts. *See* ***State v. Jahnke***, 2009 WI App 4, ¶4, 316 Wis. 2d 324, 762 N.W.2d 696 (2008) (whether a statutory standard is satisfied by undisputed facts presents a question of law for de novo review).

¶14 The question is whether the property is exempt under WIS. STAT. § 70.11(4)(a). As pertinent here, the statute provides an exemption for

> [p]roperty owned and *used exclusively* by ... churches or religious … associations [or one of the other types of entities enumerated], ... but not exceeding 10 acres of land *necessary for location and convenience of buildings* while such property is not used for profit.

WIS. STAT. § 70.11(4)(a) (emphasis added).

¶15 As italicized above, and as pertinent here, the statute imposes two requirements that must both be met: (1) the exclusive-use requirement and (2) the necessary-for-buildings requirement. The parties dispute both. However, we need

not resolve both disputes because we conclude that the necessary-for-buildings requirement was not satisfied.

¶16 The Congregation makes two necessary-for-buildings arguments. First, the Congregation argues that, under the totality of the facts, including the arson and the Congregation's intent to rebuild, the property was necessary for *a cathedral*. Second, the Congregation argues that the property was necessary not for a cathedral but for a "building" that actually existed on the property during the 2014 tax year. According to the Congregation, this non-cathedral building was comprised of the Way of the Cross Stations and related structural features. We address and reject these two arguments under subheadings A. and B. below.

A. Necessary for a Cathedral

¶17 As noted, the necessary-for-buildings requirement provides that the subject property must be "necessary for location and convenience of buildings." WIS. STAT. § 70.11(4)(a). According to the Congregation, the property was necessary for "the Cathedral of the Diocese of Madison." The Congregation seems to mean that the property was necessary for the *planned* cathedral. Regardless, it is clear that the Congregation takes the position that case law requires us to consider the totality of the circumstances, including the existence of the prior cathedral, the arson, the plan to replace the cathedral, and other circumstances.

¶18 The City's contrary argument is straightforward. According to the City, the several circumstances that the Congregation relies on do not matter because ***Deutsches Land*** makes clear that, to satisfy the necessary-for-buildings requirement, there must be a building on the property in the tax year at issue. As to a cathedral, it is undisputed that there was no such building. It follows,

according to the City, that a then-nonexistent cathedral cannot satisfy the necessary-for-buildings requirement.

¶19 We explain in the following two subsections why we agree that ***Deutsches Land*** requires the conclusion that the property here did not meet the necessary-for-buildings requirement as to a cathedral.

1. ***Deutsches Land***

¶20 As pertinent here, the ***Deutsches Land*** court addressed whether property used as soccer fields was exempt from taxation. *See* ***Deutsches Land***, 225 Wis. 2d at 75-77, 100-01. Applying the same statutory language that we apply here, the ***Deutsches Land*** court concluded that the exemption did not apply. *See* ***id.*** at 101.[2] The court interpreted the statutory language to mean that a property without any buildings cannot be, in the words of the statute, "necessary for location and convenience of buildings." The ***Deutsches Land*** court plainly stated:

> The exemption of land is tied to, and follows from, the exemption of buildings. *This means that land devoid of buildings cannot qualify for an exemption under Wis. Stat. § 70.11(4).*

Id. at 100 (emphasis added).

¶21 The Congregation attempts to persuade us that ***Deutsches Land*** is inapplicable because the court in that case did not address the type of situation that we have here, namely, one in which the owner intends to replace a building that

[2] The statute has been renumbered since the pertinent time in ***Deutsches Land, Inc. v. City of Glendale***, 225 Wis. 2d 70, 591 N.W.2d 583 (1999). *Compare* WIS. STAT. § 70.11(4)(a) *with* WIS. STAT. § 70.11(4) (1995-96) (cited in ***Deutsches Land***, 225 Wis. 2d at 76).

was destroyed. We are unaware of any authority that would permit us to ignore plain language in a supreme court opinion just because the supreme court, in that prior opinion, was not addressing the particular fact situation at issue in the instant case. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

¶22 Accordingly, we conclude that we are bound by the ***Deutsches Land*** holding that property "devoid of buildings cannot qualify for an exemption" under WIS. STAT. § 70.11(4)(a). *See* ***Deutsches Land***, 225 Wis. 2d at 100. Applying that language here, the absence of a cathedral on the property during the 2014 tax year is fatal to the Congregation's quest for a tax exemption for that tax year based on a cathedral.[3]

[3] A recent legislative change arguably provides some additional support for our conclusion, based on ***Deutsches Land***, 225 Wis. 2d 70, that the property here did not satisfy the necessary-for-buildings requirement. Earlier this year, the legislature enacted new language that modifies the necessary-for-buildings requirement in WIS. STAT. § 70.11(4)(a), but only as that requirement applies to churches and religious associations. That new language provides:

> [B]eginning with the property tax assessments as of January 1, 2018, property owned by a church or religious association necessary for location and convenience of buildings includes property necessary for the location and convenience of a building that the church or religious association intends to construct to replace a building destroyed by fire, natural disaster, or criminal act, regardless of whether preconstruction planning or construction has begun. This subdivision applies only for the first 25 years after the year in which the building is destroyed.

2017 Wis. Act 59, § 997F. This new statutory language is, by its own terms, not applicable to the 2014 tax year at issue here, and we do not rely on it in our analysis. However, one reasonable inference from the new language is that the legislature thought that, absent this change in language, the property here did not satisfy the necessary-for-buildings requirement.

¶23 We note a factual quirk in ***Deutsches Land***, and we now make clear that we have taken this factual quirk into account when reading ***Deutsches Land***. The quirk in ***Deutsches Land*** is that the soccer fields property in that case apparently *did* have a building, namely, a small locker room/rest room facility. *See* ***id.*** The court in ***Deutsches Land*** explained that the locker room/rest room facility existed to serve the soccer fields, not the other way around. *See* ***id.*** at 100-01. This fact does not undercut the clarity of the holding in ***Deutsches Land*** that we rely on today. Rather, it simply indicates that a building is a *necessary* but not always *sufficient* condition to satisfy the necessary-for-buildings requirement.

2. The Case Law the Congregation Relies On Does Not Undercut the Clear ***Deutsches Land*** *Requirement That There Be a Building*

¶24 The Congregation seems to advance the proposition that there is an overriding totality of the circumstances test that trumps the ***Deutsches Land*** bright-line rule requiring a building. Looking to this overriding totality test, the Congregation asks us, in analyzing the necessary-for-buildings requirement, to take into account a broad range of facts including but not limited to the reason a building was destroyed, the taxpayer's intentions to build or rebuild in the future, and the reason for delay in building or rebuilding.

¶25 The Congregation relies on two cases for support: ***Green Bay & Mississippi Canal Co. v. Outagamie County***, 76 Wis. 587, 45 N.W. 536 (1890), and ***Group Health Cooperative of Eau Claire v. DOR***, 229 Wis. 2d 846, 601 N.W.2d 1 (Ct. App. 1999). Neither case, however, supports the proposition that a totality of the circumstances test may be applied to property with no completed building and no building under construction.

a. ***Green Bay & Mississippi Canal***

¶26 We first summarize in simple terms the ***Green Bay & Mississippi Canal*** decision. We then quote, in full, the relevant part of the decision. Finally, we explain why we reject the Congregation's reliance on that decision.

¶27 The pertinent property in ***Green Bay & Mississippi Canal*** was owned by a church and, as is true here, the property had no actual church or cathedral-type building on it during the tax year at issue, there 1886. *See* ***Green Bay & Mississippi Canal***, 76 Wis. at 590-91. A church building was placed on the property two years later. ***Id.*** at 591. The court in ***Green Bay & Mississippi Canal*** concluded that the property was not necessary for the location of a building, stating: "There must be buildings on the property …. This question is too clear for argument." ***Id.*** The court further indicated that placement of a church building two years later was irrelevant. *See* ***id.*** The court did, however, appear to allow that a partially constructed building would have sufficed, but only if construction had actually commenced and remained in progress during the disputed tax year. *See* ***id.*** at 591-92.

¶28 The relevant discussion in ***Green Bay & Mississippi Canal***—which addresses *both* the exclusive-use requirement and the necessary-for-buildings requirement, was as follows, with italics indicating the court's emphasis and bold lettering indicating our emphasis:

> The statute is, the real property "owned by any religious association, *used* exclusively for the *purposes* of such association, and *necessary* for the *location* and *convenience* of the *buildings* of such association, and embracing the same, not exceeding ten acres." These clauses of [the statute] are thus placed together to show at a glance how foreign from this statutory exemption is this vacant and detached lot: (1) It is not *used* for the purposes—that is, the legitimate purposes—of this church. (2) It is not

> *necessary* for the *location* and *convenience* of the *buildings* of such church. (3) **There must be buildings on the property**, or they could not be *embraced* in the exemption. **This question is too clear for argument**, and the *strict* rule of construction in favor of taxation need not be invoked.
>
> That a church building was placed on this lot nearly or quite two years afterwards is foreign to the case. **How was it in 1886? is the only question.** That building could not have any such retroactive effect as to make this vacant lot exempt two years before. **It might be, by a familiar rule, that if the church had already commenced to build on the lot, and the building was in progress [sic] of completion, it would be exempt, as if the building was completed. But such is not the case here. It does not appear that this church in 1886 had any intention of building on this lot a church building,** or of selling it to another church to build on it, or of using it for church purposes in the near future.

Id. (original emphasis in italics; our emphasis in bold face).

¶29 Notably, the last sentence references the lack of an intent to build during 1886, the tax year at issue. The Congregation points to this last sentence as support for an argument that, as to the necessary-for-buildings requirement, we must consider the totality of the circumstances, including the Congregation's intentions for future building. We are not persuaded. In context, this last sentence appears to be most reasonably read as commentary supporting the court's conclusion that, with or without a building, there was no evidence that the church was *using* the property for any church purpose during the tax year in question.

¶30 Moreover, even if the last sentence was meant more generally, that sentence cannot reasonably be read as negating the ***Green Bay & Mississippi Canal*** court's plain statement that "[t]here must be buildings on the property, or they could not be *embraced* in the exemption." *See* ***id.*** at 591. It similarly does

not negate the equally plain statement that the presence of a building two years later was irrelevant. *See* ***id.***

¶31 Further, the Congregation's reading of ***Green Bay & Mississippi Canal*** is inconsistent with the ***Deutsches Land*** court's reading of that case. The ***Deutsches Land*** court cited ***Green Bay & Mississippi Canal*** as support for the ***Deutsches Land*** court's unequivocal statement that "land devoid of buildings cannot qualify for an exemption." *See* ***Deutsches Land***, 225 Wis. 2d at 100 (citing ***Green Bay & Mississippi Canal***, 76 Wis. at 591).

¶32 In sum, ***Green Bay & Mississippi Canal*** does not undercut the bright-line ***Deutsches Land*** requirement of a building, either completed or in progress.

b. ***Group Health Cooperative***

¶33 The second case cited by the Congregation as support for a totality of the circumstances test is ***Group Health Cooperative***. In that case, we applied a totality of the circumstances test to property that was the site of a planned health clinic. *See* ***Group Health Coop.***, 229 Wis. 2d at 856-59. But in ***Group Health Cooperative***, we were addressing the *exclusive-use* requirement, not the necessary-for-buildings requirement. *See* ***id.*** In ***Group Health Cooperative***, the taxpayer had taken a number of specific steps in preparing the property site for construction; nonetheless, we concluded that the property in its pre-construction phase was not being "used exclusively for [the] benevolent purpose of providing health care to [the property owner's] members." ***Id.*** at 858.

¶34 It appears that ***Group Health Cooperative*** could have been decided the same way by application of the ***Deutsches Land*** building requirement. But

our point here is that ***Group Health Cooperative*** does not address the necessary-for-buildings requirement and certainly does not undercut our reading of ***Deutsches Land***.[4]

¶35 To sum up so far, ***Deutsches Land*** requires rejection of the Congregation's argument that, even though there was no cathedral on the property during the disputed tax year, we may look at other factors to determine whether the property was "necessary for [the] location … of" a cathedral within the meaning of WIS. STAT. § 70.11(4)(a).

¶36 Before proceeding to the Congregation's backup argument based on the Way of the Cross, we note that the Congregation devotes much of its brief-in-chief and reply brief to its totality of the circumstances argument. We further note that, even if this was the applicable test, the Congregation's argument fails to

[4] The Congregation cites several out-of-state cases as support for its argument that the exemption under WIS. STAT. § 70.11(4)(a) should apply here. As the City points out, however, none of these cases appear to involve statutory language or standards like Wisconsin's. *See* ***South Iowa Methodist Homes, Inc. v. Board of Review of Cass Cty.***, 136 N.W.2d 488, 488-92 (Iowa 1965); ***Episcopal Sch. of Cincinnati v. Levin***, 884 N.E.2d 561, 562-66 (Ohio 2008); ***Dougherty v. City of Philadelphia***, 172 A. 177, 178-80 (Pa. Super. Ct. 1934); ***Summerfield Methodist Episcopal Church v. City of Philadelphia***, 88 Pa. D. & C. 134, 135-38 (Pa. Ct. of Common Pleas 1954).

Further, even if any of these cases *did* involve the same statutory language, we would not be at liberty to disregard our supreme court's interpretation of the statutory language and instead follow other courts' interpretations.

Finally, even if we could follow these cases, on balance they appear to support the *City's* argument more than they do the Congregation's argument. *See* ***South Iowa Methodist Homes***, 136 N.W.2d at 488-89 (in which the issue was whether an exemption applied during a building's construction period); ***Dougherty***, 172 A. at 180 (in which the court stated that, in order to maintain an exemption after a fire, a church needed to rebuild "with reasonable dispatch"); ***Summerfield Methodist***, 88 Pa. D. & C. at 135-36 (in which reconstruction of a church damaged by fire took place immediately, with the issue being whether the absence of religious worship during a six-month period disqualified the church for an exemption).

account for facts and legal considerations that cut against the Congregation. We do not dwell on this topic with the following exception.

¶37 There is a flaw in the Congregation's portrayal of the property at issue as being historically used for a cathedral or church. The Congregation fails to acknowledge that a significant portion of the property was not owned by the Congregation between 1971 and 2011, a time period that includes the final 34 years of the prior cathedral's existence. The Congregation sold that portion of the property in 1971, then reacquired it in 2011 as part of the Congregation's plan to build the new cathedral.

¶38 Plainly, the part of the property that the Congregation sold in 1971 and reacquired in 2011 was not necessary for the location of the *prior* cathedral or, for that matter, for any other Congregation building between 1971 and 2011. The fact that part of the property was not owned or used by the Congregation from 1971 to 2011 would seem significant in a totality of the circumstances analysis, but the Congregation never explains why that part of the property should be treated the same as the rest of the property.

B. Necessary for the Way of the Cross

¶39 As we understand it, the Congregation alternatively contends that the Way of the Cross is a "building" within the meaning of the exemption statute and the property is necessary for the location and convenience of this Way of the Cross building.

¶40 This argument is easily rejected because the Way of the Cross is plainly not a "building" within the meaning of the statutory exemption.

¶41 The Way of the Cross was professionally designed and consists of the following features:[5]

- a gated entry;
- a box containing written prayers that may be used at the site;
- plaques;
- 14 granite crosses, flush with the ground, forming the 14 Stations of the Cross;
- crushed red granite forming a path from Station to Station;
- several stones from the prior cathedral; and
- a bench for reflection at the final Station.

¶42 The term "building" is not defined in WIS. STAT. § 70.11(4)(a). Absent a specialized definition in the statute, courts give statutory language "'its common, ordinary, and accepted meaning.'" ***State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.***, 2017 WI 70, ¶33, 376 Wis. 2d 239, 898 N.W.2d 35 (quoted source omitted).

¶43 The Congregation points to no authority indicating that the term "building" in WIS. STAT. § 70.11(4)(a) should be interpreted broadly. On the contrary, as the Congregation acknowledges, there is case law that requires us to construe tax exemption statutes not only reasonably but also *strictly against granting an exemption*. *See* ***Covenant Healthcare Sys., Inc. v. City of Wauwatosa***, 2011 WI 80, ¶22, 336 Wis. 2d 522, 800 N.W.2d 906. To construe the term "building" in § 70.11(4)(a) so broadly as to include the Way of the Cross

[5] For purposes here, we need not explain additional features relating to the Way of the Cross's religious purposes.

here would be the opposite of a strict construction against granting an exemption. As far as the record discloses, the Way of the Cross lacks any roof or walls or other structural features normally associated with a "building." Indeed, it has few structural features other than those that are flush with the ground.

¶44 The Congregation directs us to the proposition that a statute "should not be so strictly construed as to defeat the legislative intent of creating the exemption." *See* ***Covenant Healthcare***, 336 Wis. 2d 522, ¶32. But the main source of legislative intent is statutory language. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110 ("We assume that the legislature's intent is expressed in the statutory language."). Thus, the Congregation's "intent" argument goes nowhere. The argument does not answer the question: What did the legislature intend when it used the term "buildings"?

¶45 Finally, the Congregation asserts that the Way of the Cross furthers the Congregation's religious purposes the same as if the Way of the Cross were enclosed by a roof and walls. That may be true, but this way of thinking, as with some of the Congregation's other arguments, appears to mix the exclusive-use requirement with the necessary-for-buildings requirement. Use for an exempt purpose is not enough to satisfy the necessary-for-buildings requirement.

¶46 To illustrate, we need only think back to the ***Deutsches Land*** facts. The outdoor soccer fields in that case did not suffice to meet the necessary-for-buildings requirement. However, ***Deutsches Land*** could be read as supplying strong support for the proposition that an indoor soccer field, that is, a soccer field within a building, would have met the necessary-for-buildings requirement. Likewise here, an outdoor Way of the Cross lacking a roof, walls, enclosure, or

other building-like features cannot suffice even though an indoor Way of the Cross might. This difference reflects the statutory language requiring a building. As the court in ***Deutsches Land*** put it, "[t]he exemption of land is tied to, and follows from, the exemption of *buildings*." ***Deutsches Land***, 225 Wis. 2d at 100 (emphasis added).

Conclusion

¶47 For the reasons stated, we affirm the circuit court's order dismissing the Congregation's challenge to the 2014 taxation of the property that includes the site of the former St. Raphael's Cathedral.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.