COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2015

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. 2014AP2688

Cir. Ct. No. 2013CV152

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

VILAS COUNTY, A WISCONSIN MUNICIPAL CORPORATION,

PLAINTIFF-RESPONDENT,

V.

HARLAN J. ACCOLA AND BRENDA L. ACCOLA,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 STARK, J. Harlan and Brenda Accola appeal an order granting summary judgment to Vilas County in the County's action to enforce a zoning ordinance. The issue on appeal is whether the ordinance permits short-term rentals of single-family detached dwelling units located in the single-family

residential district. We agree with the County and the circuit court that, under the facts of this case, the ordinance unambiguously prohibits short-term rentals of single-family detached dwelling units in the R-1 district. Accordingly, we affirm the order granting summary judgment to the County.

BACKGROUND[1]

¶2 In June 2012, the Accolas purchased a home on Rosalind Lake in the Town of Presque Isle. The property is subject to the County's general zoning ordinance and is located in the R-1 zoning district. Section 4.1 of the ordinance, which governs the R-1 district, begins with a statement explaining that the purpose of the R-1 district is to "create areas for exclusive low density residential use and prohibit the intrusion of uses incompatible with the quiet and comfort of such areas." VILAS CNTY., WIS., GENERAL ZONING ORDINANCE § 4.1(A) (Nov. 24, 2010). Immediately following this purpose statement, the ordinance lists the following as permitted uses in the R-1 district:

> (1) Single-family detached dwelling units, including individual mobile homes, which meet the yard requirements of the district.
>
> (2) One non-rental guesthouse, which may be occupied on a temporary basis.
>
> (3) Parks, playgrounds, golf courses and other recreation facilities. …

[1] The Accolas' statement of the case is devoid of record citations. WISCONSIN STAT. RULE 809.19(1)(d) requires an appellant's brief to contain "[a] statement of the case, which must include … a statement of facts relevant to the issues presented for review, with appropriate references to the record." We caution counsel that future rule violations may result in monetary sanctions. *See* WIS. STAT. RULE 809.83(2).

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

(4) Home occupations as defined in Article XI of this Ordinance.[2]

(5) Essential services.

(6) Hobby farms.

Id., § 4.1(B).

¶3 In addition to the R-1 district, the general zoning ordinance also creates a Residential/Lodging (RL) district. Section 4.2 of the ordinance, which governs the RL district, contains the following purpose statement:

> Purpose: The Residential/Lodging District is to provide for areas with primarily low-density residential use, but with some mixing of low-density Transient Lodging. (Transient Lodging is defined as: A commercial lodging establishment, which allows rental of sleeping quarters or dwelling units for periods of less than one month.) Transient Lodging uses are a permitted use. Examples of these uses include residential dwellings, bed & breakfasts and resort establishments with no contiguous multiple-family dwelling units. …

Id., § 4.2(A). The ordinance then lists the following permitted uses for the RL district:

(1) All uses permitted in the R-1 District.

(2) Bed and breakfast establishments.

(3) Resort establishments with no contiguous multiple-family dwelling units.

(4) Rental of residential dwelling unit.

Id., § 4.2(B).

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[2] Article XI of the ordinance defines a "home occupation" as "a gainful occupation engaged in by persons residing in their dwelling, which is conducted in the principal or accessory structure" and meets certain listed criteria. VILAS CNTY., WIS., GENERAL ZONING ORDINANCE, art. XI at 11-4 (Nov. 24, 2010).

¶4 The Rosalind Lake property is not the Accolas' primary residence. Shortly after they purchased the property, the Accolas began advertising it for rent on the internet, for stays as short as two nights. On July 18, 2012, the County notified the Accolas that single-family residences in the R-1 district could not be rented for periods of less than one month. The County asserted rentals of less than one month constituted "transient lodging," as that term is used in the section of the ordinance governing the RL district.

¶5 The Accolas subsequently created a corporation called A Better Way to Live. They began allowing people to stay at the Rosalind Lake property for periods of less than one month in exchange for "donations" to the corporation. The Accolas represented to individuals interested in staying at the property that the corporation would use a portion of each donation to pay "expenses, utilities[,] cleaning fees, etc[.]," and the remainder would be donated to charity.[3] The County again informed the Accolas that renting their property for periods of less than one month violated the general zoning ordinance. The County asserted, "Soliciting donations on a weekly basis in exchange for housing is the functional equivalent of renting the property[.]"

¶6 The County initiated the instant enforcement action in August 2013, seeking forfeitures and an injunction prohibiting the Accolas from renting the Rosalind Lake property for periods of less than thirty days. The parties ultimately

[3] The County asserts A Better Way to Live received $66,827 in "donations" between June 2012 and March 2014 from people who stayed at the Rosalind Lake property, but it donated only $655 to charity. The Accolas dispute this assertion, and they also argue it is irrelevant to the issue presented by this appeal. We agree with the Accolas that the amount of money their corporation donated to charity is not relevant to determining whether the County's general zoning ordinance permits single-family properties in the R-1 district to be rented for periods of less than one month.

filed cross-motions for summary judgment. The Accolas argued the short-term rental of their property was permitted because the general zoning ordinance allows "[s]ingle-family detached dwelling units" in the R-1 district. *See* ***id.***, § 4.1(B)(1). They asserted their property indisputably qualified as a single-family detached dwelling unit, and the general zoning ordinance did not explicitly prohibit short-term rentals of single-family detached dwelling units in the R-1 district.[4]

¶7 The County, in turn, argued the Accolas' short-term rental of the Rosalind Lake property constituted "transient lodging." As noted above, the general zoning ordinance expressly permits transient lodging in the RL district. ***Id.***, § 4.2(A). By definition, the term "transient lodging" applies only to rental of sleeping quarters or dwelling units "for periods of less than one month." ***Id.*** The ordinance for the RL district lists "residential dwellings" as an example of transient lodging, and it then lists "rental of residential dwelling unit" as a permitted use in the RL district. ***Id.***, § 4.2(A), (B)(4).

¶8 Reading these provisions together, the County argued the ordinance permits rental of residential dwelling units for periods of less than one month in the RL district. The County then noted the ordinance also permits in the RL district "[a]ll uses permitted in the R-1 district." ***Id.***, § 4.2(B)(1). Given that all

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[4] The general zoning ordinance defines a single-family dwelling as "[a] residential building containing one dwelling unit." VILAS CNTY., WIS., GENERAL ZONING ORDINANCE, art. XI at 11-3 (Nov. 24, 2010). It defines a dwelling unit as "[a] building or portion thereof; with rooms arranged, designed, used or intended to be used for one family." ***Id.*** A detached dwelling is defined as "[a] single-family building, which is entirely surrounded by open space on the same lot." ***Id.***

For purposes of ruling on the parties' summary judgment motions, the circuit court assumed the Accolas' property had never been used by multiple families at a single time. We do the same for purposes of this appeal. It is undisputed that the Rosalind Lake property qualifies as a single-family detached dwelling unit in all other respects.

uses permitted in the R-1 district are also permitted in the RL district, the County argued the Accolas' interpretation of the ordinance would render § 4.2(B)(4) superfluous because, if rentals of residential dwelling units for periods of less than one month were permitted in the R-1 district, there would be no need to separately list "rental of residential dwelling unit" as a permitted use in the RL district. Accordingly, the County argued the only reasonable reading of the ordinance was that short-term rentals of residential dwelling units were not permitted in the R-1 district.

¶9 The circuit court agreed with the County, concluding short-term rentals of the Accolas' property for periods of less than one month, whether compensated by direct payment of rent or by donations to the Accolas' corporation, were not permitted in the R-1 district. The court reasoned it was not dispositive that the zoning ordinance failed to expressly prohibit short-term rentals of single-family detached dwelling units in the section governing the R-1 district because "the concept of zoning is to list what you can do. And if it's not there[,] the presumption is that you [cannot]." The court then explained that the "specific permission to rent a residential dwelling unit in [the] RL District provides the necessary synthesis to say that it's permitted somewhere, that implies that it's prohibited in R-1." The court concluded the ordinance, "although not perfect, is sufficiently clear that it's not ambiguous as to whether or not you're allowed to rent property on a short term basis" in the R-1 district. As a result, the court imposed a $35,000 forfeiture and permanently enjoined the Accolas from renting the Rosalind Lake property for periods of less than thirty days. The Accolas now appeal.

STANDARDS OF REVIEW

¶10 We independently review a grant of summary judgment, 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 appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶11 Here, the material facts are undisputed, leaving only an issue of law for our review. Specifically, we must determine whether the County's general zoning ordinance permits single-family detached dwelling units in the R-1 district to be rented for periods of less than one month. "[C]onstruction of an ordinance under undisputed facts is a question of law for our independent review." ***Schwegel v. Milwaukee Cnty.***, 2015 WI 12, ¶18, __ Wis. 2d __, 859 N.W.2d 78; *see also* ***FAS, LLC v. Town of Bass Lake***, 2007 WI 73, ¶9, 301 Wis. 2d 321, 733 N.W.2d 287 (interpretation of a zoning ordinance presents a question of law that we review independently).

¶12 When interpreting a zoning ordinance, we apply the rules of statutory interpretation. ***FAS, LLC***, 301 Wis. 2d 321, ¶21. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute. ***Id.***, ¶45. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meanings. ***Id.***

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

Id., ¶46. Where possible, statutory language must be read "to give reasonable effect to every word, in order to avoid surplusage." ***Id.***

¶13 When conducting a plain-meaning analysis of statutory language, we may consider an explicit statement of legislative purpose contained in the statute's text. ***Id.***, ¶¶48-49. However, we may not consult extrinsic sources of interpretation, such as legislative history, unless the statute is ambiguous. ***Id.***, ¶46. A statute is ambiguous if its ability to support two reasonable constructions creates an ambiguity that cannot be resolved through the language of the statute itself. ***Orion Flight Servs., Inc. v. Basler Flight Serv.***, 2006 WI 51, ¶17, 290 Wis. 2d 421, 714 N.W.2d 130.

¶14 In addition to these general principles of statutory interpretation, we observe that the power to enact zoning ordinances is broadly construed in favor of the municipality. *See* ***Heef Realty & Invs., LLP v. City of Cedarburg Bd. of Appeals***, 2015 WI App 23, ¶7, __ Wis. 2d __, __ N.W.2d __. However, because zoning ordinances are "in derogation of the common law[,]" any ambiguity in the terms of a zoning ordinance must be resolved in favor of the free use of private property. ***Cohen v. Dane Cnty. Bd. of Adjustment***, 74 Wis. 2d 87, 91-92, 246 N.W.2d 112 (1976). In other words, "[t]he provisions of a zoning ordinance, to operate in derogation of the common law, must be in clear, unambiguous, and peremptory terms." ***Id.*** at 91.

DISCUSSION

¶15 The Accolas argue the County's general zoning ordinance does not unambiguously prohibit rentals of single-family detached dwelling units in the R-1 district for periods of less than one month. They note § 4.1(B)(1) of the ordinance merely lists "[s]ingle-family detached dwelling units" as a permitted use in the R-1 district, without specifically prohibiting rental of those units. We agree with the Accolas that § 4.1(B)(1) neither expressly permits nor prohibits either short-term or long-term rentals of single-family detached dwelling units.[5] We also observe that no other portion of § 4.1 expressly prohibits the rental of single-family detached dwelling units. We recently held that, when an ordinance simply lists "single-family dwellings" as a permitted use in a zoning district, without more, the ordinance does not unambiguously prohibit short-term rentals of single-family dwellings in that district. *See* ***Heef***, 2015 WI App 23, ¶¶8, 13-14. Thus, if we were limited to considering § 4.1 of the County's zoning ordinance, we would agree with the Accolas that the ordinance does not unambiguously prohibit the rental of single-family detached dwelling units in the R-1 district for periods of less than one month.

[5] The Accolas assert, and the circuit court agreed, that an absolute ban on the rental of single-family detached dwelling units in the R-1 district would be unenforceable. The County does not dispute this proposition.

However, for purposes of this appeal, we need only determine whether the general zoning ordinance unambiguously prohibits rentals of single-family detached dwelling units in the R-1 district for periods of less than one month. We are not asked to determine whether the ordinance unambiguously prohibits rentals for periods greater than one month. Accordingly, we take no position on whether a wholesale ban on the rental of single-family detached dwelling units in the R-1 district would be enforceable.

¶16 However, the language of § 4.1, governing the R-1 district, must be read in context with § 4.2, which governs the RL district. *See* ***Kalal***, 271 Wis. 2d 633, ¶46 (Statutory language is interpreted in the context in which it is used, in relation to the language of surrounding or closely-related statutes.). Section 4.2(B)(4) lists as a permitted use in the RL district "[r]ental of residential dwelling unit." Although § 4.2(B)(4) does not distinguish between short-term and long-term rentals, we agree with the County and the circuit court that the phrase "rental of residential dwelling unit" must be read in context with the definition of transient lodging in § 4.2(A), which contains a one-month time limitation.[6]

¶17 Specifically, § 4.2(A) states that the purpose of the RL district is to "provide for areas with primarily low-density residential use, but with some mixing of low-density Transient Lodging." It also states that transient lodging uses "are a permitted use" in the RL district. It defines transient lodging as "[a] commercial lodging establishment, which allows rental of sleeping quarters or dwelling units *for periods of less than one month.*"[7] (Emphasis added.) It then

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[6] The Accolas suggest we cannot consider § 4.2(A), the purpose statement for the RL district, unless we first conclude the ordinance is ambiguous. We disagree. We need not find an ordinance ambiguous before considering an explicit statement of legislative purpose contained in its text. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶¶48-49, 271 Wis. 2d 633, 681 N.W.2d 110. Only extrinsic sources of legislative intent are prohibited in a plain-meaning analysis. *See* ***id.***, ¶¶46, 50.

[7] We acknowledge that the definition of transient lodging includes the term "commercial lodging establishment," which is not defined in the ordinance. For purposes of this appeal, we need not attempt to define the term "commercial lodging establishment" or determine at what point the use of a residential property for rental purposes becomes a commercial use. However, we do note that the word "commercial" is commonly defined as "concerned with or engaged in commerce" or "making or intended to make a profit[.]" NEW OXFORD AMERICAN DICTIONARY 344 (2001). The facts of this case show that the Accolas advertised their property for rent on the internet, frequently rented the property to third parties for periods of less than one month, and received substantial funds in exchange for the rentals. Under these circumstances, the short-term rental of the Accolas' property was clearly commercial in nature. Moreover, on appeal, the Accolas do not argue their use of the property was not commercial.

lists as examples of "transient lodging uses" "residential dwellings, bed & breakfasts and resort establishments with no contiguous multiple-family dwelling units." These examples are the same uses listed as permitted uses in the RL district in § 4.2(B)(2), (3), and (4). Thus, when § 4.2(B)(4) is read in context with § 4.2(A), the only reasonable conclusion is that the phrase "rental of residential dwelling unit" in § 4.2(B)(4) refers to rentals of residential dwelling units for periods of less than one month. We therefore agree with the County and the circuit court that § 4.2(B) unambiguously permits rental of residential dwelling units in the RL district for periods of less than one month.

¶18 We next observe that § 4.2(B)(1) unambiguously permits in the RL district "[a]ll uses permitted in the R-1 District." The only residential dwelling units permitted in the R-1 District are single-family detached dwelling units. *See* VILAS CNTY., WIS., GENERAL ZONING ORDINANCE § 4.1(B) (Nov. 24, 2010). Nothing in § 4.2 permits any other type of residential dwelling unit in the RL district.[8] Accordingly, as with the R-1 district, the only residential dwelling units permitted in the RL district are single-family detached dwelling units. Thus, when § 4.2(B)(4) states that rental of residential dwelling units is permitted in the RL district, it actually means that rental of single-family detached dwelling units is permitted in the RL district.

¶19 As demonstrated in the preceding paragraphs, § 4.2 of the general zoning ordinance unambiguously permits in the RL district both: (1) the rental of

[8] "Bed and breakfast establishments" and "[r]esort establishments with no contiguous multiple-family dwelling units" are listed as permitted uses in the RL district. *See* VILAS CNTY., WIS., GENERAL ZONING ORDINANCE §§ 4.2(B)(2)-(3) (Nov. 24, 2010). However, these uses do not qualify as residential dwelling units. If they did, §§ 4.2(B)(2) and (3) of the ordinance, which list them as permitted uses, would be superfluous, in light of § 4.2(B)(4).

single-family detached dwelling units for periods of less than one month; and (2) all uses permitted in the R-1 district, which includes single-family detached dwelling units. If the Accolas were correct that the rental of single-family detached dwelling units for periods of less than one month was a permitted use in the R-1 district, § 4.2(B)(4) of the ordinance, permitting the rental of single-family detached dwelling units for periods of less than one month in the RL district, would be superfluous because all uses permitted in the R-1 district are already permitted in the RL district under § 4.2(B)(1). Where possible, an ordinance must be read "to give reasonable effect to every word, in order to avoid surplusage." *See* ***Kalal***, 271 Wis. 2d 633, ¶46. Consequently, reading § 4.1 of the ordinance in context with § 4.2 leads to the inescapable conclusion that the rental of single-family detached dwelling units for periods of less than one month is not a permitted use in the R-1 district because a contrary interpretation would render § 4.2(B)(4) superfluous.

¶20 The Accolas argue this interpretation is inconsistent with our recent decision in ***Heef***. There, a zoning ordinance promulgated by the City of Cedarburg listed "[s]ingle-family dwellings" as a permitted use in the single-family residential district. ***Heef***, 2015 WI App 23, ¶8. The City's Board of Appeals determined this language did not permit short-term rentals of single-family dwellings. ***Id.***, ¶1. The circuit court reversed the Board's decision on certiorari review, and we affirmed the court's decision on appeal. ***Id.*** We reasoned the properties at issue qualified as single-family dwellings because they were designed for use by one family and were used by only one family at a time. ***Id.***, ¶10. We further observed that the city's zoning ordinance "[did] not require occupancy over a period of time[,]" and there was "nothing inherent in the concept of a residence or dwelling that includes time." ***Id.***, ¶¶10, 13. We concluded, "If

the City is going to draw a line requiring a certain time period of occupancy in order for property to be considered a dwelling or residence, then it needs to do so by enacting clear and unambiguous law." ***Id.***, ¶13. Stated differently, a zoning board cannot "arbitrarily impose time/occupancy restrictions in a residential zone where there are none adopted democratically by the City." ***Id.***

¶21 Unlike the ordinance we interpreted in ***Heef***, the County's general zoning ordinance *does* contain a democratically adopted time restriction on the rental of single-family detached dwelling units. As explained above, when § 4.1 of the ordinance, pertaining to the R-1 district, is read in context with § 4.2, pertaining to the RL district, it is clear that rentals of single-family detached dwelling units for periods of less than one month are not permitted in the R-1 district. ***Heef*** is therefore distinguishable, and it does not mandate a conclusion that the ordinance at issue in this case permits the Accolas to rent the Rosalind Lake property for periods of less than one month.

¶22 The Accolas also argue the fact that the parties have advanced different interpretations of the general zoning ordinance "[i]n itself demonstrates ambiguity[.]" The Accolas are mistaken. "The fact that the parties advance different interpretations of [an ordinance] does not, alone, make the [ordinance] ambiguous." ***State v. West***, 2011 WI 83, ¶54, 336 Wis. 2d 578, 800 N.W.2d 929. Instead, an ordinance is ambiguous only if its language gives rise to more than one *reasonable* interpretation. *See* ***id.*** Here, the Accolas' interpretation is *unreasonable* because it would render § 4.2(B)(4) of the ordinance superfluous. Thus, the parties' differing interpretations of the ordinance are not evidence of an ambiguity.

¶23 Finally, the Accolas argue our interpretation of the ordinance is unreasonable because it produces an absurd result. The Accolas' argument on this point is somewhat convoluted. However, they essentially argue that, under our interpretation, rental of single-family detached dwelling units for periods of less than thirty days would also be prohibited in the multi-family residential district, which allows all uses permitted the R-1 district, as well as several additional uses. *See* VILAS CNTY., WIS., GENERAL ZONING ORDINANCE § 4.3(B) (Nov. 24, 2010). One of the additional permitted uses in the R-2 district is "Resorts." ***Id.***, § 4.3(B)(9). The Accolas argue:

> Resorts are prohibited in RL zoning—where short-term rental is permitted—from having contiguous multiple family dwellings on-site. Since no comparable restrictions on multiple family dwellings exist in R-2 zoning, resorts may have multi-family cabins on their property … so long as those cabins are not rented out for periods of less than thirty (30) days at a time. As the general purpose of resort cabins would be the accommodation of short-term, "transient" lodgers, the unintended consequence of the [c]ircuit [c]ourt's ruling would create an absurd result.

¶24 The Accolas' "absurd result" argument rests on a faulty premise. The prohibition on rentals for periods of less than thirty days in the R-1 district is limited to single-family detached dwelling units. It does not extend to multiple-family dwelling units, which are not a permitted use in the R-1 district in the first place. Thus, even if the prohibition on short-term rentals of single-family detached dwelling units in the R-1 district extends to the R-2 district, as the Accolas claim, that does not mean short-term rentals of multiple-family cabins on resort properties in the R-2 district are also prohibited. Both resorts and multiple-family dwelling units are expressly permitted in the R-2 district, without any restrictions on rentals. ***Id.***, § 4.3(B)(2), (9). Nor does any rental restriction arise when the section of the ordinance governing the R-2 district is read in context with

other sections of the ordinance. Under the rationale of ***Heef***, because the County failed to include any temporal or occupancy restrictions in the ordinance with respect to resorts and multiple-family dwellings located in the R-2 district, short-term rentals are not prohibited. Accordingly, our interpretation of the ordinance does not actually produce an absurd result.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.