COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1512 **Cir. Ct. No. 2013CV102**

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

THOMAS R. JORNS AND SANDRA EVANS JORNS,

PLAINTIFFS-RESPONDENTS,

V.

TOWN BOARD OF JACKSONPORT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Door County: PHILIP M. KIRK, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

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

¶1 PER CURIAM. The Town Board of Jacksonport appeals a circuit court order that reversed the Board's decision denying a town highway application, remanded for reconsideration before a substitute board, and denied

costs to the Board. We affirm those parts of the circuit court's order remanding for reconsideration due to the impermissibly high risk of bias and denying costs. However, we reverse that part of the court's order concerning selection of a substitute board. Instead, two of the Board's three members shall be substituted in a manner consistent with WIS. STAT. § 82.11(2).[1]

BACKGROUND

¶2 Thomas and Sandra Jorns purchased a forty-acre parcel with no public access in the Town of Jacksonport in 2001. Having failed to acquire access from adjoining landowners, the Jornses filed a WIS. STAT. § 82.27[2] application to create a town highway accessing their parcel. This appeal follows the third such application filed by the Jornses.[3]

¶3 The Board held a hearing on the Jornses' application in February 2013. All three Board members were present for the hearing, along with the Jornses, their witnesses, and some of the surrounding property owners. The Jornses presented testimony and exhibits to the Board regarding what they were seeking, over whose property they were requesting a roadway, and outlining efforts made to secure an access easement. During the Jornses' presentation, the town chairman and one other Board member posed questions and comments to the Jornses.

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

[2] WISCONSIN STAT. ch. 82 is titled, "TOWN HIGHWAYS," and WIS. STAT. § 82.27 is titled, "Landlocked property and property with insufficient highway access."

[3] WISCONSIN STAT. § 82.27(9) permits owners of landlocked property to reapply for a town highway to their property three years after a refusal.

¶4 Following the Jornses' presentation, neighboring property owners provided testimony and exhibits. The Board then adjourned, and it made a physical inspection of the property on another date. The Board reconvened in April and denied the Jornses' application.

¶5 The Jornses sought certiorari review in the circuit court. The court determined that, based on the two board members' questions and comments, the Jornses did not receive a fair hearing. Accordingly, the court vacated the Board's decision, disqualified all three members, and remanded for a new hearing before a substitute board. The court further ordered that it would retain jurisdiction of the matter, and it directed the Jornses and the Board to each select one substitute board member and to jointly select the third member. Finally, it ordered that the parties would bear their own costs up to that point.

¶6 The Board now appeals. Additional facts concerning the Board members' statements at the public hearing are set forth below.

DISCUSSION

¶7 The Board argues the circuit court (1) erroneously determined the Board acted contrary to law, (2) exceeded its authority when retaining jurisdiction and setting forth the procedure for selecting a substitute board, and (3) improperly denied imposition of costs against the Jornses.

¶8 A WIS. STAT. § 82.27 applicant must file an affidavit that "recites facts that satisfy the board that" the property is landlocked and "that the owner is unable to purchase a right-of-way to a public highway from the owners of the adjoining real estate or that [it] cannot be purchased except at an exorbitant price, which price shall be stated in the affidavit." WIS. STAT. § 82.27(2), (2)(a).

Following public notice, the board holds a meeting where it must "decide, in its discretion, whether to grant the application." WIS. STAT. § 82.27(4).

¶9 "Any person aggrieved by a highway order, or a refusal to issue such order, may seek judicial review under s. 68.13." WIS. STAT. § 82.15. In turn, WIS. STAT. § 68.13(1) provides: "Any party to a proceeding resulting in a final determination may seek review thereof by certiorari …. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision."

¶10 "There is nothing in the text of WIS. STAT. § 68.13(1) limiting or enlarging the scope of certiorari review. Accordingly, the scope of review under Chapter 68 is identical to the scope of common law certiorari review." ***Ottman v. Town of Primrose***, 2011 WI 18, ¶37, 332 Wis. 2d 3, 796 N.W.2d 411 (footnote omitted). Our review is therefore limited to: (1) whether the municipality kept within its jurisdiction; (2) whether it acted according to 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 the order or determination in question. *See* ***id.***, ¶35. "[O]n certiorari review, there is a presumption of correctness and validity to a municipality's decision." ***Id.***, ¶48. The petitioner bears the burden to overcome the presumption. ***Id.***, ¶50.

¶11 To act in accordance with law, a decision maker must comport with the "common-law concepts of due process and fair play." ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 24, 498 N.W.2d 842 (1993). These concepts incorporate "the right to have matters decided by an impartial board." ***Id.*** (footnote omitted). A decision maker "violates due process and fair play by harboring bias, or an impermissibly high risk of bias, or prejudging the facts or the

application of the law." ***Keen v. Dane Cnty. Bd. of Supervisors***, 2004 WI App 26, ¶14, 269 Wis. 2d 488, 676 N.W.2d 154 (citing ***Marris***, 176 Wis. 2d at 25). Whether a decision maker violated the concepts of due process and fair play is a question of law. *See* ***Ottman***, 332 Wis. 2d 3, ¶54.

Whether the Board acted according to law

¶12 We conclude certain questions and comments posed by the Board demonstrate an impermissibly high risk of bias, requiring remand for a new hearing.

¶13 Town chairman Alvin Birnschein presented several questions or comments that suggest he prejudged the matter before the Board or considered improper factors. Near the beginning of the hearing, while the Jornses' attorney was mapping out their case, Birnschein interrupted, as follows:

> I have a question. ... I would like for Mr. Jorns to explain himself, why we're sitting here again today. I was here at the last hearing as town chairman. He went through the courts. Why is there this dissentment [sic] between all the neighbors? What took place with Mr. Jorns and the neighbors? Explain that to this board. I'm the only old one here. These people don't have any idea. I don't have any idea. It was never explained to me. What took place? Why are these people so bitter? Why? Explain that to us.

¶14 Later—still during the Jornses' initial presentation—as counsel was explaining how the Jornses would be required to pay the costs of building any road, Birnschein interrupted again, leading to the following discussion:

> [Birnschein]: I've already told Mr. Jorns that the town was not going to build a town road. We have no desire to take another town road, put it on—take it off the tax rolls and put it on. It's an expense to us. We have 47, 48 miles of town road right now, and we don't need any more. Keep it a private driveway, he maintains it, plows the snow, takes

> care of it, he builds the road to our specifications, that's his problem.
>
> [Jornses' attorney]: And I certainly understand where you're coming from, and if that were an option for my client we would—we would do that without question.
>
> [Birnschein]: Then you got to sit down with these people and talk to them.
>
> [Jornses' attorney]: And we've been there, and that—
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> [Birnschein]: I don't think you have sat down with these people.
>
> [Jornses' attorney]: The statute has required—the statute requires that we come to you when we can't get to—
>
> [Birnschein]: I understand, and I fully understand all of this stuff. I've gone through this before. …
>
> [Jornses' attorney]: … But your job as a … member of the town board is to do what's in the best interest of the public, okay? So what's in the best interest of the public here? And I'm going to get to that. And if you'll let me get that far, I'd love to try to explain that to you. …
>
> I plead with you to give me a chance to get to some of these advantages that I'm going to talk about.
>
> [Birnschein]: Go ahead.
>
> [Jornses' attorney]: I'm going to try to change your mind, Mr. Birnschein, all right?

¶15 Immediately following that conversation, the Board's attorney asked a clarifying question regarding a potential windfall to the town. The Jornses' attorney explained the potential windfall came from the difference between the $30,000 to $40,000 estimated road cost and the $62,500 increase in market value to the Jornses' property in the event it gained public access.[4] The attorney

[4] A property owner requesting a highway must pay the "advantages," which is the greater of the highway costs or the increased value of the property. *See* WIS. STAT. § 82.27(1), (5).

clarified, however, that any landowners who had to be compensated for their land lost to the road would also be paid from the $62,500. At that point, board member Thomas Wilson interjected, "So where is the windfall?" The following exchange ensued:

> [Jornses' attorney]: Well, there's no reason you have to pay $20,000 to these—to the property owners for this—you're certainly—
>
> [Wilson]: Why would you not?
>
> [Jornses' attorney]: I—and that's your decision. That's—
>
> [Wilson]: No. And that's the buyer's and sellers' decision in my mind.
>
> [Jornses' attorney]: Well, not at that point. At that point it's your money.
>
> [Wilson]: No, at this point. At this point it has been. …

¶16 The last of the troubling comments came after the Jornses presented their case, during a question and answer period. The Jornses had just proposed—unsuccessfully—to pay neighboring landowners four times the appraised value of the land needed for access. The Jornses observed they had never received a single counter offer and stated, "It's hard to negotiate with yourself." At that point, Birnschein stated:

> You know, coming in the—again, Al Birnschein, town chairman. From—it's not my ideas, it's the town board's. And we've gone through this, I've gone through this the second time, and I just—I just for the life of me cannot understand that we as human beings can't sit down and come to an agreement for a 30-foot right-of-way, and it's done.
>
> I know what's going to happen. We're going to say go ahead with the road, we're going to condemn the property, and we're going to get dragged into court. I know that's going to happen, that's what's going to happen. Now they're going to—now we're the bad guys.

> The Fischers are elderly people. I've known the Fischers since I was a little toddler, and I'm 73 years old, Mr. Jorns. I've known those people that long. I have never, ever heard a bad word about the Fischer family. And I don't understand why you guys cannot come together. This has bothered me. I've sat the last couple days trying to think what is wrong, why can't you people come together and get an agreement so that you can get on your property.

¶17 The board members' comments largely speak for themselves. Nonetheless, we briefly address the concerns with each. Birnschein's first comments were confrontational, demanding that the Jornses explain why the Board was being required to convene and address the matter again—despite the Jornses' statutory right to apply to the Board for a town highway, and to reapply every three years. *See* WIS. STAT. § 82.27(2), (9). The comments also focused on the reason for the Jornses' inability to obtain access from any neighbor, rather than the relevant fact that they had attempted to obtain such access.

¶18 Birnschein's next comments suggested he—and perhaps the entire Board—had already determined it would deny the highway application prior to the hearing. Those comments came before hearing the Jornses' entire presentation, much less hearing from other interested parties. Birnschein then reiterated his belief that the matter was appropriately between the Jornses and their neighbors, as opposed to an issue for the Board to consider. Further, when the Jornses' attorney then pleaded for an opportunity to present their entire case and change Birnschein's mind, Birnschein did not deny having already made up his mind; he was mute.

¶19 Wilson's comments, though brief, suggest he also prejudged the case—based on improper considerations. His comments confirmed his views were consistent with Birnschein's, that the matter was between the Jornses and their neighbors and that they should simply work it out themselves. Additionally,

despite raising the windfall issue, Wilson revealed an unwillingness to actually consider the advantages of granting the highway application.

¶20 In Birnschein's final comments, he again reiterated that the parties should simply settle the matter themselves, again appearing to speak on behalf of the entire Board as if it had already decided the issue. He then vouched for some of the neighboring landowners, whom he had known for seventy years. The Jornses could hardly have believed they were receiving a fair hearing when the most vocal board member was vouching for the good character of those opposing the Jornses' application. As we observed in ***Keen***, 269 Wis. 2d 488, ¶15, a board member "cannot be both an advocate and an impartial decision[]maker."

¶21 We conclude Birnschein's and Wilson's comments demonstrate an impermissibly high risk of bias, requiring remand for a new hearing where those two members are substituted. *See* ***id.***, ¶¶17, 21 (where impermissible risk of bias, proper remedy is to remand for reconsideration without objectionable board member); ***Marris***, 176 Wis. 2d at 24 n.5, 31 (recognizing a common-law duty to disqualify board members where there is bias or impermissibly high risk of bias). While we start with a presumption of correctness and validity, we are satisfied that the record overcomes that presumption. *See* ***Marris***, 176 Wis. 2d at 27-30. However, we agree with the Board that the third member should be permitted to participate in the new hearing. Although Birnschein purported to speak on behalf of the entire Board, the third member never confirmed his concurrence with Birnschein's comments or made any improper comments of his own. Thus, we presume the third member was impartial.

Whether the circuit court exceeded its authority

¶22 The Board argues the circuit court exceeded its authority by retaining jurisdiction of the matter and by directing how the substitute board would be selected upon remand. We agree in both respects.

¶23 The specific review statute applicable here provides: "Any party to a proceeding resulting in a final determination may seek review thereof by certiorari …. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision." WIS. STAT. § 68.13(1). Nothing in the statute permits a court to maintain jurisdiction.

¶24 Further, upon determining that the agency reviewed did not act according to law, "a certiorari court can reverse the agency's decision and remand it to the agency to hold a new hearing. However, a certiorari court cannot order the board to perform a certain act." ***Guerrero v. City of Kenosha Hous. Auth.***, 2011 WI App 138, ¶9, 337 Wis. 2d 484, 805 N.W.2d 127 (citations omitted). Additionally, a certiorari court lacks authority to grant equitable relief. *See* ***id.*** Therefore, we further conclude the circuit court lacked authority to mandate a special procedure for selecting a substitute board.

¶25 We agree with the Board that WIS. STAT. § 82.11(2) provides the proper procedure upon remand. That statute states, "If a town official is prevented from acting, the remaining town officials shall act." Sec. 82.11(2)(a). Further, the statute directs the substitution procedure where "there are fewer than 2 supervisors in the town who are able to act on the application …." Sec. 82.11(2)(b). Because we have disqualified Birnschein and Wilson, the Board is required to proceed under § 82.11(2)(b) on remand.

Whether the Board was entitled to costs

¶26 Finally, the Board argues the circuit court erroneously denied imposition of costs against the Jornses. The court ordered that "[a]ny costs for the Jorns[es]' town road application hearing and the appeal to [c]ircuit [c]ourt shall be borne by the respective parties without reimbursement. Any future costs shall be allocated pursuant to [WIS. STAT. §] 82.27." Section 82.27(5) permits a town board to assess certain costs against a landowner who successfully obtains a town highway to their property, and it alternatively permits assessment of one-half those costs in the event of a denial.

¶27 The Board asserts the court lacked authority to deny it costs from the Jornses. We disagree. Because the Board failed to ensure the Jornses received a fair hearing, a new hearing must be conducted before a substitute board. The initial hearing is a nullity; therefore, it cannot be said that the Board has either approved or denied the Jornses' application. Because the Board is deemed not to have acted in the first instance, it follows that the Board lacked authority to assess costs against the Jornses for the nullified proceedings. Indeed, it seems absurd to suggest an applicant should be required to bear the costs of an unfair hearing. Further, WIS. STAT. § 82.27(5) uses the term "may," demonstrating it is not a mandatory provision. The Board's exercise of discretion in ordering costs cannot be considered reasonable when the Board failed to afford a fair hearing. We therefore affirm the circuit court's order with respect to costs.

¶28 Having prevailed on two of three issues, the Jornses may recover two-thirds of their total WIS. STAT. RULE 809.25(1) appellate costs.

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.

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