COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2772 **Cir. Ct. No. 2013CV2647**

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

NEZIH HASANOGLU AND DEBRA HASANOGLU,

PLAINTIFF-APPELLANTS,

V.

TOWN OF MUKWONAGO AND TOWN OF MUKWONAGO PLAN COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

Before Neubauer, C.J., Kessler and Stark, JJ.

¶1 PER CURIAM. Nezih and Debra Hasanoglu appeal a circuit court order sustaining a decision of the Town of Mukwonago Plan Commission to grant a special exception to Michael and Laurie Hollern for construction of an accessory building. The Hasanoglus contend that the Plan Commission lacked jurisdiction to

grant a special exception to the Hollerns. They further contend that the decision of the Plan Commission was arbitrary and unreasonable, and represented its will rather than its judgment. We disagree and affirm.

¶2 The Hasanoglus and Hollerns are neighbors in the rural portion of the Town of Mukwonago. By an application dated August 21, 2013, the Hollerns requested a zoning permit for construction of an accessory building on their property. The Hollerns indicated that the building would be used as a "riding arena."

¶3 The Town of Mukwonago building inspector reviewed the Hollerns' application and issued a memorandum to the Plan Commission regarding it. The memorandum notes that the proposed building would be located in the suburban estate zoning district and would be in "substantial compliance" with the town ordinances with two exceptions.

¶4 The first exception related to the square footage of the structure. The memorandum states:

> The zoning allows for a maximum of two accessory structures not to exceed 3,900 square feet. The existing barn is 418 square feet and the accessory building proposed (riding arena) is 6,300 square feet. Therefore, the proposed building would need Plan Commission Approval for the additional 2,818 square feet per Section 82-25(b)(3) of the Zoning Code.

¶5 The second exception related to the height of the structure. The memorandum states: "The proposed accessory building would also need Plan Commission Approval for the roof height increase per Section 82-23(c) of the Zoning code. The maximum allowable average roof height is a [sic] 15 feet and the proposed building has an average roof height of 24.75 feet."

¶6 Overall, the building inspector did not believe the size and height discrepancies would be fatal to the Hollerns' proposal. The memorandum concludes, "I have no objections to this improvement as proposed due to the rural surrounding area which has little chance of being developed."

¶7 On September 4, 2013, the Plan Commission met and approved the Hollerns' proposed accessory building subject to several conditions.[1] The Town Planner prepared a deed restriction for the property, which was subsequently recorded. The deed restriction characterizes the action of the Plan Commission as granting a special exception to the Hollerns.

¶8 Upon learning of the Plan Commission's decision, the Hasanoglus filed a certiorari action in the circuit court. Following the filing of the record and briefing of the issues raised by the Hasanoglus, the circuit court entered an order sustaining the decision. This appeal follows.

¶9 Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality. ***Ottman v. Town of Primrose***, 2011 WI 18, ¶34, 332 Wis. 2d 3, 796 N.W.2d 411. Municipal decisions are entitled to a presumption of correctness and validity. ***Sills v. Walworth Cty. Land Mgmt. Comm.***, 2002 WI App 111, ¶6, 254 Wis. 2d 538, 648 N.W.2d 878. Accordingly, our review is limited to four inquiries: "(1) whether the municipality 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

[1] One of the conditions was that there would be no commercial use of the building. This condition was later included in a deed restriction for the property.

its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." ***Ottman***, 332 Wis. 2d 3, ¶35.

¶10 On appeal, the Hasanoglus first contend that the Plan Commission lacked jurisdiction to grant a special exception to the Hollerns. The Hasanoglus assert that only the Town Board could grant a special exception to allow the Hollerns' accessory building to exceed the size and height limits of the ordinances. In support of this argument, the Hasanoglus rely on Town of Mukwonago Municipal Code § 82-25(a)(2)(b)(2), which provides:

> For parcels of three (3) acres of [sic] more in size in any zoning district other than the Environmental Corridor District, the accessory building areas may be greater than those requirements set forth in subsection 2(a), if the Town Board in its discretion, upon consideration of a recommendation from the Plan Commission, grants a special exception and makes all of the following findings:
>
> a. That one or more rural accessory building(s) as defined herein, are located on the property;
>
> b. That such rural accessory building(s) is (are) not a nuisance or detriment to the existing neighborhood;
>
> c. That the property is in compliance with the floor area ratio requirements of the District in which it is located; and
>
> d. That the total floor area of all accessory buildings, excluding the floor areas of such rural accessory building(s), is in compliance with the requirements set forth in subsection 2(a).

¶11 It is true that § 82-25(a)(2)(b)(2) gives the Town Board power to grant special exceptions under certain circumstances. However, it is also true that a different part of the municipal code gives the Plan Commission the same power. Town of Mukwonago Municipal Code § 82-25(b)(3) provides that, "Upon petition from a property owner, the plan commission may grant a special exception to the maximum attached garage size limitations of subsection (b)(2) of this section or

maximum accessory building square footages allowed in the table in subsection (a)(2) of this section…"

¶12 Reviewing these two ordinances, we conclude that § 82-25(a)(2)(b)(2) does not apply in this case because there was no finding of a rural accessory building[2] on the Hollerns' property. By contrast, § 82-25(b)(3) contains no such limitation. Although the Hasanoglus suggest that § 82-25(b)(3) applies only to garages based on its location in the code, the terms of the section do not support such a view. Moreover, we give deference to the municipality's interpretation of its own ordinance. *See* ***Ottman***, 332 Wis. 2d 3, ¶60. For these reasons, we are satisfied that § 82-25(b)(3) conferred jurisdiction to the Plan Commission to grant a special exception to the Hollerns.

¶13 The Hasanoglus next contend that the decision of the Plan Commission was arbitrary and unreasonable, and represented its will rather than its judgment. Specifically, they complain that (1) the Hollerns did not follow the proper procedure to apply for a special exception; (2) the Plan Commission agenda

[2] A rural accessory building is defined as:

> An existing building, which is: (1) set apart from other buildings as being distinct, due to its construction technique, construction materials, age, local historic significance, or design as determined by the Town Board; and (2) is characteristic of past agricultural practices or rural life, whether presently utilized or not for agricultural practice, as determined by the Town Board; and (3) which is sufficiently structurally sound to meet minimum safety requirements for the proposed use, as determined by the Town Building Inspector, provided that such determination shall not relieve the property owner of any responsibility or liability as to the building and shall not form a basis of liability against the Building Inspector or the Town.

Town of Mukwonago Municipal Code § 82-4(b). There is no evidence that the Town Board previously determined that the preexisting barn on the Hollerns' property met this definition.

was not sufficiently specific to give notice of the Hollerns' request for a special exception; and (3) the Plan Commission did not conduct a sufficient inquiry into whether the Hollerns' proposed riding arena qualified as an accessory building. We consider each argument in turn.

¶14 The Hasanoglus first assert that, per Town of Mukwonago Municipal Code § 82-22(a)(10)(a.), the Hollerns were required to file a petition with the town clerk, pay additional fees to the clerk, and do so no later than three weeks prior to the Plan Commission meeting. There are at least two problems with this argument. First, it was not raised in the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not raised before the circuit court generally will not be considered on appeal). Second, § 82-22(a)(10) applies to property owners seeking a special exception for a setback.[3] Setbacks are not at issue in this case; therefore, the requirements do not apply.

¶15 The Hasanoglus next contend that the absence of any reference to "special exception" in the Plan Commission's agenda and meeting minutes regarding the Hollerns is evidence that the Plan Commission acted improperly. We disagree. Here, the Plan Commission's agenda bluntly states, "ACCESSORY BUILDING HEIGHT AND SIZE INCREASE FOR S64W27645 RIVER ROAD, MICHAEL AND LAURA HOLLERN PROPERTY OWNER." Anyone reading this description in advance of the meeting could understand what the Plan Commission was being asked to consider. The minutes, meanwhile, indicate

[3] The introductory text of Town of Mukwonago Municipal Code § 82-22(a)(10) states, "In the case of a lot abutting a dedicated but unimproved right-of-way that terminates at a public water body, the town plan commission may grant a special exception as to the setback from such dedicated but unimproved right-of-way, subject to the following procedures, requirements and conditions."

approval of the Hollerns' request subject to several conditions. The Plan Commission was not obligated to use any additional special language in the agenda and meeting minutes.

¶16 Finally, the Hasanoglus argue that the proposed riding arena does not conform to the definition of an accessory building. They also submit that the Plan Commission should have engaged in discussion, reflected in the meeting minutes, as to whether a riding arena qualified as an accessory building. Again, we disagree. An accessory building is defined in Town of Mukwonago Municipal Code § 82-4(b) as "a building or portion of a building subordinate to the principal building and used for a purpose customarily incident to the permitted use of the principal building." Much like a barn,[4] a riding arena can be larger than the principal building on a property and still be subordinate to it. It can also be used to support animals on a property. As for the actions of the Plan Commission, there is no requirement that it record such a discussion in its meeting minutes. Finally, the fact that it made the special exception subject to several conditions (e.g., no commercial use) demonstrates that it exercised its judgment.

¶17 For these reasons, we are not persuaded that the Hasanoglus have overcome the presumption of correctness and validity afforded to the Plan Commission's decision. Accordingly, we affirm.

By the Court.—Order affirmed.

[4] A barn is an accessory building permitted in a suburban estate zoning district. *See* Town of Mukwonago Municipal Code §§ 82-110(6)(d) and 82-140.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2013-14).