COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1770 **Cir. Ct. No. 2003CV1628**

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

RAINBOW SPRINGS GOLF COMPANY, INC.,

PLAINTIFF-APPELLANT,

V.

WAUKESHA COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: MARK S. GEMPELER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Rainbow Springs Golf Company, Inc. appeals from an order of the circuit court affirming on certiorari review the Waukesha County Park and Planning Commission's (planning commission) decision to terminate a

conditional use permit and three addenda thereto (CUP) for Rainbow Springs' property.[1] We affirm.

¶2 The CUP, issued in 1981, permitted Rainbow Springs to operate a recreational resort, including accommodations, food service and meeting facilities. However, Rainbow Springs never opened and operated such a facility. The first and second addenda, issued in 1992 and 1993, permitted Rainbow Springs to operate a haunted house on the premises and serve beer. The haunted house operated until 2001. The third addendum, issued in 1998, authorized Rainbow Springs to operate a full-service restaurant in the building which had been a clubhouse. The CUP and addenda contained conditions which had to be fulfilled. In April 2002, the hotel/conference center was badly damaged by a fire which precluded further operation of the haunted house. At the time of the fire, the clubhouse offered a snack bar, but not a full-service restaurant.

¶3 After determining that Rainbow Springs' use of the property did not conform to conditions of the CUP and that certain uses under the permit were discontinued for a period of twelve consecutive months, the Waukesha County planning commission terminated the CUP in June 2003.[2] On statutory certiorari review, the circuit court concluded that the County planning commission had authority to revoke the CUP, followed the correct procedure in doing so and made the necessary findings to reach a determination which was neither arbitrary nor capricious. Rainbow Springs appeals.

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[1] For ease of reference, we refer to the permit and the three addenda collectively as the CUP.

[2] The Town of Mukwonago's board voted in May 2003 to terminate the CUP.

¶4 Many of Rainbow Springs' appellate issues have already been addressed in our decision of even date in ***Rainbow Springs Golf Company, Inc. v. Town of Mukwonago***, No. 2004AP1769, unpublished slip op. (WI App June 1, 2005). We incorporate that opinion herein by reference.

¶5 We are left in this appeal with two issues to address: (1) WAUKESHA COUNTY, WI SHORELAND FLOODLAND PROTECTION ORDINANCE § 3.07(6) (2003) which governs expiration or modification of conditional use status; and (2) the sufficiency of the evidence before the County planning commission.

¶6 Section 3.07(6) provides:

> Conditional use status will terminate when, after public hearing, and a class 2 notice is published and notice provided the town and the owner of the subject property, the plan commission and county zoning agency determine any of the following
>
> (A) The conditional use has not continued in conformity with the conditions of the permit.
>
> (B) A change in the character of the surrounding area or if the conditional use itself causes it to be no longer compatible with surrounding uses.
>
> (C) The conditional use has been discontinued for a period of twelve (12) consecutive or eighteen (18) cumulative months during a three-year period. A business of a seasonal nature shall not be deemed discontinued during periods in which it is normally inactive (i.e., summer camps, ski hills, quarries, marinas, etc.)

WAUKESHA COUNTY, WI ORDINANCE § 3.07(6).

¶7 Rainbow Springs argues that the definition section of the ordinance, § 2.01, defines "plan commission" as the "local Town Plan Commission" and does not refer to a town board. WAUKESHA COUNTY, WI ORDINANCE § 2.01. Relying

upon the definition of "plan commission" and the provisions of § 3.07(6), Rainbow Springs argues that the absence of any mention of a town board in the County's CUP termination process means that the decisions of the Town and County planning commissions control. In this case, the County planning commission and the Mukwonago town board revoked the CUP; the Town planning commission did not recommend termination of the CUP. Because the action of the Town board is not recognized by the County ordinance, the County planning commission's decision to revoke the CUP was fatally flawed, in Rainbow Springs' view. The circuit court rejected this argument on certiorari review, and so do we.

¶8 Rainbow Springs' interpretation of WAUKESHA COUNTY, WI ORDINANCE § 3.07(6) erroneously elevates the Town of Mukwonago planning commission over the Town board. This is a particularly odd result given that the Town of Mukwonago's own ordinances recognize that the Town board is the senior decision-making body in the municipality.

¶9 The Town of Mukwonago's ordinance states in pertinent part:

> If the [conditional] use does not continue in conformity with the conditions of the original approval, or for similar cause based upon consideration for the public welfare, such conditional use status may be terminated by action of the Town Board following referral to the Plan Commission and a public hearing per Section 23.00, in which case such use shall thereafter be terminated unless permitted as a pre-existing legal conforming use.

TOWN OF MUKWONAGO, WI ORDINANCE § 3.08(3).

¶10 As we held in ***Rainbow Springs Golf Company, Inc. v. Town of Mukwonago***, No. 2004AP1769, unpublished slip op. ¶7 (WI App June 1, 2005), the ordinance does not limit the Town board's authority to rubber-stamping the Town planning commission's determination regarding a CUP or require the planning

commission to first approve terminating a CUP. The Town board is the entity with ultimate authority to plan land use, and it is the Town board's decision that is relevant under the County ordinance when it comes to deciding whether to terminate a CUP.

¶11 In an appeal from a circuit court decision on certiorari, we review the record of the planning commission to which certiorari is directed, not the judgment or findings of the circuit court. ***Klinger v. Oneida County***, 149 Wis. 2d 838, 845 n.6, 440 N.W.2d 348 (1989).

> When no additional evidence is taken, statutory certiorari review is limited to: (1) whether the board 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 its judgment; and (4) whether the board might reasonably make the order or determination in question based on the evidence.

State ex rel. Ziervogel v. Washington County Bd. of Adjustment, 2004 WI 23, ¶14, 269 Wis. 2d 549, 676 N.W.2d 401.

¶12 For the reasons set forth in ***Rainbow Springs Golf Company, Inc. v. Town of Mukwonago***, No. 2004AP1769, unpublished slip op. (WI App June 1, 2005), we conclude that the County planning commission kept within its jurisdiction, need not have resorted to alternatives to termination of the CUP, and did not act arbitrarily or capriciously.

¶13 We turn to whether the County planning commission reasonably decided to revoke the CUP based on the evidence. We will not disturb the planning commission's decision if any reasonable view of the evidence sustains the decision. ***Snyder v. Waukesha County Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976). Because there was evidence from which a reasonable decision

could be made that Rainbow Springs violated the CUP, the planning commission did not act arbitrarily in terminating the CUP.

¶14 As the minutes of the June 2003 meeting on Rainbow Springs' CUP reveal, the County planning commission discussed the Waukesha County Department of Parks and Land Use staff report and recommendation relating to Rainbow Springs' CUP. The minutes of the meeting reflect that the commission approved the staff report, which provided the commission with detailed information about the history of the site and its current problems. The commission considered the specific termination requirements under the shoreland zoning ordinance and the staff report.

¶15 The staff report indicates that even before the April 2002 fire, sections of the property were not being used as required by the CUP. The staff report cited the efforts of the Town of Mukwonago to have the property cleaned up. The staff report recommended terminating the addenda relating to the haunted house because the house had not operated for more than twelve consecutive months due to the fire. The report also noted building and fire code violations at the site and the presence of hazardous debris as documented by the Town of Mukwonago building inspector, all in violation of the 1981 CUP. The report further noted that the warming shack did not have a sanitary permit, and the property owner did not advise when the conditions of the CUP would be met.

¶16 There is substantial evidence—"evidence of such convincing power that reasonable persons could reach the same decision as the board"—to support the County planning commission's decision to terminate the CUP. *See* ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct.

App. 1994). The planning commission's decision was not arbitrary or capricious because it had a reasonable and rational basis. *See* ***Snyder***, 74 Wis. 2d at 476.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).