COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1769 **Cir. Ct. No. 2003CV1409**

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

RAINBOW SPRINGS GOLF COMPANY, INC.,

PLAINTIFF-APPELLANT,

V.

TOWN OF MUKWONAGO,

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 Town of

Mukwonago's 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 had not cleaned up or secured the fire-damaged premises, or complied with conditions of the CUP, the Town board terminated the CUP in May 2003. On statutory certiorari review, the circuit court concluded that the Town 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.

¶4 In an appeal from a circuit court decision on certiorari, we review the record of the board to which certiorari is directed, not the judgment or findings of the

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

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. The board's decision enjoys a presumption of correctness and validity, and Rainbow Springs bears the burden of overcoming this presumption. *See* ***Miswald v. Waukesha County Bd. of Adjustment***, 202 Wis. 2d 401, 411, 550 N.W.2d 434 (Ct. App. 1996).

¶5 Rainbow Springs argues that the Town did not keep within its jurisdiction because it did not follow its ordinances in terminating the CUP. Rainbow Springs posits that TOWN OF MUKWONAGO, WI ORDINANCE § 3.08(3) requires the Town board to follow the recommendation of the Town planning commission. In Rainbow Springs' view, because the planning commission did not recommend terminating the CUP, the Town board lacked the authority to do so.

¶6 Section 3.08(3) 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).

¶7 The Town board acted on the CUP after the planning commission held a public hearing. This is exactly the procedure contemplated by the ordinance. The ordinance does not limit the Town board's authority to rubber-stamping the planning commission's determination regarding a CUP or requiring the planning commission to first approve terminating a CUP. The Town acted within its jurisdiction.

¶8 Rainbow Springs next argues that the Town should have considered alternatives to terminating the CUP. In lieu of terminating the CUP, the Town could have imposed penalties, ordered Rainbow Springs to clean up the property or billed Rainbow Springs for the cost incurred by the Town to clean up the property.

¶9 We reject this argument. While the CUP contemplates monetary penalties for violations, it also states that monetary penalties are "in addition to other fines and penalties permitted under Federal, State, Town and County ordinances …." Therefore, the Town board had the authority to determine which penalty to impose. TOWN OF MUKWONAGO, WI ORDINANCE § 3.08(3) permits termination of the CUP if the property's uses are not within the conditions permitted. We agree with the Town that whether it should have chosen the monetary penalties, the clean-up provisions or termination of the CUP was a legislative decision.

¶10 We turn to whether the Town reasonably made its decision to revoke the CUP based on the evidence. We will not disturb the Town's decision if any reasonable view of the evidence sustains the decision. *See* ***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 Town did not act arbitrarily in terminating the CUP.

¶11 The Town's order terminating the CUP sets out the evidence upon which the board relied. After notice and a hearing, the Town board found that Rainbow Springs was notified in 2002 of violations on the property arising from the fire damage, the failure to clean up the fire damaged premises, and the failure to secure the buildings. Rainbow Springs was warned in September 2002 that termination of the CUP was a possibility if Rainbow Springs did not present a plan for removing debris, securing the remaining structures and a timetable for such activities.

¶12 An inspection by the Town's building inspector in April 2003 revealed that portions of the premises were not secured as required, debris remained on the property, damaged property was not repaired, structural analyses were not submitted, a warming shack authorized under the CUP for winter activities was being used as a living unit without a sanitary permit and in violation of the Town's zoning code, the hotels authorized by the 1981 CUP were not used for over twenty years, and the premises was being used for storage in violation of the CUP. Additionally, with regard to the 1981 CUP, the sewage and water systems were not approved by the Wisconsin Department of Natural Resources, the facilities plan for sewer and water was never presented to the Town for approval, the fire protection system was neither constructed nor approved by the Town's fire chief, and road improvements were not made. The Town found that Rainbow Springs did not intend to reconstruct the buildings on the property as contemplated in the 1981 CUP and did not indicate at the hearings held on the future of the CUP when Rainbow Springs intended to comply with the conditions of the 1981 CUP. The Town determined that the owner failed to use the property in conformity with the CUP.

¶13 With regard to the 1992 and 1993 addenda, the Town found that the haunted house was abandoned or discontinued for twenty-four months, the haunted

house was authorized for operation within a portion of the original hotel complex, which complex no longer existed after the fire, and the fire department's and building inspector's concerns about the property were not addressed.

¶14 With regard to the 1998 addendum, the owner did not operate in accordance with various approved plans for the property, did not maintain the premises in a neat, attractive and orderly manner, and used the property to store junk and rubble, rendering the property a safety hazard and violating the Town zoning code relating to hazardous conditions on the property.

¶15 Based on these facts, the Town concluded that uses authorized by the CUP did not continue in conformity with the conditions of the original approvals. In addition to violations of the CUP, public welfare concerns warranted terminating the CUP.[2] The Town's decision is supported by substantial evidence—"evidence of such convincing power that reasonable persons could reach the same decision as the board." ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994).

¶16 Rainbow Springs argues that the Town board's findings were not sufficient. Again, we disagree. Rainbow Springs restricts its search for findings to the audiotape of the final hearing of the Town board at which the board voted to terminate the CUP. After the hearing, the Town issued a lengthy order setting out all of the facts and conclusions relating to its decision to terminate the CUP.[3] "[T]he findings of fact and conclusions of law are specific enough to inform the parties and

[2] The Town permitted the two golf courses and the pro shop/clubhouse to remain as legal nonconforming uses because they predated the 1981 CUP.

[3] The order was signed by the Town chair and Town clerk.

the courts on appeal of the basis of the decision." ***Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield***, 180 Wis. 2d 254, 277, 509 N.W.2d 323 (Ct. App. 1993) (citation omitted). Furthermore, the order is entitled to a presumption of validity. ***Miswald***, 202 Wis. 2d at 408.

¶17 Moreover, there were several opportunities for the Town board to gather information about the situation at Rainbow Springs. The Town board participated in hearings relating to Rainbow Springs on November 6, 2002 (at which issues relating to clean-up from the April 2002 fire were discussed), April 2, 2003 (at which progress on clean-up and securing the property was discussed), and the May 14, 2003 meeting (at which the decision was made to terminate the CUP). At these meetings, the Town board had before it information from the Town planner, building inspector, fire chief and the planning commission's analysis and recommendation for the property.

¶18 Rainbow Springs complains that Town employees controlled the CUP termination process. We do not agree. The Town board was entitled to rely upon the efforts and analyses of Town employees and professionals in reaching its decision to terminate the CUP.[4]

¶19 Finally, we reject Rainbow Springs' argument that the decision to terminate the CUP represented the Town's will and not its judgment. Rainbow Springs cites three examples in support of its argument: the Town did not consider alternatives to terminating the CUP, the Town terminated the CUP for reasons other

[4] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

than the fire, and the Town's agents and employees predetermined the outcome. We have rejected these claims earlier in this opinion.

¶20 We conclude that the Town board's decision to terminate the CUP was neither arbitrary nor 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).