COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1646 **Cir. Ct. No. 2008CV201**

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

JAMES C. RULE,

PLAINTIFF-APPELLANT,

V.

IOWA COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 VERGERONT, J. James Rule challenges the denial by the Iowa County Board of Adjustment of his application for a variance from a conditional use requirement for an expansion of his quarry operation. The requirement at issue is that "[a]ctive mining shall not take place within five hundred (500) feet of

any residential district or any structure used for dwelling purposes." IOWA COUNTY ZONING ORDINANCE § 3.5, AB-1, Conditional Uses (4)(b). The Board concluded this was not an area variance, as contended by Rule, but was instead a use variance, which it did not have the authority to grant. The Board also construed this requirement to mean that active mining could not take place within either 500 feet of any residential district boundary line or 500 feet of a dwelling. The circuit court affirmed the Board's decision and Rule appeals. For the reasons we explain below, we affirm.

BACKGROUND

¶2 Rule operates a quarry on land located in the Town of Dodgeville, Iowa County, and has recently acquired an adjacent parcel on which he would like to expand the operation. Both parcels are located in zoning district A-1, Exclusive Agricultural. In order for Rule to expand his quarry operation onto the new parcel, he will need to have the new parcel rezoned to AB-1, Agricultural Business, and then apply for a conditional use permit to allow mining. However, before attempting to rezone the parcel and applying for a conditional use permit, Rule sought to determine whether the Board would grant him a variance to one of the five conditions that must be satisfied before a conditional use permit may be granted for mining: that "[a]ctive mining shall not take place within five hundred (500) feet of any residential district or any structure used for dwelling purposes." IOWA COUNTY ZONING ORDINANCE § 3.5, AB-1, Conditional Uses (4)(b).[1]

[1] IOWA COUNTY ZONING ORDINANCE § 3.5 is entitled, "Business Districts" and includes separate provisions for recreational, agricultural, local, highway, heavy, industrial, and adult entertainment business districts. The provision for each type of business district includes a listing of "permitted principal uses" and "conditional uses," and a chart detailing "lot dimensions and building setbacks." The AB-1 Agricultural Business District provision provides, in part:

(continued)

Permitted Principal Uses:
None

Conditional Uses:

1. The division of an existing AB-1 lot where the result is the creation of a new lot that meets the dimensional standards of this section may be requested.

2. Feed mills, dryers and fertilizer plants may be requested.

3. Commercial grain storage bins may be requested.

4. Mining and extraction of minerals or raw materials may be requested, provided:

    a) A restoration plan has been approved by the Commission and Town Board, the restoration plan provided by the applicant shall contain proposed contours after filling, depth of the restored topsoil, type of fill, planting or reforestation, restoration commencement and completion dates. The plan shall also state the intended post-mining land use, which must be consistent with the underlying zoning and compatible with the surrounding land uses.

    b) Active mining shall not take place within five hundred (500) feet of any residential district or any structure used for dwelling purposes.

    c) Active mining shall not take place within one hundred (100) feet of the right-of-way of any railroad, public street, road or highway.

    d) Active mining shall not impair property sight distances in any portion of the area within three hundred (300) feet of any street, road or highway intersection or within three hundred (300) feet of a railroad intersection, a street, road or highway.

    e) The applicant shall furnish all necessary fees to provide for inspection and administrative costs and the necessary sureties of the site in the even[t] of default by the applicant.

    ….

¶3 Rule filed an application with the Board requesting a "variance … [t]o allow mining within 100 [feet] of a residential district or dwelling unit, as a conditional use in a[n] AB-1 district …."[2] At the hearing before the Board, Rule modified his request, stating through a representative that he was willing to accept a ruling that the quarry operation had to be at least 200 feet from the residential district boundary or 500 feet from a residential dwelling. Rule's construction of the ordinance was that it required active mining to be at least 500 feet from *either* the residential district boundary *or* a dwelling.

¶4 The neighboring property owners objected to Rule's position on two grounds. They contended the variance requested was a use variance, not an area variance as Rule characterized it, and the Board did not have the authority to grant a use variance. They also asserted that the proper construction of the 500-foot requirement is that this distance is measured from the boundary line of a residential district and not from the dwellings within the district; only if the relevant district is not residential is the distance measured from a dwelling.

¶5 The Board asked for position statements from both sides and a legal opinion from the Iowa County corporation counsel. At a continued hearing, counsel's opinion was read and discussed. With respect to whether Rule's application was for an area variance or a use variance, counsel's opinion stated:

[2] The application asked for the variance for both the parcel on which the quarry was already operating and the new parcel. However, Rule asserts in his brief, and the Board does not dispute, that the existing quarry operation is a pre-existing nonconforming use not subject to the ordinance. It is not clear from the record or the parties' briefs why the application included the existing operation if it is a pre-existing nonconforming use. However, Rule states in his main brief that the new parcel is the subject of this action. Therefore we limit our attention to the application for a variance for the new parcel.

> The land in question may not be actively mined unless it is zoned as AB-1. Even under that zoning, the land may not be actively mined unless a Conditional Use Permit is granted. The Ordinance states that a CUP may not be granted unless the prohibition on active mining within 500 feet of a residential district or non-residential dwelling is met. This 500 foot area is a buffer zone applicable to mining or extraction of raw materials and is not what is typically known as a setback.
>
> Therefore, by the ordinance itself, no active mining is permissible within this buffer zone, even if a CUP is granted.
>
> As such, it is my opinion that any petition for a variance to allow for active mining within this 500 foot zone is a "use" variance and not an "area" variance. Therefore, it is my opinion that the BOA does not have the authority to grant this permit under the Ordinance.

¶6 With respect to the proper construction of the 500-foot requirement, counsel's opinion was that active mining could not take place within 500 feet of any residential district boundary line**,** or, when a dwelling is not located in a residential district, within 500 feet of that dwelling.

¶7 Based on counsel's opinion, the Board voted "to deny the application for non-metallic mining within 500 feet of the residential district." The Board's written decision states that it denied the application based on the advice of counsel, "whose opinion was that this request is a 'use' variance and therefore the [Board] does not have the authority to grant the request."

¶8 Rule sought review by certiorari in the circuit court, and the circuit court affirmed the Board's decision.

DISCUSSION

¶9 On appeal to this court, Rule challenges both the Board's decision that his application sought a use variance and not an area variance, and the Board's construction of the 500-foot requirement.[3]

¶10 On certiorari review, this court reviews the decision of the Board, not the decision of the circuit court. ***Board of Regents v. Dane County Bd. of Adjustment***, 2000 WI App 211, ¶10, 238 Wis. 2d 810, 618 N.W.2d 537. Like the circuit court, we limit our certiorari review 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 evidence was such that it might make the decision it did." ***Id.*** This appeal implicates the second criteria. Rule asserts the Board proceeded on an incorrect theory of law in making the two challenged rulings.

¶11 Both of the Board's rulings involve construction of the ordinance. The construction of an ordinance is a question of law, which we generally review de novo. ***Id.***, ¶11. However, the reviewing court may defer to the construction adopted by a board or agency. ***Id.*** Boards of adjustment generally are entitled to a

[3] Rule makes a third argument in his main brief: that the Board did not adequately specify its findings or reasoning on the record when it denied his application. The Board responds that the case Rule cites for this proposition, ***Lamar Central Outdoor, Inc. v. Board of Zoning Appeals***, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87, is not applicable because it addressed the proper interpretation of a now-repealed statute pertaining to city boards of zoning appeals and did not address WIS. STAT. § 59.694, which governs county boards of adjustment. Rule does not address this issue in his reply brief, which we take as a concession. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession the failure in a reply brief to refute propositions in a responsive brief).

degree of deference in the interpretation of a county zoning ordinance. ***Roberts v. Manitowoc County Bd. of Adjustment***, 2006 WI App 169, ¶16, 295 Wis. 2d 522, 721 N.W.2d 499 (citing ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 33, 498 N.W.2d 842 (1993)). In deciding on the appropriate level of deference to accord a county board of adjustment's interpretation of a county ordinance, we have looked to the levels of deference utilized in reviewing decisions of state boards and agencies interpreting state statutes. *See* ***Board of Regents***, 238 Wis. 2d 810, ¶11; ***Schroeder v. Dane County Bd. of Adjustment***, 228 Wis. 2d 324, 333-34, 596 N.W.2d 472 (Ct. App. 1999).

¶12 We conclude the degree of deference appropriate here is due weight, meaning that we will affirm the Board's construction of the ordinance if it is reasonable and there is not a more reasonable interpretation. ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 287, 548 N.W.2d 57 (1996). Due weight deference is appropriate here because the Board is given the authority in IOWA COUNTY ZONING ORDINANCE § 10.5(3) to interpret the zoning regulations.[4] *See* ***UFE Inc.***, 201 Wis. 2d at 286 (due weight, when accorded state agencies, is based on the fact that the legislature has charged the agency with enforcement of the statute in question).

¶13 We first consider Rule's challenge to the Board's decision that he was requesting an area variance, not a use variance. IOWA COUNTY ZONING ORDINANCE § 10.5(2) addresses the Board's authority to grant variances and provides:

[4] IOWA COUNTY ZONING ORDINANCE § 10.5(3) provides: "Interpretations. To hear and decide application for interpretations of the zoning regulations and the boundaries of the zoning districts after the Commission has made a review and recommendation."

> Variances. To hear and grant appeals for variances as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement will result in practical difficulty or unnecessary hardship, so that the spirit and purpose of this Ordinance shall be observed and the public safety, welfare and justice secured. *Use variances shall not be granted.* If compliance can be achieved without a variance, the variance shall not be granted. No variance shall be granted that increases the nonconformity of any existing nonconforming use or structure. Petitions for a variance to allow an addition to or alteration of a nonconforming structure shall only be considered provided the addition or alteration is not proposed within any yard setback and will not increase the footprint of the structure by more than 50%.

(Emphasis added.)

¶14 Although this ordinance provision mentions only "use variances" and not "area variances," both parties agree that the Board does have the authority under this provision to grant area variances. The distinction between these two types of variances is:

> A use variance is one that permits a use other than that prescribed by the zoning ordinance in a particular district. An area variance … has no relationship to a change of use. It is primarily a grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of a zoning ordinance. Area variances usually modify such features as setbacks, frontage requirements, height, or lot size.

3 E.C. Yokley, ZONING LAW AND PRACTICE § 20-3 at 20-8-9 (4th ed., rev. 2002), cited in ***State ex rel. Ziervogel v. Washington County Bd. of Adjustment***, 2004 WI 23, ¶21, 269 Wis. 2d 549, 676 N.W.2d 401. The distinction between these two types of variances flows from the distinction between use zoning and area zoning:

> [U]se zoning regulates fundamentally how property may be used, in order to promote uniformity of use within neighborhoods and regions. Area zoning, on the other hand, regulates density, setbacks, frontage, height, and other dimensional attributes, in order to promote uniformity

> of development, lot size, and building configuration and size.

Id., ¶22.

¶15 Because a use variance generally has greater impact on the surrounding neighborhood than does an area variance, the standard for obtaining a use variance is higher. In order to obtain a use variance the property owner must show that, in the absence of a variance, no reasonable or feasible use can be made of the property. ***Id.***, ¶¶23, 24. The lower standard for an area variance requires a showing that "compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." ***Id.***, ¶33 (citation omitted).

¶16 Rule contends that his request for a variance from the 500-foot condition for a conditional use permit is an area variance, not a use variance, because it seeks a "reduced setback from 500 feet to 200 feet" from residential boundaries. He does not seek a use forbidden by the zoning ordinance, he asserts, because mining is allowed as a conditional use in the AB-1 district; rather, he seeks only to modify the "area restriction" created by the condition in (4)(b) of the AB-1 subsection. This condition, according to Rule, is no different from the lot dimensions and building setbacks that are listed in the AB-1 subsection. These establish minimum measurements for lot frontage and width, lot area, principal structure height, and "yards, all structures."

¶17 We conclude the Board reasonably decided that Rule's request for a variance of the 500-foot requirement is not a request for an area variance but is instead a request for a use variance. First, the typical types of requirements

subject to an area variance are contained in a chart entitled "Lot Dimensions and Building Setbacks" at the end of each zoning district section, whereas the requirements for each conditional use are specified under the "Conditional Use" heading in each section. Second, a variance to a setback for a building, the use of which is already permitted, does not alter the use. In contrast, Rule seeks to modify a requirement for a conditional use, which use, by definition, he is not entitled to unless he meets all the conditions specified in IOWA COUNTY ZONING ORDINANCE § 3.5, AB-1, Conditional Uses, (4)(a)-(e). Indeed, even if he meets all those conditions, he is not necessarily entitled to a conditional use permit for a quarry on the new parcel.[5] The Iowa County Planning and Zoning Commission, the entity that has the discretionary authority to grant conditional use permits under the ordinance, may impose additional conditions or, apparently, conclude for other reasons that a permit should not be granted even if the conditions contained in the ordinance are met. IOWA COUNTY ZONING ORDINANCE § 4.0, Conditional Uses. *See also* ***Town of Rhine v. Bizzell***, 2008 WI 76, ¶56, 311 Wis. 2d 1, 751 N.W.2d 780 (even though conditional uses may be authorized pursuant to the ordinance, that does not render them uses as of right). Third, the requirement at issue here—that no "active mining shall take place within five hundred (500) feet of any residential district or any structure used for dwelling purposes"—does not regulate the placement of permitted structures but by its terms prohibits an activity—active mining—in the designated area.

[5] Of course, Rule must obtain a rezoning to AB-1 before a conditional use permit becomes even a possibility, because a quarry is neither a permitted nor a conditional use in an A-1 Exclusive Agricultural district. However, the Board apparently did not object to Rule filing his application for a variance before obtaining a rezoning and before filing an application for a conditional use permit, and it does not argue on appeal that the application was not properly before it.

¶18 In addition, according to the written position statement of the neighboring property owners submitted to the Board:

> The guidance manual used by the BOA notes that "it may not always be easy to determine if an applicant is seeking an area variance or a use variance." Section IV, Decisions of the Zoning Board, Ch. 15-Variances, at 102. The manual defines an area variance as one which "provide[s] an increment of relief (normally small) from a physical dimension restriction such as a building height or setback." Id. at 93. Furthermore, the manual notes that even where a variance is from a dimensional standard, "A large deviation from a dimensional standard, or multiple deviations from several dimensional standards on the same lot," may be a use variance, not an area variance. Id. at 102. The manual defines a use variance as one which "permit[s] a landowner to put a property to an otherwise prohibited use." Id. at 93.

These manual provisions were also referred to in oral argument to the Board.

¶19 We conclude the Board could reasonably decide that the 500-foot requirement was intended to protect the neighboring residential properties from the significant impact of a mining operation and that this purpose distinguishes it from restrictions on building heights and set backs, which are typically the subject of area variances. We also conclude that the Board's position is at least as reasonable as Rule's view that his request is for an area variance. Rule's position focuses solely on the "physical dimension" aspect of the 500-foot requirement and does not take into account that the requirement, like other conditional use requirements, serves to insure compatibility with different neighboring uses.

¶20 Rule asserts that a New Jersey case supports his position: ***Coventry Square, Inc. v. Westwood Zoning Board of Adjustment***, 650 A.2d 340 (N.J. 1994). We disagree. ***Coventry Square*** concerned the substantive standard to be applied to a variance from a requirement for a conditional use. An amendment to the New Jersey land use statute specifically allowed a board of adjustment to grant

conditional use variances but did not address whether the standard for conditional use variances was the same as for use variances. ***Id.*** at 345. The court concluded the standard for a conditional use variance should not be as stringent and established a different standard. ***Id.*** at 346. The ***Coventry Square*** court does not hold that a variance from a requirement for a conditional use is an area variance. We read ***Coventry*** to say that under New Jersey law a variance from a conditional use requirement is in a category distinct from both a use variance and an area variance. Rule's argument before the Board and on appeal is that he is requesting an area variance. He has not developed an argument under Wisconsin law and the terms of this ordinance that a request for a variance from a requirement for a conditional use, while not an area variance, is a type of variance that is not included in a "use variance" as that term is used in IOWA COUNTY ZONING ORDINANCE § 10.5(2).

¶21 We conclude the Board did not proceed on an incorrect legal theory in deciding that the variance Rule requested was not an area variance but was instead a use variance, which it did not have the authority to grant.

¶22 We next consider Rule's argument that the Board erred in its construction of IOWA COUNTY ZONING ORDINANCE § 3.5, AB-1, Conditional Uses (4)(b). As a threshold matter, we consider the Board's arguments that this issue is not properly before us and that it is moot. We reject these arguments for the following reasons.

¶23 The Board agrees it has the authority to interpret this provision of the ordinance under IOWA COUNTY ZONING ORDINANCE § 10.5(3). However, the Board asserts, § 10.5(3) requires an "application" for an interpretation and Rule's application requested only a variance from § 3.5, AB-1, Conditional Uses (4)(b),

not an interpretation of it. This is an accurate characterization of Rule's application. However, at the hearing before the Board, Rule's representative stated that Rule was willing to accept a ruling that the quarry operation had to be at least 200 feet from the residential district boundary or 500 feet from a dwelling. Rule's representative added that Rule was "willing to modify or have [the Board] modify the variance request in accordance with those standards." Rule was very clear that his construction of the ordinance was that it required that the mining be 500 feet *either* from the residential district boundary *or* from the dwellings within that district.

¶24 No Board member or representative responded that Rule had to submit another application. Instead, the Board proceeded to ask for position statements and an opinion from corporation counsel and to hear argument on the disputed interpretation of the 500-foot requirement. The Board's vote not to permit "non-metallic mining within 500 feet of the residential district" makes it clear that the Board decided the issue against Rule. Under these circumstances, the Board has forfeited the right to raise an objection to our review of the merits based on the inadequacy of the application. *See* ***State v. Outagamie County Bd. of Adjustment***, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376 (generally, issues not raised before a board or agency cannot be raised on judicial review).

¶25 The Board's mootness argument is also without merit. Rule requested either a construction of the ordinance whereby the 500 feet is measured from the dwelling, or, if it is measured from the residential district boundary line, a variance from the requirement. Although we have concluded the Board did not err in deciding it did not have the authority to grant a variance from the requirement, the issue of how to interpret it may still have an impact on the controversy concerning a quarry on Rule's new parcel. *See* ***State ex rel. Riesch v.***

Schwarz, 2005 WI 11, ¶11, 278 Wis. 2d 24, 692 N.W.2d 219 (an issue is moot if its resolution can have no practical effect upon an existing controversy). Nothing prevents Rule from applying for rezoning and then applying for a conditional use permit. If he does that, the very same issue of the proper construction of the 500-foot requirement will arise.

¶26 Turning to the Board's interpretation of IOWA COUNTY ZONING ORDINANCE § 3.5, AB-1, Conditional Uses (4)(b), we conclude it is a reasonable one. Under the Board's construction, the use of the term "or" sets forth alternatives depending on how the neighboring district is zoned. If the neighboring district is zoned residential, the 500 feet is measured from the boundary line. If it is not zoned residential but there is a dwelling in it, such as a farmhouse in an A-1 Exclusive Agricultural district, the 500 feet is measured from the dwelling. This ensures that, if dwellings are later built in a residential district—which is, after all, the primary purpose of a residential district—there will always be at least a 500-foot buffer from an active mining operation.

¶27 In contrast, under Rule's construction, the 500 feet is always measured from a dwelling, unless there is no dwelling, in which case it is measured from the residential district boundary line. This is an unreasonable construction. The evident purpose of the ordinance is to protect neighboring residences from the noise and other disturbances of a quarry operation, and 500 feet was selected as necessary to fulfill that purpose. Under Rule's construction, existing dwellings will receive this protection but new dwellings in a residential district may not. Rule contends that it is unreasonable to ensure that new dwellings in a residential district will always have a 500 foot buffer zone because new dwellings in a nonresidential district do not have the same protection. We disagree. It is reasonable to treat a residential district differently from a

nonresidential district in terms of protection from the impact of a quarry operation. It is reasonable to ensure that all dwellings in a residential district, both those dwellings existing now and those built in the future, will have the protection of a 500-foot buffer zone, but to decide that persons who choose to build a future dwelling in a nonresidential district, after the quarry operation is established, will not have that same protection.

CONCLUSION

¶28 Applying due weight deference to the Board's decision, we affirm both its conclusion that Rule sought a use variance, not an area variance, and its interpretation of IOWA COUNTY ZONING ORDINANCE § 3.5, AB-1, Conditional Uses (4)(b). Accordingly, we affirm the circuit court order affirming the Board's decision to deny Rule's request for a variance.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.