COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1746 **Cir. Ct. No. 2010CV94**

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

ADMAR REAL ESTATE CO., LLC AND SCULLY REAL ESTATE CO. II, LLC,

PETITIONERS-APPELLANTS,

V.

DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Juneau County: JOHN P. ROEMER, JR., Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ

¶1 BLANCHARD, J. ADMAR Real Estate Company, LLC, and Scully Real Estate Company II, LLC (collectively "ADMAR"), appeal a circuit court order upholding a Division of Hearings and Appeals (DHA) decision that

affirmed the Department of Transportation's (DOT's) revocation of two permits DOT had previously granted to ADMAR. The permits were granted to allow ADMAR to erect two outdoor advertising signs adjacent to Interstate Highway 90/94.

¶2 ADMAR argues that, in affirming revocation of the permits, DHA incorrectly interpreted the statute that regulates outdoor advertising, WIS. STAT. § 84.30 (2009-10).[1] ADMAR also argues that, even if the permits should not have been granted in the first instance, under the unusual circumstances of this case DOT should be equitably estopped from revoking them.

¶3 Assuming, without deciding, that DHA incorrectly interpreted WIS. STAT. § 84.30, we decline to reverse on this ground, because ADMAR fails to show that it is entitled to the permits under any reasonable interpretation of the statutory provision at issue pertaining to what constitutes a "business area" when a sign is located adjacent to an interstate highway. We also conclude that equitable estoppel is not available to prevent DOT from revoking the permits, based on the rule that equitable estoppel cannot be applied to interfere with the government's exercise of police power. We therefore affirm the circuit court's order upholding DHA's decision.

BACKGROUND

¶4 For context, we begin with a brief summary of relevant law before turning to relevant facts.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 The legislature enacted WIS. STAT. § 84.30 to comply with the requirements of the federal Highway Beautification Act, 23 U.S.C. § 131, thereby avoiding a reduction in federal highway funding. *See* ***Vivid, Inc. v. Fiedler***, 219 Wis. 2d 764, 775, 580 N.W.2d 644 (1998); ***Vivid, Inc. v. Fiedler***, 182 Wis. 2d 71, 78, 512 N.W.2d 771 (1994). Section 84.30(3) provides that "[n]o sign visible from the main-traveled way of any interstate or federal-aid highway may be erected or maintained," absent one of several exceptions enumerated in the statute. The pertinent exception here is for signs in "business areas." *See* § 84.30(3)(e).

¶6 The statute generally defines a "business area" as an area "zoned for business, industrial or commercial activities under the authority of the laws of this state; or not zoned, but which constitutes an unzoned commercial or industrial area …." WIS. STAT. § 84.30(2)(b). "Unzoned commercial or industrial areas" are defined to include "those areas which are not zoned by state or local law, regulation or ordinance, and on which there is located one or more permanent structures devoted to a commercial or industrial activity or on which a commercial or industrial activity is actually conducted …." § 84.30(2)(k).

¶7 Signs adjacent to interstate highways, as opposed to other types of highways, are a special case. For signs adjacent to interstate highways, a "business area" is limited to the following two categories: (1) "commercial or industrial zones within the boundaries of incorporated municipalities, as those boundaries existed on September 1, 1959"; or (2) "other areas where the land use as of September 1, 1959, was clearly established by state law as industrial or commercial." WIS. STAT. § 84.30(2)(b).

¶8 ADMAR applied to DOT for permits to construct two outdoor advertising signs adjacent to an interstate highway, I90/94, in Juneau County.

Therefore, ADMAR's signs needed to meet the stricter limitations for signs adjacent to interstates.

¶9 As part of its permit applications, ADMAR submitted a document signed by the Village of Camp Douglas clerk, verifying that the site of the proposed signs was located within the Village boundaries as of September 1, 1959, and was zoned as a commercial district. DOT issued the permits. However, after ADMAR began constructing the signs, DOT received a complaint that the land on which the signs were located was not within the Village of Camp Douglas boundaries as of September 1, 1959.[2] After further investigation, DOT discovered that the land had not in fact been within the Village boundaries as of that date. On that basis, DOT revoked the permits in two "sign removal orders."

¶10 ADMAR sought review of the sign removal orders before DHA. ADMAR did not dispute that the land where the signs were located was outside the Village boundaries as of September 1, 1959. Instead, ADMAR argued that it was sufficient for ADMAR to show, apparently under the "clearly established by state law" standard contained in WIS. STAT. § 84.30(2)(b), that the land had been in continuous commercial use since before September 1, 1959.

¶11 DOT argued that, even accepting as true that there was continuous commercial use throughout that period, this would not satisfy the "clearly established by state law" standard. DOT argued that, under the statute, "clearly established by state law ... as industrial or commercial" means "zoned" for

[2] For the sake of simplicity, we refer to the signs, regardless of their state of construction, as if fully constructed. The partially constructed nature of the signs does not affect our decision.

industrial or commercial use, and DOT pointed out that the land in question was not zoned as of September 1, 1959.

¶12 DHA rejected ADMAR's interpretation of the statute, concluding that ADMAR was essentially seeking to apply the "unzoned commercial or industrial areas" standard for non-interstate signs, rendering superfluous the "clearly established by state law" standard for interstate signs. DHA concluded that DOT's interpretation, in contrast, was reasonable and that ADMAR's signs were not in an area where the land use was clearly established by state law as industrial or commercial as of September 1, 1959. In addition, DHA rejected an argument by ADMAR that DOT should be equitably estopped from revoking the permits. DHA concluded that equitable estoppel is not available against a state agency when, as here, the state is exercising its police power. Accordingly, DHA affirmed DOT's orders revoking the permits.

¶13 ADMAR sought review of DHA's decision in the circuit court, and the circuit court upheld DHA's decision. ADMAR now appeals the resulting order.

DISCUSSION

¶14 ADMAR argues that DHA erred in interpreting WIS. STAT. § 84.30 to conclude that ADMAR was not entitled to the permits. ADMAR also renews its argument that, regardless of the proper interpretation of § 84.30, DOT should be equitably estopped from revoking the permits. We address each argument in turn.

A. Interpretation of WIS. STAT. § 84.30

¶15 Ordinarily, statutory interpretation is a question of law that we review de novo. ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995). However, when reviewing an agency interpretation of a statute, due deference or great weight deference to the agency interpretation may sometimes be appropriate. *See, e.g.*, ***Stoughton Trailers, Inc. v. LIRC***, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477. Here, because we assume without deciding that DHA's interpretation of WIS. STAT. § 84.30 was incorrect, we need not decide what level of deference, if any, would be appropriate.

¶16 The burden of persuasion in a proceeding to review an agency action is on the party seeking to overturn the action. ***Racine Educ. Ass'n v. Commissioner of Ins.***, 158 Wis. 2d 175, 182, 462 N.W.2d 239 (Ct. App. 1990); ***City of La Crosse v. DNR***, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). For the reasons that follow, we conclude that ADMAR fails to carry this burden.

¶17 Statutory interpretation begins with the language of the statute. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret that language in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results. ***Id.***, ¶46. In addition, "[a] statute should be construed so that no word or clause shall be rendered surplusage and every word if possible [is] given effect." ***Donaldson v. State***, 93 Wis. 2d 306, 315, 286 N.W.2d 817 (1980).

¶18 Because there is no dispute that ADMAR's signs are adjacent to an interstate highway, and because ADMAR no longer asserts that the signs are on land that was within the boundaries of an incorporated municipality as of

September 1, 1959, it follows that the signs, in order to be permitted, must be in an area where the "land use as of September 1, 1959, was clearly established by state law as industrial or commercial." *See* WIS. STAT. § 84.30(2)(b). Thus, the statutory interpretation question in this case, stated precisely, is this: Are ADMAR's signs located in an area "where the land use as of September 1, 1959, was clearly established by state law as industrial or commercial" under the terms of § 84.30?

¶19 ADMAR argues that DHA erred by interpreting "clearly established by state law" to mean "zoned" in the context of WIS. STAT. § 84.30(2)(b). ADMAR points out that the legislature used the term "zoned" elsewhere in § 84.30(2)(b), showing that the legislature used that term when it wanted to establish a requirement of a zoned status. ADMAR argues that DHA's interpretation violates the presumption that the legislature intends for "similar but different terms in a statute, particularly within the same section," "to have different, distinct meanings." *See, e.g.*, ***American Motorists Ins. Co. v. R & S Meats, Inc.***, 190 Wis. 2d 196, 214, 526 N.W.2d 791 (Ct. App. 1994).

¶20 Assuming, without deciding, that ADMAR is correct that DHA erred in interpreting "clearly established by state law" in 1959, as required in WIS. STAT. § 84.30(2)(b), to mean "zoned" in 1959, we nonetheless decline to reverse DHA on this ground because ADMAR fails to show that it was entitled to the permits under any reasonable interpretation of the statutory provision at issue.

¶21 More specifically, ADMAR's briefing does not appear to present an alternative interpretation of "clearly established by state law," much less show why the facts here meet the standard set by an alternative interpretation. With one possible exception, which we address below, ADMAR fails to make any clear,

affirmative statement in its briefing as to how it interprets "clearly established by state law." Rather, as far as we can discern, ADMAR equates "clearly established by state law" "as of September 1, 1959," with "continuous commercial use since before September 1, 1959."

¶22 We discern this to be ADMAR's argument for the following reasons. ADMAR focuses on evidence in the record that the site of the signs has been in "unbroken" or "continuous" commercial use since before September 1, 1959, including as an A&W Root Beer stand as of that date. ADMAR then argues that DHA ignored "the substantial undisputed evidence at the hearing that ADMAR was entitled to its sign permits *because of an unbroken claim of commercial use of the land on which the Signs were built since before 1959, in compliance with Wis. Stats. § 84.30(2)(b)* …." (Emphasis added.) Similarly, ADMAR argues that "DHA's failure to address the continuous commercial activity is contrary to law." (Capitalization altered.)

¶23 ADMAR's approach suffers from at least two related problems, given the statutory language: (1) ADMAR focuses on the nature of use that has been allegedly "continuous" from before September 1, 1959, to the present, but the pertinent statutory language plainly focuses on use occurring on a single day, "*as of* September 1, 1959" (emphasis added); and (2) even if we ignore the "continuous" aspect of ADMAR's approach, ADMAR's argument still assumes, without explanation, that an actual commercial use as of September 1, 1959, necessarily constitutes a use that was "clearly established by state law" as of that date.

¶24 The first aspect of ADMAR's approach, the "continuous" "unbroken" aspect, needs no further comment because it is evident that there is no

basis for it in the pertinent statutory language, and ADMAR does not provide any persuasive grounds for construing the statute to include such a standard.

¶25 As to the second aspect of ADMAR's approach, the actual use of the property, we recognize that evidence of the actual use of land as of (or near the time of) September 1, 1959, might be *relevant* to whether that use was "clearly established by state law" as of September 1, 1959. Moreover, there would seem to be little doubt that operating a retail fast food restaurant is a commercial use of a property.

¶26 However, ADMAR's interpretation could prevail only if such evidence is *conclusive* to satisfy the pertinent terms of WIS. STAT. § 84.30. And, we are presented with no reason to conclude that this is the case. To the contrary, the terms of the statute signal that the legislature knew how to refer to actual commercial use when it wanted to, because that is what the legislature did in defining an "unzoned commercial or industrial area." As indicated above, the statute defines an "unzoned commercial or industrial area" to include "those areas which are not zoned …, and on which there is located one or more permanent structures devoted to a commercial or industrial activity or on which a commercial or industrial activity is actually conducted." *See* § 84.30(2)(k). Thus, as DHA recognized, ADMAR interprets the statute as if the legislature had provided that an interstate sign may be permitted if the area in question was an "unzoned commercial or industrial area as of September 1, 1959," when the operative phrase requires that the use be a use that is "clearly established by state law" as industrial or commercial as of that date. As ADMAR acknowledges, we generally presume that the legislature intends different meanings for different terms in the same statutory section, *see* ***American Motorists***, 190 Wis. 2d at 214. We do not conclude that this presumption cannot be overcome in this context; rather we

conclude that ADMAR has not met its burden of demonstrating reversible error because it provides nothing to overcome this presumption. We decline to develop an argument for ADMAR.

¶27 ADMAR's reliance on two other provisions in WIS. STAT. § 84.30, paras. (2)(d) and (5)(c), suffers from a similar problem. Both provisions appear to relate to what qualifies as an "unzoned commercial or industrial area."[3] Nothing in ADMAR's arguments persuasively explains how those two provisions might be reasonably read to inform the meaning of "clearly established by state law." Instead, these provisions address, respectively, what types of activities may be considered "commercial or industrial activities" "for purposes of unzoned industrial and commercial areas," *see* § 84.30(2)(d), and how to redefine unzoned areas if any such "activity" "cease[s] to operate," *see* § 84.30(5)(c).

¶28 Moreover, ADMAR fails to explain why "clearly established by state law … as industrial or commercial" should be interpreted to mean

[3] WISCONSIN STAT. § 84.30 provides in pertinent part:

> (2) ….
>
> (d) "Commercial or industrial activities" *for purposes of unzoned industrial and commercial areas* mean those activities generally recognized as commercial or industrial by local zoning authorities in this state, . . .
>
> ….
>
> (5) ….
>
> (c) Should any commercial or industrial activity, which has been used in defining or delineating an unzoned area, cease to operate, the unzoned area shall be redefined or redelineated based on the remaining activities.

Id. (emphasis added).

functionally the same thing as an "unzoned commercial or industrial area," or why "clearly established by state law" should be interpreted to mean nothing more than actual use.

¶29 As noted above, ADMAR does make one argument that directly addresses the statutory language "clearly established by state law." Specifically, ADMAR argues that, because the land in question was not zoned as of September 1, 1959, the then-existing commercial use was

> protected by clearly established state law from being eliminated because it was a legal nonconforming use. Had [the county or town in which the signs are located] zoned the Land as agricultural, the commercial use of the Land was protected by state law, irrespective of local ordinances, from being retroactively eliminated.

ADMAR does not elaborate further on noncomforming use law in this context, but what we infer from its argument is that ADMAR is referring to a state constitutional provision or other state law, in effect as of September 1, 1959, that would have prevented the elimination of an existing use through zoning, at least absent compensation to the land owner.

¶30 This "existing use" argument is not persuasive for at least two reasons. First, it is not a common-sense reading of "clearly established by state law." That is, the right a property owner may have to continue an existing commercial use that would otherwise violate a new zoning rule does not in any logical way mean that the use is "clearly established by state law" at all times prior to the new zoning rule. Second, if ADMAR's argument were correct, then *any* unzoned area with an existing commercial or industrial use as of September 1, 1959, would qualify as an area where such a use is "clearly established by state

law" as of that date, again making actual use conclusive as to whether that use was "clearly established by state law."

¶31 ADMAR relies on alleged evidence of the Congressional intent behind the Highway Beautification Act, in the form of a letter from the Secretary of Commerce included in the House Report for the Act, and published in *United States Code Congressional and Administrative News*. ADMAR cites an excerpt from that letter as follows:

> The purpose of the administration language is to make sure that "unzoned" commercial or industrial areas along our interstate and primary highways will be defined on the same basis as those which are actually zoned.… [I]n order to avoid an obvious inequity, those areas which are actually used for commercial or industrial purposes should be treated as if they were zoned for such purposes.
>
> HR. Rep. No. 1084, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. Ad. News, p. 3713-14.

Our response to ADMAR's reliance on this excerpt from the Secretary's letter is twofold.

¶32 First, ADMAR has not developed an argument that WIS. STAT. § 84.30 is ambiguous—that is, ADMAR has not shown that the statute has at least two differing but reasonable interpretations—so we see no reason why we should consider this extrinsic evidence of legislative intent. *See* ***Kalal***, 271 Wis. 2d 633, ¶50 ("Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous. By 'extrinsic sources' we mean interpretive resources outside the statutory text—typically items of legislative history.") (citation omitted). For this reason alone, we could reject ADMAR's Congressional-intent argument.

¶33 Second, even if we were to consider the letter, it is not clear how it would support ADMAR's argument. Assuming that the Secretary is interpreting the Highway Beautification Act as enacted in 1965, it does not follow that the Secretary's interpretation is determinative, or even informative, as to the meaning of "clearly established by state law." The 1965 Act did not when enacted, and does not now, contain this language, although a predecessor to the 1965 Act did. *Compare* Beautification Act of 1965, Pub. L. No. 89-285, 1965 U.S.C.C.A.N. (79 Stat. 1028) 1023, *and* 23 U.S.C.A § 131 (2012), *with* Pub. L. No. 85-381,§ 12 (creating new § 122(b)), 72 Stat. 89, 95 (1958). For reasons that are not clarified by the Secretary's letter, the Wisconsin legislature retained the "clearly established by state law" language in WIS. STAT. § 84.30 when it was enacted in 1971, even though that language was no longer part of the federal Act. *See* 1971 Wis. Act 197, § 3. We decline ADMAR's invitation to ignore this language based on an isolated portion of the House Record not tied to the Wisconsin statutory language in any discernible way.

B. Equitable Estoppel

¶34 We turn to ADMAR's argument that, even if its statutory interpretation argument is unavailing, DOT should be equitably estopped from revoking the permits. The "test for equitable estoppel consists of four elements: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." ***Village of Hobart v. Brown County***, 2005 WI 78, ¶36, 281 Wis. 2d 628, 698 N.W.2d 83 (citation omitted).

¶35 ADMAR's equitable estoppel argument, in summary, is as follows: Even though the error in ADMAR's applications resulted from the Village of

Camp Douglas clerk's error, and not from any DOT action or inaction, DOT should have discovered the error by checking its own records when ADMAR submitted the applications, and DOT's failure to discover this error sooner than it did caused losses to ADMAR.

¶36 We need not decide whether ADMAR could satisfy the elements of equitable estoppel on this basis. This is because we agree with DOT and DHA that, regardless whether the elements of equitable estoppel are met, equitable estoppel is not available to ADMAR as a defense because it would interfere with DOT's exercise of police power. Courts have consistently applied this rule. *See* ***Village of Hobart***, 281 Wis. 2d 628, ¶29 n.9 ("[The court] ha[s] typically refused to apply estoppel against the government when its application would interfere with the police power for the protection of the public health, safety or general welfare."); ***DOR v. Moebius Printing Co.***, 89 Wis. 2d 610, 639, 279 N.W.2d 213 (1979) ("[The court] ha[s] not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare."); ***State v Drown***, 2011 WI App 53, ¶8, 332 Wis. 2d 765, 797 N.W.2d 919 ("[W]e will 'not allow[] estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare.'" (quoting ***Moebius Printing***, 89 Wis. 2d at 639)).

¶37 ADMAR does not dispute that DOT's revocation of the permits was an exercise of police power for protection of the public health, safety, or general welfare. Rather, ADMAR argues that the rule cited above is not absolute and should not be followed here. ADMAR cites one case in support of this argument, ***Epstein v. Benson***, 2000 WI App 195, 238 Wis. 2d 717, 618 N.W.2d 224.

¶38 In ***Epstein***, the court's discussion of equitable estoppel was limited to a footnote, in which the court accepted "for the sake of argument" that the defense presented in that case could be viewed as a defense of equitable estoppel. *See* ***id.***, ¶30 n.6. Assuming, without deciding, that ***Epstein*** may therefore be read as an exception to the rule, ***Epstein*** makes plain that any such exception is strictly limited. The government conduct in ***Epstein*** was egregious, involving a pattern of government delay, evasion, and deception that this court repeatedly termed "unconscionable." *See* ***id.***, ¶¶2, 7, 28, 49. Thus, ***Epstein*** at most stands for the proposition that equitable estoppel might be available as a defense to the exercise of police power when the government's conduct is extreme and unconscionable. This case is not such a case, based on any argument made by ADMAR or any facts that we can discern from the record.

CONCLUSION

¶39 For all of the reasons stated, we affirm the circuit court's order, which upheld DHA's decision affirming DOT's revocation of ADMAR's permits to erect its signs.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.