COURT OF APPEALS DECISION DATED AND FILED

December 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 96-2591

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

OGDEN DEVELOPMENT GROUP, INC.,

PLAINTIFF-APPELLANT,

V.

DOLORES M. BUCHEL, CARL G. A. GRISAR, CHRISTINE R. SWANNELL, CAROL NAWROCKI, MYRON STIRMEL, KENNETH J. GONNERING, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF APPEALS, VILLAGE OF WEST MILWAUKEE AND DONNA M. BUSE, AS CLERK FOR BOARD OF REVIEW,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Reversed and cause remanded.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Odgen Development Group, Inc. (Ogden) appeals from a trial court judgment affirming a decision of the Village of West Milwaukee Zoning Board of Appeals (the Board) denying Ogden's request for a zoning variance. Ogden claims that the Chairperson of the Board, Christine Swannell, although she abstained from voting, prejudged its application, and thus created bias or unfairness in fact, or an impermissibly high risk of bias, so that her failure to recuse herself deprived Ogden of a fair hearing. We agree with Ogden. Therefore, we reverse the trial court's judgment and remand the matter to the circuit court with instructions to remand it to the Board for a new hearing consistent with this opinion.

I. BACKGROUND.

On July 26, 1994, Ogden presented a proposal to the Village of West Milwaukee Planning Commission to erect three four-family apartment buildings on property it owns in the Village of West Milwaukee. Christine Swannell spoke at the Planning Commission meeting, and expressed concerns about parking and traffic issues related to the proposed development. Following the meeting, on August 5, 1994, the West Village Condominium Association Board (the WVCAB) sent a signed petition in opposition to the proposal to Ogden and a number of other parties. The petition was signed by fifteen people, including Swannell, who signed by proxy.[1] Ogden alleges in its brief that, at the time of the petition's creation, Swannell was a member of the WVCAB, and owned a condominium in

[1] In its appellate brief, the Board argues that it would be "pure speculation" to attribute the statements in the petition to Swannell. However, in a brief submitted to the trial court, the Board admitted that Swannell "was a signatory by proxy" to the petition. In addition, the Board failed to actually claim, and has presented us with no evidence to show, that the signature by proxy was fraudulent or a mistake. Therefore, we conclude that it is appropriate to attribute the petition's statements to Swannell.

the Village of West Milwaukee. Aside from the petition, the record appears to contain no evidence substantiating or disproving these factual claims by Ogden. The Board, however, does not dispute these assertions, and therefore, we deem them admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

The WVCAB petition opposed Ogden's development mainly because Ogden planned to build apartments rather than condominiums. The petition listed thirteen separate specific reasons for its opposition, and concluded that "[a] short term decision to develop rental units may be the worst decision for the village in terms of long term value and overall return." The petition not only argued against the development on the grounds that it would create parking problems and decrease tax revenues, but also because it would financially harm the condominium owners. For instance, the petition opposed the development because "[o]ur condominium property values fall (or have little appreciation) as more rental units are built. Not advantageous for current and future owners."

On June 16, 1995, Ogden applied for a zoning variance to construct two, instead of the previously proposed three, apartment buildings on the same plot of land. In response, on September 6, 1995, the West Milwaukee Zoning Board of Appeals held a public hearing. Swannell, a member of the Board, acted as Board chairperson during the hearing. Chairperson Swannell raised a number of concerns during the meeting, but eventually abstained from voting. The Board voted to deny Ogden's request for a zoning variance, with three of the four remaining Board members voting against the proposal. Ogden appealed to the Milwaukee County Circuit Court by writ of certiorari, and the trial court affirmed the Board's decision. Odgen now appeals from the trial court judgment.

II. ANALYSIS.

This appeal arises by way of statutory certiorari. *See* § 62.23(7)(e)(10), STATS. The scope of our review by certiorari is limited to determining the following: (1) whether the Board "kept within its jurisdiction"; (2) whether the Board "acted according to law"; (3) whether the Board's action "was arbitrary, oppressive, or unreasonable and represented its will and not its judgment"; and (4) whether the evidence was such that the Board "might reasonably make the order or determination in question." ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 24, 498 N.W.2d 842, 846 (1993).

In ***Marris***, the Wisconsin Supreme Court explained that the Board's obligation to act "according to law" includes an obligation on the Board's part to adhere to "the common-law concepts of due process and fair play." *See* ***id.*** at 24, 498 N.W.2d at 846-47. In the instant case, these "common law concepts of due process and fair play" entitled Ogden to a fair hearing before an impartial board. *See* ***id.*** at 24, 498 N.W.2d at 847. Ogden's right to an impartial board was violated if there was "bias or unfairness in fact" or an "impermissibly high … risk of bias." *See* ***id.*** at 25, 498 N.W.2d at 847. If any Board member prejudged the facts or the application of the law, an impermissibly high risk of bias was created. *See* ***id.*** at 26, 498 N.W.2d at 847. We must examine the facts of Ogden's individual case in order to determine whether a board member prejudged Ogden's matter. "A clear statement, 'suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision.'" ***Id.*** at 26, 498 N.W.2d at 848 (quoting Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D.L.REV. 161, 208 (1989)). Although the court in ***Marris*** invalidated the Board's decision on the basis of statements made by a board member during the actual hearing, the law review article on which the ***Marris*** court relied states that

instances where "the right to an impartial decisionmaker is arguably violated … usually occur where a member of the board has indicated a strong bias regarding a particular decision *prior to or outside the normal decisionmaking process*." Cordes, *supra*, at 208 (emphasis added). Thus, it appears that clear statements made outside of or before the hearing, as well as during the hearing, which suggest that a decision has already been reached, or prejudged, should suffice to invalidate a decision.

Ogden argues that public statements which Board chairperson Swannell made prior to the hearing clearly suggest that she prejudged the matter before the Board. We agree. On July 26, 1994, Chairperson Swannell publicly expressed concerns at a Planning Commission meeting relating to Ogden's initial proposal. Following the meeting, Swannell signed a petition drafted by the WVCAB which opposed Ogden's planned development. The petition clearly and strongly expressed the opinion of the signatories that Ogden should not be allowed to construct apartment buildings on the property in question. The signatories characterized their opposition to the development of "100% rental units" as "strong," and listed thirteen separate reasons in support of their position. The petition stated that "[a] one-hundred percent rental apartment development, as proposed or otherwise, is NOT a viable, value-adding option for either the Village of West Milwaukee or the tax-paying homeowners of the WVCA." If the proposal was not changed to include a mix of owner-occupied condominiums, the petition provided that "the WVCA opts for no development of the land by Ogden & Co. at this time." Further, the petition stated that "[t]hese concerns and opinions have been discussed in depth by WVCA members and will be vehemently supported as future events transpire." Chairperson Swannell owned a condominium, was a member of the WVCA board that drafted the petition, and signed the petition. We

can reasonably infer that by signing the document, Swannell meant to express her agreement with the document's contents. Thus, the petition was a clear statement by Swannell indicating that she had considered Ogden's proposal, and had strongly decided that it should be rejected. Given such clear evidence of prejudgment, we must conclude that Ogden's right to an impartial decision-maker has been violated.

The Board, however, makes two arguments in defense of its decision. First, the Board argues that Swannell's statements in opposition to Ogden's previous proposal do not show that Swannell prejudged Ogden's current proposal because, in its view, the two proposals are "completely different." The Board specifically claims that the current proposal is "much different" than the earlier proposal because the previous proposal was for a development "50% larger" than the current proposal. We conclude that the small difference in size between the first proposal, for three apartment buildings, and the second proposal, for two buildings, is immaterial. The signers of the petition, including Chairperson Swannell, were opposed to Ogden's previous proposal not because of its size, but because of Ogden's plan to construct apartments instead of condominiums. Nearly all of the thirteen reasons given in support of the petition's position involve an assessment of the unfavorable aspects of apartment buildings in comparison to condominiums. In addition, the petitioners stated that they would "vehemently support" their opposition to the construction of 100% rental units on the land in question. The current Ogden proposal, like the earlier proposal, is for 100% rental apartments. Therefore, Swannell's opposition to the previous proposal logically relates equally to the current proposal, and thus creates an impermissibly high risk of bias.

The Board also argues that Ogden was not deprived of a fair hearing because Swannell abstained from voting. The Board specifically claims that "[w]here the allegedly biased member does not vote, it is irrelevant whether the alleged bias distorted her judgment, or whether she pre-judged the case." We disagree. Although, in some ways, a biased decision-maker who abstains from voting does less harm than a biased decision-maker who votes, under the circumstances of this case, the harm was still great enough to deprive Ogden of a fair hearing. Ogden had the right, under ***Marris***, to a fair hearing before an impartial board. The zoning decision in this case, as in ***Marris***, required the Board to "engage in fact-finding and then make a decision based on the application of those facts to the ordinance." ***Marris***, 176 Wis.2d at 26, 498 N.W.2d at 847. Ogden had the right to expect not only that the ultimate decision would be made by unbiased Board members, but that the fact-finding process which preceded the decision would be untainted by biased Board members who had prejudged the facts or application of the law. *See* ***id.*** at 25-26, 498 N.W.2d at 847 ("Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational decision-making as well as to ensure public confidence in the decision-making process.").

Chairperson Swannell was heavily involved in the fact-finding process which preceded the Board's ultimate decision. She made a number of comments and asked a number of questions during the public hearing. She also expressed her view that the Ogden development would adversely affect the traffic patterns in the Village. Additionally, Swannell not only participated in the hearing, but acted as Chairperson, directing and controlling the hearing procedure. Given her strong opposition to Ogden's previous proposal, the fact that she did not recuse herself prior to the beginning of the hearing created an impermissibly high

risk of bias. Even though she eventually abstained from voting, her actions created "a perception of unfairness" and threatened to "erode confidence in the decisionmaking process." *See* Cordes, *supra*, at 170. Given the facts, Swannell's proper course of action should have been recusal prior to the beginning of the hearing, rather than abstention at the end of the hearing. Therefore, we conclude that in spite of Chairperson Swannell's abstention, Ogden's right to a fair hearing before an impartial decision-maker was violated.[2] Consequently, we reverse the judgment of the trial court and remand to the circuit court to remand to the Board for a rehearing consistent with this opinion.

By the Court.–Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[2] The Board also argues that Ogden's appeal should be dismissed because Ogden "has not demonstrated, and cannot demonstrate, sufficient proof to require a variance." This argument is completely misplaced. Ogden is not contesting the merits of the Board's decision, but rather the procedural defect which resulted from a biased decision-maker's participation in Ogden's hearing. Therefore, Ogden is not required as part of this appeal to show that its variance should have been granted. That issue is solely for the Board to determine on remand in an impartial manner consistent with this opinion.