COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3202

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

JEFFREY ALLEN,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

v.

WAUKESHA COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Reversed.*

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

SNYDER, P.J. The Waukesha County Board of Adjustment (the Board) appeals from a circuit court decision reviewing its denial of a variance

request and remanding the case to the Board for further factfinding.[1] The circuit court concluded that there was insufficient evidence in the record to uphold the Board's finding that the homeowner, Jeffrey Allen, had failed to meet the "undue hardship" requirement for the variance. The Board appeals, claiming that: (1) its decision should be upheld because Allen failed to prove the undue hardship element; (2) the circuit court erred in its decision because it shifted the burden to prove unnecessary hardship to the Board; and (3) Allen has failed to show any additional hardship from that presented by earlier variance requests. Allen cross-appeals, arguing that the Board's consideration of a "floor area ratio" (FAR) requirement was incorrect because he owns a legally nonconforming lot.[2]

We conclude that Allen is correct; Allen's lot is governed by a provision of the Shoreland, Floodland Protection Ordinance that exempts nonconforming lots from the FAR requirements. Thus Allen, in this instance, is not required to obtain a variance. *See* WAUKESHA COUNTY, WIS., ORDINANCE, APPENDIX B—SHORELAND, FLOODLAND PROTECTION ORDINANCE § 3.10(2)(E) (1986) (hereinafter, ORDINANCE). We therefore reverse the Board's decision

[1] While the circuit court remanded the case to the Board for further factfinding rather than affirm or reverse the Board decision, that resolution is appealable pursuant to the supreme court's decision in ***Bearns v. DILHR,*** 102 Wis.2d 70, 75-78, 306 N.W.2d 22, 25-26 (1981) (concluding that a remand to an administrative agency for further proceedings is appealable as of right because in such an instance the circuit court's determination disposes of the entire matter *in litigation*). An appellate court therefore conducts a de novo review of the board's decision. *See* ***Miswald v. Waukesha County Bd. of Adjustment,*** 202 Wis.2d 401, 408, 550 N.W.2d 434, 436 (Ct. App. 1996).

[2] Allen also asserts in the cross-appeal that the circuit court erred when it refused to permit him to present additional evidence. Because of our determination that the first issue of the cross-appeal is determinative, this issue will not be addressed. *See* ***City of Racine v. J-T Enters. of Am., Inc.,*** 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974) (a matter is moot if a determination is sought which cannot have a practical effect on an existing controversy).

which was grounded in its conclusion that a variance was required. In light of our decision, remanding the case to the Board is unnecessary.

Allen owns a legally nonconforming lake parcel that has been grandfathered in by the above ordinance. *See* ***id.*** Allen's lot is 50 feet wide and approximately 288 feet long, or 14,400 square feet; a conforming lot would be 20,000 square feet. *See* ORDINANCE § 11.04(2)(A). The lot contains a single family residence, a boathouse and a detached garage. Allen applied for a zoning permit to make certain alterations to the home, which included a cantilevered second story addition over an existing deck and a "mudroom" entrance into the kitchen over the existing foundation. The Waukesha County Parks and Land Use Department refused to grant the zoning permit because the proposed addition would exceed what it considered the maximum allowable FAR for Allen's nonconforming lot. Allen then requested a variance from the FAR requirement. This request was originally heard by the Town of Oconomowoc Plan Commission and was approved. The variance request indicated that the proposed construction would increase the FAR of the Allen property from 21.9% to 23%.[3]

Allen's wife, Linda, appeared before the Board to request the variance. The Board denied the Allens' request to construct the mudroom and second floor addition, although it did approve their plan to construct a deck which was to be attached to the second floor addition. Allen then commenced a certiorari appeal of the Board's decision in circuit court.

[3] The area in which the home is located is zoned R-3 residential, which permits a maximum FAR of 15%.

The circuit court remanded the case to the Board to take additional evidence. The court neither affirmed nor reversed the Board, but merely stated that it was "reluctant … to affirm the Board's action by substituting our own reason for denying the variance where the Board has denied the variance request by citing reasons that are unsupported by the record" (citing ***Arndorfer v. Sauk County Bd. of Adjustment,*** 162 Wis.2d 246, 258-59, 469 N.W.2d 831, 835-36 (1991)). The circuit court ruled that it was "unable to make a determination that the [Board] did not [substitute] its will rather than its judgment, [and therefore] the matter is remanded to the [Board] to take further evidence, allowing the Petitioners to demonstrate or fail to demonstrate unnecessary hardship as … that term is defined in Snyder and Arndorfer, and then rendering a decision based on the law …." It is from this decision that the Board appeals.

Under a certiorari standard, we review the Board's decision de novo. *See* ***Miswald v. Waukesha County Bd. of Adjustment,*** 202 Wis.2d 401, 408, 550 N.W.2d 434, 436 (Ct. App. 1996). On certiorari review, we are 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 evidence was such that it might reasonably make the order or determination in question.

Id. at 410-11, 550 N.W.2d at 437. While a board's decision should be accorded a "presumption of validity and correctness," *see* ***id.*** at 411, 550 N.W.2d at 437, the threshold issue presented is whether the Board correctly construed the applicable sections of the ordinance. The construction of an ordinance is a question of law which we review de novo without deference to the circuit court. *See* ***State ex rel. Beidler v. Zoning Bd. of Appeals,*** 167 Wis.2d 308, 310, 481 N.W.2d 669, 671

(Ct. App. 1992). However, it is the petitioner's initial duty to convince the court that the Board's interpretation is incorrect. *See* ***id.*** at 311, 481 N.W.2d at 671. Allen has done so here; we conclude that the Board misconstrued the applicable ordinance sections when it required him to show undue hardship and obtain a variance because he was unable to meet the FAR requirements.

The first step is to determine if the language of the ordinance is clear or ambiguous; the test of ambiguity is whether the statute is capable of being construed in more than one way by reasonable people. *See* ***R.W.S. v. State,*** 156 Wis.2d 526, 529, 457 N.W.2d 498, 499 (Ct. App. 1990), *aff'd*, 162 Wis.2d 862, 471 N.W.2d 16 (1991). We conclude that the ordinance is ambiguous. It is not clear from the plain language whether the FAR requirements are applicable to nonconforming lots. We therefore construe the applicable sections in order to determine this issue.

In any construction, we are to consider not only the disputed section, but also related sections. *See* ***Pulsfus Poultry Farms v. Town of Leeds,*** 149 Wis.2d 797, 804, 440 N.W.2d 329, 332 (1989). Furthermore, when one section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible. *See* ***State v. Amato,*** 126 Wis.2d 212, 217, 376 N.W.2d 75, 78 (Ct. App. 1985). If there is any conflict the specific section prevails over the general. *See* ***American Fed'n of State, County & Mun. Employees v. Brown County,*** 140 Wis.2d 850, 854, 412 N.W.2d 167, 169 (Ct. App. 1987), *aff'd*, 146 Wis.2d 728, 432 N.W.2d 571 (1988). We turn to the ordinances governing area regulations for lots in an R-3 residential zoning district.

Allen owns a legally nonconforming lot with 50 feet of shoreland in an area zoned R-3 residential. Section 3.10 of the applicable ordinance is entitled "Area regulations" and includes three different points of regulation. The first paragraph is entitled "Floor area" and specifies minimum and maximum floor area requirements for residences and how to compute those ratios for existing homes. *See* ORDINANCE § 3.10(1). Because the issue presented by this appeal concerns the Board's determination that Allen is constrained by FAR requirements which prohibit him from adding on to his residence, we consider the language of the one paragraph which pertains to the maximum FAR permitted. Section 3.10(1)(B) reads:

> The maximum total floor area of the buildings on a lot shall not exceed that permitted under the floor area ratio as hereinafter specified by the regulations for the district in which such building is located.

The "regulations for the district" in which Allen's home is located specify a FAR of 15%.

Subsection (2) is entitled "Lot size." It begins with the following provision:

> (A) No lot shall hereafter be created and no building shall be erected on a lot of less land area or minimum average width than hereinafter specified by the regulations of the district in which such building is located *except as may be provided in subsection 3.10(2)(E) of this Ordinance.* No lot may be created which has less than one hundred (100) feet of frontage on a navigable river or lake …. [Emphasis added.]

Because Allen's lot does not conform to the lot size regulations for this area, we consider the provisions of § 3.10(2)(E):

> (E) Where a lot has less land area … [than that] specified in section 3.10(2)(A) and was of record at the time of passage of this ordinance, *such lot may be used for any purpose permitted in such district*, but not for residential

> purposes for more than one (1) family; *provided, however, that in no case shall the setback and offset requirements be reduced to less than that required in the R-3 zoning district and the open space requirements be reduced to less than ten thousand (10,000) square feet per family.* [Emphasis added.]

Finally, § 3.10(3) is entitled "Open space" and outlines the amount of usable open space that must be retained on a lot. This paragraph states that "[n]o building shall … reduce the usable open area of [any] lot to less than that hereinafter specified by the regulations for that district …." ORDINANCE § 3.10(3)(A). In the case of conforming lots in the R-3 zoning district, each lot must include 15,000 square feet of usable open space in order to comply with this regulation.

Allen claims that § 3.10(2)(E) of the ordinance is the applicable section for his nonconforming lot, and because this paragraph does not include FAR restrictions, the Board's application of those requirements to his project was incorrect. He argues that he is only required to satisfy the following conditions in order to qualify for a building permit: (1) that his lot is used for residential purposes for only one family; (2) that his plan meets the setback and offset requirements of the R-3 residential zoning district; and (3) that the open space on his lot will not be reduced below 10,000 square feet. Because he has met these three requirements, Allen argues that no variance is required.

The Board disagrees and contends that "area requirements are composed of three elements: floor area, lot size, and open space requirements." According to the Board, any reading that permits the requirements of § 3.10(2) to be considered as distinct and independent of the other provisions would cause conflict between the provisions. According to the Board, "[t]o interpret the Waukesha County Shoreland and Floodland Protection Ordinance as Allen

requests would render most of the ordinance's sections unusable and would lead to absurd results." The Board then offers the following as an example: "[T]o read 3.10(2) [lot size] to the exclusion of 3.10(3) [open space] would dictate that a property owner could build a house that covered every square inch of his property." We conclude, however, that the Board has misconstrued the application of this section.

We do not disagree that this section defines three types of area regulations: floor area, lot size and open space. Section 3.10(1)(B) specifies that "[t]he maximum total floor area of the buildings on a lot shall not exceed that permitted under the floor area ratio as hereinafter specified by the regulations for the district in which such building is located." ORDINANCE § 3.10(1)(B). The generally applicable FAR for this district is 15%.

Section 3.10(3)(A) provides in straightforward language that "[n]o building shall be erected, structurally altered or placed on a lot so as to reduce the usable open area of such lot to less than that hereinafter specified by the regulations for that district …." The required usable open area for a lot in the R-3 residential district is 15,000 square feet. *See* ORDINANCE § 11.04(3).

We agree with the Board that all of the preceding sections of the ordinance need to be harmonized and construed together. However, these two subsections provide general regulations that pertain to conforming lots in a given area. There is only one subsection that specifies it is applicable *only* to substandard, nonconforming lots. *See* ORDINANCE § 3.10(2)(E).

Section 3.10(2)(E) includes only three requirements for the use of such lots: one-family occupancy, setback and offset requirements conforming to those required by the R-3 residential zoning district, and open space requirements

of at least 10,000 square feet per family. The rules of statutory construction require that we acknowledge that the specific open space requirement of 10,000 square feet in subsection (2)(E) supersedes the more general requirement of subsection (3)(A) which requires 15,000 square feet of open space for lots in the R-3 residential district. *See* ***American Fed'n,*** 140 Wis.2d at 854, 412 N.W.2d at 169 ("Where two conflicting statutes apply to the same subject, the more specific controls."). We then apply this same rule of statutory construction to the other provisions of § 3.10. In doing so, it becomes apparent to us that the FAR requirements outlined in § 3.10(1) have also been superseded by the specific, less restrictive area regulations contained in subsection (2)(E).

Two of the three conditions imposed by § 3.10(2)(E) directly pertain to space and area regulations. However, this subsection specifies only that offset and setback requirements must be adhered to and that a minimum 10,000 square feet of open space must be maintained. There are no FAR requirements included. Under the rules of statutory construction, we cannot supply something that is not included in an ordinance. *See* ***Lang v. Lang,*** 161 Wis.2d 210, 224, 467 N.W.2d 772, 777-78 (1991). Instead, the plain language of this paragraph subjects nonconforming lots to the specified space and area regulations. In addition, we read the language of § 3.10(2)(A) as exempting nonconforming lots from any of the regulations contained therein when it states: "[N]o building shall be erected on a lot of less land area or minimum average width than hereinafter specified … *except as may be provided in subsection 3.10(2)(E) of this Ordinance*." ORDINANCE § 3.10(2)(A) (emphasis added).

We are further convinced that this construction harmonizes all of the pertinent statutory sections when we consider the following. Allen's lot is 288 feet by 50 feet, or 14,400 square feet. According to the open space requirement,

4400 square feet of the lot is available for any building purposes.[4] As long as the lot retains 10,000 square feet of open space, and appropriate setback and offset requirements are adhered to, the provisions of § 3.10(2)(E) are met. However, if we were to superimpose the 15% FAR requirement onto Allen's nonconforming lot, multiplying 15% by the size of the lot (14,400 square feet) permits Allen to utilize *only* 2160 square feet for any building purpose. To overlay FAR requirements on top of the provisions of subsection (2)(E) renders the requirement that a homeowner is permitted to retain only 10,000 square feet of open space a nullity under these facts.[5] *See* ***State v. Ozaukee County Bd. of Adjustment,*** 152 Wis.2d 552, 559, 449 N.W.2d 47, 50 (Ct. App. 1989) (a cardinal rule of construction is that no part of a statute or ordinance should be rendered superfluous by interpretation). We therefore construe the specific provision, subsection (2)(E), as the only section directly applicable to zoning requirements for nonconforming lots. The general FAR and open space requirements of the area regulations are superseded by the specific provision, subsection (2)(E).

The Board nonetheless argues that this construction "would cause conflict between the provisions. For example, to read § 3.10(2) to the exclusion of § 3.10(3) would dictate that a property owner could build a house that covered every square inch of his property." This misconstrues the application of the

[4] This includes not only the residential space, but also any outbuildings, garages, boathouses, etc.

[5] Using some basic mathematical calculations, it appears that if the 15% FAR requirement is construed as applicable to substandard lots, it is only those lot owners whose nonconforming lots are 11,750 square feet or less who would be circumscribed by the 10,000 square feet of open space requirement. On any nonconforming lot larger than 11,750 square feet, building would be restricted solely on the basis of the 15% FAR requirement and the open space allowance of 10,000 square feet would be immaterial. A lot of 11,750 square feet would be only 59% of the size of a conforming lot; Allen's nonconforming lot is 72% of the size generally required in the R-3 residential zoning district.

ordinance. Legally conforming lots are subject to all of the requirements and restrictions of this and any other applicable section. In a similar way, nonconforming lots are also made subject to other applicable sections through the provision that "such lot may be used for any purpose permitted in such district ...." *See* ORDINANCE § 3.10(2)(E). Consequently, the Board's argument that Allen's interpretation "pick[s] and choos[es] those requirements that allow him to rebut the County's arguments" but does not acknowledge the most rational reading of the ordinance is without merit. For example, the Board's argument that this construction would permit Allen to build a skyscraper on his lot is addressed when one considers that Allen's lot is subject to the same height restrictions as any building in the R-3 residential zoning district because the specific provisions of paragraph (2)(E) subject even substandard lots to only those uses "permitted in such district." *See* ***id.***

Further, it is logical to conclude that an area will be enhanced if the owners of smaller, nonconforming lots are nonetheless permitted to plan and build additions that will allow them to add amenities and bring their homes' square footage more in line with the homes on standard lots. The Board's construction of this ordinance is overly restrictive and renders a provision of the controlling ordinance a virtual nullity. *See supra* note 5. We decline to permit such a result.

In sum, we reverse the decision of the Board which denied Allen's request for a variance. Because we conclude that Allen is constrained only by the conditions contained in § 3.10(2)(E) of the ordinance, the circuit court's remand for further factfinding is unnecessary. Our determination that this issue of the cross-appeal is dispositive renders the issues raised by the Board moot and they will not be addressed. *See* ***State ex rel. Wis. Envtl. Decade, Inc. v. Joint Comm.,*** 73 Wis.2d 234, 236, 243 N.W.2d 497, 498 (1976).

By the Court.—Order reversed.

Not recommended for publication in the official reports.