

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-2869

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

RICHARD A. EBERLE AND BARBARA J. EBERLE,

**PLAINTIFFS-APPELLANTS-CROSS
RESPONDENTS,**

BURT AVEDON AND SILVANA AVEDON,

INVOLUNTARY-PLAINTIFFS,

V.

DANE COUNTY BOARD OF ADJUSTMENT,

**DEFENDANT-RESPONDENT-CROSS
APPELLANT,**

**SHARON CLARK-GASKILL, JAMES E. QUACKENBUSH,
JOHN A. SAYLES, AND LOUISE KLOPP,**

DEFENDANTS-RESPONDENTS.

APPEAL and CROSS-APPEAL from orders of the circuit court for
Dane County: SARAH O'BRIEN, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

EICH, J. Richard and Barbara Eberle appeal from orders dismissing various constitutional and money-damage claims in their action against the individual members of the Dane County Board of Adjustment. The Eberles initially sought *certiorari* review of the Board’s decision denying their application for a special permit to construct a 3000-foot driveway that would connect their parcel of land to a road. While the proceedings were pending, they filed an amended complaint purporting to assert claims against the Board members: (1) for damages resulting from what they describe as an illegal and unconstitutional “taking” of their property without just compensation; (2) for denial of their “substantive” and “procedural” due process rights during the course of the proceedings; and (3) for their attorney fees pursuant to 42 U.S.C. § 1988.¹

The circuit court decided the *certiorari* petition in the Eberles’ favor, holding that the Board had acted arbitrarily, unreasonably, and contrary to law by applying improper zoning criteria to their property, by considering *ex parte* communications, and by visiting the property without providing the Eberles an opportunity to participate. The court ordered the Board to issue the requested permit forthwith and dismissed the Eberles’ constitutional and damage claims, as well as their claim for attorney fees. The Eberles appeal the order dismissing these claims, and the Board cross-appeals the court’s decision in the *certiorari* proceeding.

¹ The amended complaint also contained a claim for inverse condemnation under ch. 32, STATS., which the trial court dismissed. The Eberles do not challenge the dismissal on this appeal.

Taking the cross-appeal first, we are satisfied that the circuit court properly reversed the Board's denial of the requested permit. With respect to the Eberles' appeal, we conclude that the court also properly dismissed their constitutional and attorney-fees claims. We therefore affirm the court's orders in all respects.

I. Background

The Eberles are real estate developers and substantial landowners in Dane County. This lawsuit involves a 42-acre parcel in the Town of Verona. In 1994, the Eberles received permission from the Town to divide the parcel into two lots for purposes of residential development. The Town's approval, however, was conditioned upon the Eberles' agreement that access to one of the lots (Lot #1) would be only from Timber Lane, one of two roads in the area. The result was that access to the lot from the other, much closer road, Coray Lane, was precluded. Upon the recording of a deed restriction to that effect, the Dane County Board of Supervisors adopted an ordinance rezoning the property for residential use and precluding access to Lot #1 from Coray Lane.²

Following the rezoning, the Eberles sold Lot #1 and contracted to build a home for the purchasers on the property. As construction began, the Eberles, who were responsible under the sales contract for obtaining all necessary permits, applied to the Board of Adjustment for a special permit to build the driveway connection to Timber Lane.³ After a public hearing, the Board voted to

² The ordinance stated: "Access for the ... parcel shall be from Timber Lane."

³ As we discuss in more detail below, the permit was required by § 11.05 of the Dane County Ordinances, which prohibits the filling, grading and ditching of land within 300 feet of a navigable waterway without the county's approval.

deny the request and, as indicated, the Eberles sought *certiorari* review of the Board's decision.

While their action was pending, the people to whom the Eberles had sold Lot #1 sued to rescind the sales contract and for restorative damages. To settle the lawsuit, the Eberles agreed to repurchase the lot for \$20,000 more than their sale price. Thereafter, they amended their *certiorari* complaint to add the constitutional and damage claims against the Board members. Other facts will be discussed in the body of the opinion.

II. The Cross-Appeal: The *Certiorari* Proceedings

In *certiorari* proceedings, we review the agency's decision, not the circuit court's. *State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis.2d 646, 651, 275 N.W.2d 668, 671 (1979). We accord a presumption of correctness and validity to the agency's decision, and the issues on review are limited to (a) whether the agency kept within its jurisdiction and acted according to law, (b) whether its action was arbitrary, oppressive and unreasonable, representing its will and not its judgment, and (c) whether the evidence was such that the agency might reasonably make the order or determination it did. *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis.2d 246, 253-54, 469 N.W.2d 831, 833-34 (1991).

The Board's decision was based on three "conclusions of law" which, to facilitate discussion, we set forth in their entirety:

CONCLUSIONS OF LAW:

- 1). 11.05(3) Dane County Ordinance requires a Special Exception Permit for construction of proposed private roadway within three hundred feet of ordinary high-water mark of navigable water and for filling and grading on all slopes, as proposed.

2). 11.09 Dane County Ordinance does not permit the construction of private roadway for residential access across a wetland as defined in 11.01(13) Dane County Ordinance ... and construction of roadway as proposed would violate Shoreland-Wetland district standards set forth in 11.06(1)...

3). Even if proposed roadway is permitted across this unmapped wetland, special Exception Permit requirements set forth in 11.05(4) Dane County Ordinance have not been complied with and proposed roadway and bridge violate Shoreline District standards set forth in 11.02(2) and (3) specifically including but not necessarily limited to:

a). Proposed roadway and bridge are a massive intrusion and bifurcation of a sensitive ecosystem which could and probably will cause:

- 1). Water pollution from chemicals, oils and salts through vehicular usage;
- 2). Unnecessary erosion and sedimentation;
- 3). An impediment to the natural surface flow and drainage of the area;
- 4). Alteration of ground water recharge and storage capacity;
- 5). Impairment or destruction of existing vegetation; and
- 6). Impairment or destruction of existing wildlife habitat including spawning grounds, fish and aquatic life.

b). Scope of project and disturbance of area is greater than necessary and is contrary to the public interest which is to preserve a rapidly disappearing natural resource.

c). Intrusion in the Shoreland-Wetland as proposed will adversely impact on its natural beauty.

d). Access to Coray Lane would not intrude onto Shoreland-Wetland and is preferred access to public road.⁴

⁴ These conclusions were preceded by several findings of fact, which we also set forth in full:

Finding of fact:

- 1). Applicant proposes to construct a 2,500-foot ... roadway... Approximately 500 feet thereof crosses an unnamed, navigable tributary to the Sugar River and other wetlands.

(continued)

One of the arguments the Eberles advanced in circuit court was that the Board exceeded its jurisdiction when it concluded (Conclusion #2) that their proposal was either prohibited by or would violate DCO §§ 11.09 and 11.06(1), which govern improvements in Shoreland-Wetland Districts, because their property is not located in a Shoreland-Wetland District. The court agreed,

2). The stream channel ... is several feet wide, 2-3 feet deep and ... together with the adjacent wetlands ... drains approximately 880 acres of watershed into the Sugar River one-half mile to the south ...

3). Applicant proposes to bridge the stream with an elevated, 44-foot, steel girder and plank, single-span bridge.

4). One hundred-year flood levels indicate a 3-4 foot rise in the surface level of the stream with a substantial increase in its velocity and overflow of its banks.

5). That portion of the wetlands on both sides of the proposed roadway, approximately 400 feet in length, ... appears to be a contiguous extension of the hundred plus acres of Wisconsin DNR mapped wetlands lying to the South....

6). The quality of the wetlands surrounding the proposed roadway is characterized as a sedge meadow with isolated pockets of shallow, standing water and possesses the vegetation, soils and hydrology of a defined wetland ...

7). The area is habitat for ducks, cranes, frogs and other wetland creatures.

....

9). Updating available wetland maps to current conditions would include subject wetlands which are in excess of two acres.

10). Construction of the 20-foot wide road and bridge within the 66-foot right-of-way will disturb approximately two acres of shoreland-wetland and will require 3 feet of fill topped with breaker-run and asphalt, and the installation of sediment traps and heavy rip-rapping.

11). Applicant's closest public road is Coray Lane ... less than 200 feet west of his property....

12).

concluding that the Board exceeded its jurisdiction and acted arbitrarily and illegally by “apply[ing] inapplicable standards to the subject property.”

On appeal, the Board does not contest the trial court’s conclusion in this regard. Rather, it argues that the error affects only one of its several findings and conclusions and that other proper findings and conclusions exist that support its decision to reject the Eberles’ request. Accordingly, says the Board, we should affirm its decision if its other reasons for the denial were valid. *See Clark v. Waupaca County Bd. of Adjustment*, 186 Wis.2d 300, 304, 519 N.W.2d 782, 784 (Ct. App. 1994).

As may be seen, the Board’s other principal conclusion of law, Conclusion #3, states that the proposed project will “violate Shoreland District standards set forth in [§§] 11.02(2) and (3)[,] Dane County Ordinance” in several respects.

The Eberles point out, however, that the ordinances on which this conclusion is expressly based, §§ 11.02(2) and (3), have nothing to do with the issuance of special exception permits under the ordinance in question, § 11.05, which, as indicated above, requires a permit for any filling or grading of areas within 300 feet of the ordinary high-water mark of a navigable waterway. Section 11.05(4) sets forth the matters to be considered by the Board in deciding whether a permit should issue:

In considering a special exception permit the board of adjustment shall evaluate the effect of the proposal as to possible water pollution, including erosion and

sedimentation, harmful changes to fish life or aquatic plants, maintenance of safe and healthful conditions.⁵

We agree with the Eberles that, while some aspects of Conclusion #3, and its supporting findings of fact, may bear some relationship to the criteria in § 11.05, others do not—particularly the conclusion statement that the project will have an adverse impact on the area’s “natural beauty.” Nothing in the § 11.05 permit-issuing criteria deals with natural beauty, and if the Dane County Board of Supervisors had wanted to ensure consideration of such matters in passing on permit applications, it could have done so. Thus, as they stand, significant portions of the Board’s principal conclusions of law do not address the extent to which the Eberles’ permit application meets, or fails to meet, the specific criteria set forth in the applicable ordinance.⁶

Beyond that, the ordinances the Board relied on in Conclusion #3 are not substantive provisions at all. They are merely the prefatory “statement-of-purpose” provisions—and, as indicated, they do not even appear in the permit-

⁵ The ordinance goes on to state that the Board shall, in granting a permit, attach several conditions where appropriate. Section 11.05(4). These conditions include: exposing the smallest amount of bare ground for the shortest feasible time; using temporary ground cover and various methods to trap sediments; conducting any “lagooning” in a manner that will avoid creating fish traps; stabilizing fill according to accepted engineering standards; avoiding restriction of floodways or destruction of the storage capacity of the flood plain; and stabilizing the sides of channels or artificial water courses. *Id.*

⁶ The Board’s Conclusion #(3)(d) is also problematic. It states, “Access to Coray Lane ... is the preferred access to [the] public road.” As the trial court noted:

It is undisputed that the County Board prohibited plaintiffs from having access to their property via [Coray] Lane when it adopted [the ordinance rezoning the Eberles’ land]. The only possible access is via [Timber] Lane. Therefore this conclusion of law is contrary to law. There is *no* access via [Coray] Lane, and thus no way that route could be preferable. [Coray] Lane might as well be on the moon. Plaintiffs cannot put a drive through to it, and this is an inappropriate consideration in evaluating the request for a special exception permit.

granting ordinance but in one regulating buildings and activities within the Shoreland District.⁷ The Board argues that it makes little sense to conclude that, in considering requests for special exception permits under § 11.05, it cannot consider such basic public-interest factors as preservation of natural beauty and the other goals and purposes of Shoreland District regulation found in § 11.02. It is an attractive argument and we are not unsympathetic to it. The county ordinances, however, deal quite specifically with the permit the Eberles sought and set forth in plain and unambiguous language the factors the Board of Adjustment will consider in passing on such requests. It would have been a simple matter for the county's legislative body, the Board of Supervisors, to have included language similar to that in §§ 11.02(2) and (3) when it enacted § 11.05, or to have simply referred to those sections in § 11.05—and to any other provisions of related ordinances it felt should be included in the special permit decision-making process. It did not.

⁷ The sections read as follows:

(2) *Legislative finding:* The county board does find that the uncontrolled use of the shorelands and pollution of the navigable water of Dane County adversely affect the public health, safety, convenience, and general welfare and impair the tax base. The legislature of Wisconsin had delegated responsibility to the counties to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structures and land uses; and, preserve shore cover and natural beauty, and this responsibility is hereby recognized by Dane County.

(3) *Statement of purpose:* For the purpose of promoting and protecting the public health, safety, convenience and general welfare to: prevent and control water pollution; protect fish spawning grounds, fish and aquatic life, control building sites, placement of structures, preserve shore cover and natural beauty.

We agree with the Board that, where possible, statutes relating to the same subject matter should be read together and harmonized if possible. *Payment of Witness Fees in State v. Huisman*, 167 Wis.2d 168, 174, 482 N.W.2d 665, 667 (Ct. App. 1992). We have also recognized, however, that, in passing laws, a legislative body is presumed: (1) to act with full knowledge of existing statutes, *Murphy v. LIRC*, 183 Wis.2d 205, 218, 515 N.W.2d 487, 494 (Ct. App. 1994); and (2) to have chosen its terms carefully and precisely to express its meaning. *Ball v. District No. 4, Area Board*, 117 Wis.2d 529, 539, 345 N.W.2d 389, 394 (1984). In the situation facing us, we simply cannot rewrite § 11.05 to meet the Board’s desired construction. “If a statute fails to cover a particular situation and the omission should be cured, the remedy lies with the legislature, not the courts.” *La Crosse Hosp. v. La Crosse*, 133 Wis.2d 335, 338, 395 N.W.2d 612, 613 (Ct. App. 1986).

We are also persuaded that, as the trial court ruled, the Board’s consideration of an *ex parte* communication from the Department of Natural Resources impairs several of its principal findings and conclusions. The letter—which the Eberles became aware of after their request had been denied—specifically referred to their application and criticized it in several respects. Comparing the contents of the letter to the Board’s findings of fact and conclusions of law, the trial court demonstrated that findings ## 6, 9, 10, and 11,⁸ as well as several portions of Conclusion of Law #3, were based on statements contained in the letter. The record bears out the trial court’s observations in this regard, as does the transcript of the Board’s deliberations on the Eberles’ motion for reconsideration, which indicates that members of the Board were actively discussing various portions of the letter preceding their vote to deny reconsideration. Finally, as the trial court also noted, a

⁸ See note 3 *supra*.

second letter, which the Eberles obtained from DNR after the Board had denied their application, retracts many of the negative statements in the first letter—some of which the Board had plainly relied on. And while the court saw this as a violation of the Eberles’ constitutional due process rights, we consider it as evidence that the Board acted in an arbitrary and unreasonable manner in denying the Eberles’ application.⁹

Finally, the trial court engaged in a lengthy examination of the evidence, noting that “none of the reports of professionals contained in the record support[s] the Board’s factual conclusions that the project will cause unnecessary erosion, impact on aquatic vegetation or harm wildlife,” and that, on the other hand, “[t]he record is replete with documentation that this project will be conducted in a manner that minimizes harm to the environment.” After noting that its review of the transcript of the hearings held with respect to the Eberles’ application established that the Board gave “virtually no attention ... to any of the evidence [or] how the evidence applied to the factors set forth in the ordinance on which [its] decision was to be based,” the court concluded:

All of the substantive evidence supports issuance of the permit. If the Board felt that additional evidence was necessary in order to determine environmental impact, the applicant could have been asked to procure such evidence. If the Board felt that conditions to the permit were necessary to minimize environmental impact, the ordinance authorized it to attach conditions. However the Board was not free to ignore all of the evidence in the record, refuse to inform the applicant in what way his proposal failed to meet the requirements of the ordinance, and then base its decision on speculation about totally undocumented harms that might occur if the project was approved. This is what

⁹ The same may be said of the Board members’ *ex parte* visit to the Eberles’ property, another event not of record that apparently also entered into the Board’s decision.

the Board did, and this is the essence of arbitrary decision-making. The Board applied its will, and not its judgment.

We noted above that we review the Board's decision, not the trial court's. We have long recognized, however, that in many cases the trial court's reasoning may be of great assistance to us in determining the appeal. *Id.* See also *Barnes v. DNR*, 178 Wis.2d 290, 302, 506 N.W.2d 155, 160 (Ct. App. 1993), *aff'd*, 184 Wis.2d 645, 516 N.W.2d 730 (1994). That is the situation here. The circuit court's exhaustive examination and analysis of the evidence and the Board's findings and conclusions have greatly aided our consideration of the issues. Our independent examination of the record satisfies us that the trial court properly applied applicable *certiorari* criteria when it reversed the Board's decision.

III. The Appeal: The Eberles' Constitutional and Damage Claims

In their amended complaint, the Eberles raised issues under both the United States and the Wisconsin Constitutions. First, they sought damages from the Board members claiming that the Board had taken their property without just compensation in violation of Article I, Section 13, of the Wisconsin Constitution because the denial of their request for the permit effectively "landlocked" Lot #1, rendering it useless for most if not all purposes.¹⁰ The trial court rejected this claim, concluding that, because it had granted the Eberles the relief they sought in their initial *certiorari* action—reversal of the Board's decision and an order directing immediate issuance of the requested permit—there had been no legally cognizable "taking" of their property. The court's decision was based on *Reel Enterprises v. City of La Crosse*, 146 Wis.2d 662, 431 N.W.2d 743 (Ct. App.

¹⁰ Article I, Section 13, provides: "The property of no person shall be taken for public use without just compensation therefor."

1988), where we held under similar circumstances—the agency action claimed by the plaintiffs to have constituted a taking of their property was reversed on appeal—that no taking had occurred. We agree that *Reel Enterprises* requires dismissal of the Eberles’ Article I, Section 13, claim.

Reel Enterprises was an inverse condemnation action where the plaintiff, the developer of an industrial park near the La Crosse River, claimed that the Department of Natural Resources, by authorizing creation of a floodplain zoning ordinance in the area, had effectively rendered its property useless for all reasonable purposes and thus “took” plaintiff’s property for public use without compensation. Specifically, the plaintiff complained that DNR had refused to permit a sewer extension to the property. Recognizing that, in order for there to be an unconstitutional taking, there must be a “legally imposed restriction upon the property’s use” which deprives the owner of all, or practically all, of the use of the property, we held that because the DNR decision had been reversed in judicial review proceedings in circuit court, “DNR’s refusal was not a legally enforceable restriction on the use of the plaintiff’s properties [and] therefore could not be a taking.” *Id.* at 676, 431 N.W.2d at 749. While we recognized that a legally imposed restriction which the adopting agency later repeals, rescinds or amends can, in certain circumstances, constitute a compensable taking, we said that “if a court reverses the agency’s action which created the restriction, a legally imposed restriction does not exist and no taking has occurred.” *Id.* at 677, 431 N.W.2d at 749-50.

The Eberles argue at length that *Reel Enterprises* is itself unconstitutional and contrary to reported decisions of the Wisconsin Supreme

Court¹¹ and several courts in other states; they ask us to overrule it. The argument is readily resolved. Under *Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997), we may not overrule our prior published opinions.

The Eberles next argue that the trial court improperly dismissed their claim, grounded on 42 U.S.C. § 1983, that the Board members violated their rights to procedural and substantive due process. With respect to the substantive due process claim, they point out that, in the *certiorari* proceeding, the trial court ruled that the Board had acted arbitrarily and they say that such a finding “is, of course, the fundamental description of the type of governmental action that constitutes a denial of substantive due process.”¹² This appears to us to be precisely the type of argument the parties made, and the court rejected, in *Gamble v. Eau Claire County*, 5 F.3d 285 (7th Cir. 1993). There, the board initially granted the plaintiff a permit to operate a business in an area zoned for other uses and then denied it after neighbors complained to the board. As the court noted, she “could have sought judicial review of the [board’s] decision” in state court but did not. *Id.* at 286. Instead, she brought an action under 42 U.S.C. § 1983, claiming both that she had been denied just compensation for the “taking” of her property and that the board’s action “denied her right to substantive due process.” *Id.* at 285. The court rejected the claim, holding that, under the United States Supreme Court’s

¹¹ We note in this regard that a petition for review of our decision in *Reel Enterprises* was denied by the supreme court. *Reel Enter. v. City of La Crosse*, 146 Wis.2d 662, 431 N.W.2d 743 (Ct. App. 1988), *petition for review denied*, 147 Wis.2d 887, 436 N.W.2d 29 (1988).

¹² Specifically, the Eberles argue that the Board violated their right to substantive due process in two ways: (1) by using improper zoning criteria—*e.g.*, inapplicable ordinances—in considering their appellation; and (2) by referring to Coray Lane access as preferable when they “knew that the [Eberles] could not legally access [their] property from Coray Lane.” We concluded above that the Board’s decision was subject to reversal because it acted arbitrarily and unreasonably when, among other things, it referred to inapplicable ordinances and stated a preference for Coray Lane access.

decision in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), “even if a taking can be challenged as a denial of substantive due process, a suit based on this theory is premature if the plaintiff has possible state remedies against the ... state action that he wants to attack.” *Id.* at 287. The court went on to note that “if the plaintiff could have gotten the state court to overturn the revocation of her conditional permit, she would have been spared all the harm of which she complains....” *Id.* at 288.

In this case, of course, the Eberles not only had a state remedy available to them to challenge the Board’s action; they took advantage of that remedy and prevailed, obtaining an order granting them the permit they requested! As the Seventh Circuit Court of Appeals said in a more recent case, *Gosnell v. City of Troy, Ill.*, 59 F.3d 654, 658-59 (7th Cir. 1995):

Williamson concludes that the opportunity to litigate in state court after the fact supplies all the process due for claims of inverse condemnation by excessive regulation.... The Gosnells complain about meddlesome regulation that diminished the value of their property; they do not use the language of takings, but we held in *Gramble* that a landowner cannot avoid *Williamson* by switching constitutional nomenclature and arguing “substantive due process.” *River Park [Inc. v. City of Highland Park]*, 23 Fed.3d 164, 167 (7th Cir. 1994) added that “procedural due process” would be handled the same way... The Gosnells had ample opportunity for hearings, they used their opportunities, and they won....

The constitutional case is over...

See also Hartland Sportsman’s Club, Inc. v. Town of Delafield, 35 F.3d 1198, 1202 (7th Cir. 1994), where the court stated that the action of a town zoning board which was found to have violated state law “d[id] not in itself rise to the level of a violation of substantive due process.”

We glean from these cases that a federal “substantive due process” claim arising from allegations of excessive or arbitrary action with respect to limitations placed on the use of property does not arise under 42 U.S.C. § 1983 where state-law remedies exist to seek reversal of the challenged action. In this case, as we have said, not only did such remedies exist, they were successfully pursued by the Eberles. Finally, we consider the court’s concluding statements in *Gosnell*, which we quoted above, to also dispose of the Eberles’ “procedural due process” claims based on the Board’s consideration of the DNR letter and its *ex parte* view of the property in question. The Board’s actions in this case which, at the suit of the Eberles, have been held to be both procedurally and substantively erroneous, have been nullified and we have affirmed the trial court’s order directing the Board to issue the requested permit.¹³

IV. The Appeal: Attorney Fees

¹³ It is true here, as it is with respect to the Eberles’ substantive due-process claims, that the challenged actions—the property view and consideration of the DNR letter—implicate due-process considerations. But they also represent the type of arbitrary and unreasonable agency action for which state-law *certiorari* proceedings can—and in this case did—provide a full remedy. As the court stated in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988): “Something more is necessary than dissatisfaction with the rejection of a site plan to turn a zoning case into a federal case; and it should go without saying that the something more cannot be merely a violation of state (or local) law.” In this regard, we think Judge Reynolds’s observations in *Magulski v. County of Racine*, 879 F. Supp. 83, 85 (E.D. Wis. 1995), are particularly appropriate:

[T]he Seventh Circuit has held that zoning decisions do not violate the due process clause of the Constitution as long as the plaintiff had the opportunity to seek review of the decision in state court. The *River Park* case, like the case before this court, involved a constitutional due process challenge to a local zoning ordinance that was passed by means of procedural irregularities which ... the court considered to be a violation of state law. 23 F.3d at 165. Yet the *River Park* court affirmed the dismissal of the plaintiffs’ due process claim, holding that a municipality’s zoning decision does not violate the due process clause as long as there was an opportunity to seek review of the decision in state court.... [and] such an opportunity is available through a petition for ... certiorari.

The Eberles' claim for attorney fees is based on 42 U.S.C. § 1988, which provides for an award of fees to a plaintiff who has prevailed on a federal civil rights claim. *National Organization for Women v. Operation Rescue*, 37 F.3d 646, 653 (D.C. Cir. 1994). And while it is true, as the Eberles point out, that a plaintiff may be deemed to have "prevailed" where success on pendent state law claims provides the primary relief available on the civil rights claims and thus obviates the need for a determination of the merits of the federal claims, where no civil rights claim has been successfully stated, success on a state claim does not trigger the fee provisions of § 1988. *Hensley v. Eckerhart* 461 U.S. 424, 434-35 (1983).

Citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978), for the proposition that a plaintiff may be considered a prevailing party under § 1988 if he or she succeeds "on any significant issue in litigation which achieves some of the benefit ... sought in bringing suit," the Eberles claim they are entitled to recover their attorney fees in this case. But § 1988 permits the court, in its discretion, to award fees only where the plaintiff has prevailed "in any action ... to enforce a provision of sections ... [42 U.S.C. §§ 1981-1983]"; and the trial court dismissed all of the Eberles' 42 U.S.C. § 1983 claims in a decision which we have affirmed in full. We do not see how fees may be validly requested under these circumstances.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

