COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1005 **Cir. Ct. No. 2013CV560**

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

NEXTMEDIA OUTDOOR, INC., PREDECESSOR IN INTEREST TO LAMAR CENTRAL OUTDOOR, LLC,

PLAINTIFF-RESPONDENT,

V.

THE VILLAGE OF HOWARD, WISCONSIN AND THE ZONING BOARD OF APPEALS OF THE VILLAGE OF HOWARD,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Reversed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 HRUZ, J. NextMedia Outdoor, Inc. (NextMedia) owned a legal, nonconforming billboard sign in the Village of Howard (the Village) that was displaced as the result of a Wisconsin Department of Transportation (DOT)

highway project. NextMedia sought to have the sign "realigned"—i.e., moved to a different spot on the same property—pursuant to a newly enacted state law. Accordingly, it filed an application for realignment with the Village, which the Village denied under a local ordinance implementing the new state law. NextMedia appealed to the Zoning Board of Appeals of the Village of Howard (the Board), which reversed the Village's decision and authorized NextMedia to realign the sign with certain conditions.

¶2 The DOT objected to the Board's decision, advising the Village it had acquired, by condemnation, NextMedia's permit rights to the sign months prior to the Board's decision. The Village then filed a motion for reconsideration, and the Board held a second hearing on the matter. The Board reversed its earlier decision, concluding NextMedia's right to apply for realignment ceased when the DOT acquired NextMedia's permit rights. NextMedia sought certiorari review, and the circuit court agreed with NextMedia and entered a judgment concluding the Board lacked reconsideration authority and erred as a matter of law by considering the evidence submitted during the reconsideration proceedings.

¶3 We reverse the circuit court. We conclude the Board had inherent authority, based on long-standing Wisconsin precedent, to reconsider a decision based on mistake, such as occurred here. We further conclude the evidence submitted on reconsideration was sufficient to establish that the Board's earlier decision was fundamentally rooted in its mistaken beliefs that NextMedia still owned permit rights to the sign and that the DOT had proposed realignment of the sign. We also reject NextMedia's other arguments, including that the Board erred as a matter of law, that it should be estopped from reconsidering its prior decision, and that the Board's reconsideration decision was unreasonable and contrary to the concepts of due process and fair play.

BACKGROUND

¶4 As of early 2012, NextMedia owned ten outdoor billboard signs located on properties in the Village. One such sign—known as the "Wallaby's sign" because of its proximity to Wallaby's restaurant—was constructed in 1984 on leased land near Highways 29 and 41.[1] The Wallaby's sign continued as a legal, nonconforming use after the Village prohibited new billboard signs.

¶5 At some time prior to October 2011, the DOT began planning significant changes to Highways 29 and 41. The Wallaby's sign was in the path of a planned overpass, and the DOT required it to be removed. The DOT later observed that the site would eventually be "buried beneath more than 20 feet of earthwork." The proposed highway design was such that the overpass would rise much higher than the sign, so that the sign, even if moved nearby, would no longer be visible to traffic unless it was also raised. NextMedia, along with the underlying property owner, attempted to negotiate a resolution with officials in the DOT's Green Bay office that would allow them to move the sign to a different location on the same property. This process is known as "realignment" under what was at the time a new law. *See* 2011 Wis. Act 32, § 2233m (codified at WIS. STAT. § 84.30(5r)).[2]

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[1] The Wallaby's sign was an "off-premises sign" under the Village's Code of Ordinances because it "advertise[d] goods, products, facilities or services not necessarily on the premises where the sign [was] located, or direct[ed] persons to a different location from where the sign [was] located." VILLAGE OF HOWARD, WIS., CODE OF ORDINANCES ch. 50, art. VI., div. 1., § 50-1220, https://www.municode.com/library/wi/howard/codes/code_of_ordinances?nodeId=PTIICOOR_CH50ZO_ARTVIRESI_DIV1GE (updated through October 23, 2014).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶6 WISCONSIN STAT. § 84.30(5r) governs the realignment of nonconforming signs due to state highway projects. "Realignment," as used in the statute, is a term of art defined as "relocation on the same site." WIS. STAT. § 84.30(5r)(a). Under § 84.30(5r), the DOT proposes realignment of a noncomforming sign, after which it must notify the municipality or county (whichever created the ordinance that produced the nonconformity) of the proposal. WIS. STAT. § 84.30(5r)(c). The municipality or county may then request that the DOT acquire the sign in lieu of realignment. ***Id.*** If the DOT, pursuant to the municipality or county's request, successfully condemns the sign, the municipality or county must then pay to the DOT an amount equal to the condemnation award, minus whatever relocation costs the DOT would have paid if the sign had been realigned instead. ***Id.***

¶7 After WIS. STAT. § 84.30(5r) became effective, the Village amended its ordinance governing nonconforming signs. *See* VILLAGE OF HOWARD, WIS., ORDINANCE 2011-19, § 1 (Nov. 14, 2011) (the Ordinance). Whereas the Village Code of Ordinances (the Village Code) previously prohibited a nonconforming sign's relocation or replacement, the Ordinance now permitted such activities in a limited set of circumstances. The amendment added the following subsection:

> If a highway project of the [DOT] causes the realignment of a nonconforming sign per Section 84.30(5r) of the Wisconsin State Statutes, such sign may be relocated on the same site as long as no modifications or alterations are made to the sign other than those specifically necessary to move the structure. Such realignment or relocation of the sign shall not affect its nonconforming status under this ordinance.

Id.

¶8 Ultimately, NextMedia was unsuccessful in its efforts to persuade DOT officials to propose realignment of the sign. The DOT appears to have believed the Village would not allow realignment because the height adjustment necessary was beyond the modifications or alterations permitted by the Ordinance, in which case the DOT believed it would be subject to an inverse condemnation claim from NextMedia. Rather than risk such an outcome, the DOT's Green Bay office notified NextMedia that the DOT was preparing an "offering package" and would be acquiring NextMedia's sign rights via condemnation instead.

¶9 NextMedia was undeterred. On October 13, 2011, NextMedia's attorneys wrote to the DOT secretary, urging that the DOT revisit NextMedia's realignment proposal. Then, on October 25, 2011, NextMedia submitted an application to the Village requesting "a permit to realign the sign on the same parcel pursuant to [WIS. STAT. § 84.30(5r) as a] result of an order to vacate due to [the] State Hwy 41 improvement project." The application called for moving the sign approximately fifty feet south of its former location on the same parcel, and for the replacement of three "I" beam supports with four larger beams to account for an increase in the sign's height.

¶10 The Village's Director of Code Administration, James Korotev, denied NextMedia's realignment application. He concluded the proposed realignment would not comply with the Ordinance because NextMedia's proposal contained modifications and alterations beyond what was necessary to move the structure. Specifically, Korotev concluded NextMedia improperly sought to (1) build a new sign out of new materials; (2) incorporate new digital facing on one side of the billboard; and (3) increase the height of the sign by forty-five feet. NextMedia responded that it was abandoning its request for digital facing, and that, contrary to Korotev's decision, the remainder of the proposed modifications

were permissible under the Village Code. Korotev apparently declined to reconsider his decision.

¶11 NextMedia appealed Korotev's decision to the Board on December 14, 2011. The Village opposed the appeal on numerous grounds, among them its belief that the DOT paid a relocation award and therefore had paid just compensation to acquire NextMedia's sign interests. NextMedia responded on May 8, 2012, asserting that, under a recent Wisconsin Supreme Court decision, it was entitled to both relocation expenses and the fair market value of any property taken. Even though NextMedia acknowledged it had received $37,625 in relocation expenses from the DOT, it claimed it had not yet reached an agreement with the DOT about the fair market value of NextMedia's property interests for condemnation purposes. Accordingly, NextMedia asserted it could proceed with the appeal because it had not yet been compensated for any taking.

¶12 Following a public hearing on May 10, 2012, the Board reversed the Village's decision. It approved realignment of the Wallaby's sign with certain conditions, including that the sign be supported by three beams, and that the "structure of the sign above the supports be a replica or as close to the original as [is] structurally [possible] …." Critically, the Board perceived NextMedia's realignment request to have been initiated by a realignment proposal from the DOT under WIS. STAT. § 84.30(5r), thereby triggering the Ordinance.

¶13 On July 11, 2012, the Village requested that the Board reconsider and vacate its May 10, 2012 decision. The Village's motion was supported by an affidavit from Korotev, who averred that DOT attorney John Sobotik had contacted him on July 5, 2012. Sobotik, in an email attached as an exhibit to Korotev's affidavit, asserted the DOT had, in fact, acquired all of NextMedia's

signing rights, including its permit rights, months before the May 10, 2012 hearing. Other exhibits showed that on February 10, 2012, the DOT recorded an award of damages to NextMedia consistent with a January 13, 2012 jurisdictional offer, which allocated $75,800 of the total acquisition price of $118,000 toward an "off premise sign." Sobotik asserted that NextMedia's permit rights were included in this award of damages and, consequently, NextMedia had no right to continue to pursue realignment after February 10. In short, the DOT posited that it owned all rights to the sign, and it had owned those rights since February 10, 2012.[3]

¶14 The Board held a public hearing on August 29, 2012, at which Sobotik and Curt Van Erem, the DOT real estate manager for the highway project, testified. Their testimony was consistent with the notion that the $75,800 awarded to NextMedia on February 10, 2012, included compensation for NextMedia's leasehold and permit rights.

¶15 The Board issued a new decision on January 29, 2013, determining that the Village correctly denied NextMedia's realignment application. The Board specifically found that the DOT's purchase "also included the right to erect signs along that portion of Highway '29' abutting the [condemned] property …." The Board concluded that the "new information" the DOT provided "regarding its purchase and acquisition [of NextMedia's] signage rights … was significant and relevant and presented a substantial change in circumstances from that presented to the Board at the May 10, 2012 hearing."

[3] NextMedia does not dispute that the DOT acquired all signage rights pertaining to the Wallaby's sign as part of the condemnation proceedings.

¶16 NextMedia petitioned the circuit court for certiorari review. At a hearing, NextMedia, for the first time, suggested the DOT had not acquired its permit rights.[4] It also argued that, even if the DOT had acquired those rights, such information was available to the Board any time after February 10, 2012, through a public records search.

¶17 At the conclusion of the hearing, the circuit court opined that the purpose of WIS. STAT. § 84.30(5r) was to "stop the unnecessary waste of taxpayers[']s dollars," and it determined that the DOT "spen[t] $75,000 of taxpayers[']s money unnecessarily" when it decided it would acquire NextMedia's sign rights based on speculation about whether the Village would grant a realignment request. The court later entered a written decision concluding, first, that the Board exceeded its authority, because it was not empowered to entertain motions for reconsideration, and, second, that there was no basis for reconsideration, because evidence regarding the DOT's acquisition of NextMedia's permit rights was available prior to the May 10, 2012 hearing. The circuit court therefore reinstated the Board's May 10, 2012 decision in favor of NextMedia. The Village and the Board now appeal.

DISCUSSION

¶18 This appeal is before us on certiorari review. "Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior tribunal." ***Ottman v. Town of Primrose***, 2011 WI 18, ¶34, 332 Wis. 2d 3, 796 N.W.2d 411. We accord a

[4] Again, we perceive NextMedia to have abandoned this argument on appeal.

presumption of correctness and validity to the municipality's decision. *See* ***Nowell v. City of Wausau***, 2013 WI 88, ¶24, 351 Wis. 2d 1, 838 N.W.2d 852. We review the Board's decision, not that of the circuit court. ***O'Connor v. Buffalo Cnty. Bd. of Adjustment***, 2014 WI App 60, ¶11, 354 Wis. 2d 231, 847 N.W.2d 881, *review denied*, 2014 WI 109, 358 Wis. 2d 306, 852 N.W.2d 746. Our review is limited to: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on the correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable, or represented its will and not its judgment; and (4) whether the evidence was such that the municipality might reasonably make the order or determination in question.[5] ***Ottman***, 332 Wis. 2d 3, ¶35.

¶19 NextMedia's primary assertion—and the primary basis on which it secured reversal before the circuit court—is that the Board exceeded its authority when it reconsidered its prior decision. NextMedia observes that the Village Code[6] gives the Board those powers and duties prescribed by WIS. STAT. § 62.23(7)(e)7., which does not explicitly include the power to reconsider a prior decision. We review the extent of the Board's authority under the statutory scheme de novo. ***Osterhues v. Board of Adjustment***, 2005 WI 92, ¶12, 282 Wis. 2d 228, 698 N.W.2d 701.

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[5] NextMedia sought certiorari review pursuant to WIS. STAT. § 62.23(7)(e)10. Under that statute, when—as here—the circuit court does not take additional evidence, the scope of review is identical to the common law certiorari standards described above. *See* ***Ottman v. Town of Primrose***, 2011 WI 18, ¶42, 332 Wis. 2d 3, 796 N.W.2d 411.

[6] *See* VILLAGE OF HOWARD, WIS., CODE OF ORDINANCES ch. 2, art. III., div. 2., § 2-141, https://www.municode.com/library/wi/howard/codes/code_of_ordinances?nodeId=PTIICOOR_CH2AD_ARTIIIBOCOCO_DIV2VIBOAP_S2-141PODU (updated through October 23, 2014); VILLAGE OF HOWARD, WIS., CODE OF ORDINANCES ch. 50, art. II, div. 2, §§ 50-63, 50-64, https://www.municode.com/library/wi/howard/codes/code_of_ordinances?nodeId=PTIICOOR_CH50ZO_ARTIIADEN_DIV2VIBOAP (updated through October 23, 2014).

¶20 NextMedia heavily relies on ***Goldberg v. City of Milwaukee Bd. of Zoning Appeals***, 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983), in support of its argument. The Village and Board, too, rely on ***Goldberg***, but they interpret it as authorizing reconsideration based on mistake of fact or law, both of which they argue are established in the present case. Upon careful inspection of the ***Goldberg*** opinion, we agree with the Village and the Board.

¶21 In ***Goldberg***, the Pipers submitted an offer to purchase an apartment building and then applied for an occupancy certificate, which was denied. ***Id.*** at 519. The Pipers appealed that determination to the board of zoning appeals, which granted a variance for a permit to occupy the building as a six-family dwelling. ***Id.*** However, a few days later, without further hearing or notice, the board revised its own decision and made the variance personal to the Pipers. ***Id.*** The Pipers did not receive notice of the revision until after they completed the building purchase; they did not appeal. ***Id.*** Years later, Sidney Goldberg submitted an offer to purchase the property. ***Id.*** Because the variance was personal to the Pipers, Goldberg was required to submit a new permit application, which the board denied. ***Id.*** at 519-20.

¶22 On certiorari review, we concluded the revised decision that made the variance personal to the Pipers was invalid. We noted that "[a]lthough there is some split of authority on a board's power to reopen or reconsider, … our research persuades us that the better rule is that a zoning board acts in excess of its power in reopening a proceeding which has once been terminated." ***Id.*** at 521 (footnote omitted). Taken out of context and standing alone, that quote appears to support NextMedia's argument. However, the court also acknowledged there were possible exceptions to this rule, although none were supported by the record in that

case. ***Id.*** ("Possible exceptions to this rule, such as public necessity or other good cause, are not evidence from the record and are, therefore, inapplicable here.").

¶23 Indeed, the rule we ultimately adopted was far less rigid than NextMedia suggests. Although the general rule is that reconsideration falls outside the scope of a zoning board's authority, reconsideration is nonetheless justified when the initial decision is based on a mistake of fact or law. *See* ***Goldberg***, 115 Wis. 2d at 521-22. In articulating this rule, we relied on ***Morton v. Mayor & Council of Clark Township***, 245 A.2d 377, 384 (N.J. Super. Ct. Law Div. 1968), *aff'd*, 260 A.2d 5 (N.J. Super. Ct. App. Div. 1969), which stated the following:

> [V]iewing the board of appeals as a *quasi*-judicial tribunal, the general rule is that *such a board is not vested with the power to reopen and rehear a proceeding which has once been terminated*, at least in the absence of mistake in the prior proceedings. Otherwise there would be no finality to the proceeding; the result would be subject to change at the whim of members, or due to influence exerted upon them or other undesirable elements tending to uncertainty and impermanence.

See ***Goldberg***, 115 Wis. 2d at 521-22; *accord* ***Mackler v. Board of Ed.***, 108 A.2d 854, 857-58 (N.J. 1954) (mistake justified reopening proceedings). The ***Morton*** court also determined that, in addition to mistake, other circumstances justifying reconsideration include inadvertence, surprise, fraud and a substantial change in

the circumstances underlying the prior proceedings.[7] *See* ***Morton***, 245 A.2d at 384.

¶24 ***Tateoka v. City of Waukesha Board of Zoning Appeals***, 220 Wis. 2d 656, 583 N.W.2d 871 (Ct. App. 1998), cited by NextMedia, supports the ***Morton*** view. There, the Tateokas purchased property in 1996 after the broker represented the property was a duplex and was taxed as such by the municipality. ***Tateoka***, 220 Wis. 2d at 660. Later, the Tateokas sought a variance after city officials informed them the residence could not be used as a duplex, only to be told that their request would not be considered because other prospective purchasers had applied for, and been denied, a variance in 1995. ***Id.*** at 661. The city cited a board of appeals rule prohibiting new applications seeking previously denied relief absent a substantial change in conditions or circumstances. ***Id.***

¶25 We determined, on certiorari review, that the Tateokas were effectively challenging the validity of the rule itself, rather than whether they sufficiently established a substantial change in circumstances. *See* ***id.*** at 663-64. We observed that there must be some measure of finality to municipal zoning decisions, and that reconsideration or rehearing "'should not be lightly granted.'" ***Id.*** at 665 (quoting EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 27.274, at 412 (3d ed. 1994)). However, we concluded the municipality did not exceed its jurisdiction and that it could validly enact an

[7] These additional bases for reconsideration were not specifically mentioned in ***Goldberg v. City of Milwaukee Board of Zoning Appeals***, 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983), likely because the board's decision to revise the permit in that case was made sua sponte without notice and the revision was not defended for any permissible reason articulated in ***Morton v. Mayor & Council of Clark Township***, 245 A.2d 377 (N.J. Super. Ct. Law Div. 1968), *aff'd*, 260 A.2d 5 (N.J. Super. Ct. App. Div. 1969).

ordinance allowing it to revisit a prior decision where an intervening change in circumstances has occurred. ***Id.*** at 668-72.

¶26 Consistent with these authorities, we reiterate that a quasi-judicial body, such as the Board in this case, retains limited authority to reconsider its own decisions. *See* ***Goldberg***, 115 Wis. 2d at 522. The mistake exception to the general rule prohibiting a municipality from revisiting its prior decisions has been long established. As ***Goldberg*** holds, and ***Tateoka*** suggests, permitting reconsideration in such limited circumstances does not fatally undermine the need for finality in municipal zoning decisions, but rather ensures decisions are not based on fraud or mistake.

¶27 NextMedia's arguments to the contrary are unpersuasive. First, we find little significance in the fact that reconsideration authority is not specifically granted by WIS. STAT. § 62.23(7)(e)7.[8] It is true that the scope of an administrative review must be determined by reference to the statutes that authorize it. *See* ***Osterhues***, 282 Wis. 2d 228, ¶26. In this case, § 62.23(7)(e)7. is silent regarding the power of reconsideration. However, the statute grants boards of appeal the broad authority to "hear and decide appeals" in cases of alleged error, to "hear and decide special exceptions" to the terms of an ordinance, and to "authorize upon appeal" variances in certain instances where "a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship …." ***Id.***

[8] The scope of a board of appeals' authority is also discussed in WIS. STAT. § 62.23(7)(e)8. The parties, however, fail to cite or articulate any argument regarding that subdivision. Accordingly, we do not address it. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (court of appeals will not abandon its neutrality to develop arguments for the parties).

¶28 We view the limited power of reconsideration articulated in ***Goldberg*** as implicit in this statutory grant of authority. Where a statute does not specifically authorize reconsideration, the federal courts and most state courts recognize the inherent authority of municipalities to reconsider their own quasi-judicial decisions.[9] *See* ***Cinque v. Montgomery Cnty. Planning Bd.***, 918 A.2d 1254, 1261 (Md. 2007); *cf.* ***State v. Cummings***, 199 Wis. 2d 721, 736, 546 N.W.2d 406 (1996) ("A grant of jurisdiction by its very nature includes those powers necessary to fulfill the jurisdictional mandate."); ***State v. Kielisch***, 123 Wis. 2d 125, 131-32, 365 N.W.2d 904 (Ct. App. 1985) (recognizing inherent authority of quasi-judicial bodies to take possession of subpoenaed records). This authority is constrained by requiring a showing, as we have explained, that the original decision was the product of fraud, surprise, mistake or inadvertence, or that circumstances have changed substantially since the original decision; the decision-making body's mere change of mind is insufficient. *See* ***Cinque***, 918 A.2d at 1261; *see also* ***Tateoka***, 220 Wis. 2d at 665, 672; ***Goldberg***, 115 Wis. 2d at 521-22.

¶29 Here, any permit to realign the Wallaby's sign issued to NextMedia could only have been based on a mistake, as NextMedia no longer owned the property rights necessary to conduct such a realignment. Rather, the DOT had acquired those rights, and it was the real party in interest as to any realignment of the sign. While the record, based on our independent review, could arguably support a finding that the original grant of a permit for realignment was based on

[9] If, however, a statute does specifically authorize reconsideration, it instead governs the circumstances under which the municipality may grant reconsideration. *See* ***Cinque v. Montgomery Cnty. Planning Bd.***, 918 A.2d 1254, 1261 (Md. 2007).

NextMedia's misrepresentations (if not fraud upon the Board), it definitely supports a finding that the decision was based on mistake. As set forth more fully below, *see infra***,** ¶¶35-37, the principal mistakes were that the DOT had proposed realignment of the sign under WIS. STAT. § 84.30(5r)—it had not—and that NextMedia still owned the permit and leasehold rights to the sign on the property at issue—it did not.

¶30 NextMedia also argues that judicial review is the exclusive mechanism of review available for relief from a board of appeals decision. Both the Village Code[10] and WIS. STAT. § 62.23(7)(e)10. provide for judicial review by certiorari. We have recently rejected an argument similar to the one NextMedia makes—namely, that the sole remedy for a party aggrieved by a zoning decision is certiorari review. *See* ***O'Connor***, 354 Wis. 2d 231, ¶¶20-22. In ***O'Connor***, a citizen who opposed a conditional use permit (CUP) argued that the board lacked authority to consider the application because the board in that case previously denied an identical application from the same party. ***Id.***, ¶¶5, 20. We concluded certiorari review was not the exclusive remedy because "nothing in [the applicable statute,] WIS. STAT. § 59.694(10)[,] prevented [the applicant] from instead filing a second CUP application." ***Id.***, ¶21. Similarly, nothing in WIS. STAT. § 62.23(7)(e)10. prohibits reconsideration under ***Goldberg*** based on mistake. In any event, for the reasons articulated above, *see infra*, ¶¶23-26, NextMedia's argument in this regard fails when the decision can be reviewed based upon the ***Morton*** criteria prior to the filing of a petition for certiorari review.

[10] *See* VILLAGE OF HOWARD, WIS., CODE OF ORDINANCES ch. 50, art. II., div. 2., § 50-66, http://www.municode.com/library/wi/howard/codes/code_of_ordinances?nodeId=PTIICOOR_CH50ZO_ARTIIADEN_DIV2VIBOAP_S50-66FIDE (updated through October 23, 2014).

¶31 Additionally, NextMedia argues that even if the Board had authority to reconsider, its decision on reconsideration was contrary to law because the evidence justifying the change in the Board's position could have been discovered prior to, and presented at, the Board's May 10, 2012 hearing. NextMedia, citing a plethora of state and federal decisions, contends a motion for reconsideration is improper and must be denied when the only basis for the motion is evidence that could have been previously introduced. *See* ***Oto v. Metropolitan Life Ins. Co.***, 224 F.3d 601, 606 (7th Cir. 2000); ***Caisse Nationale de Credit Agricole v. CBI Indus., Inc.***, 90 F.3d 1264, 1269-70 (7th Cir. 1996); ***Executive Ctr. III, LLC v. Meieran***, 823 F. Supp. 2d 883, 897 (E.D. Wis. 2011); ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶46, 275 Wis. 2d 397, 685 N.W.2d 853.[11]

¶32 The problem with this argument is that all of NextMedia's supplied authorities regarding reconsideration pertain to such motions before a court, not a municipality. NextMedia fails to cite any authority for the proposition that a municipal zoning appeals board—or even a similar, quasi-judicial body—is barred from reconsidering a decision fundamentally rooted in a mistake of law, fact, or both, even if information that would have negated the mistake was previously discoverable. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be

[11] NextMedia also cites to several unpublished, per curiam opinions of this court, in violation of the Rules of Appellate Procedure. *See* WIS. STAT. RULE 809.23(3)(a), (b). We admonish NextMedia's attorneys that future noncompliance may result in sanctions, including dismissal, summary reversal, striking of the offending document, or monetary penalties. *See* WIS. STAT. RULE 809.83(2).

considered."). Thus, the authorities to which NextMedia cites do not convince us the Board acted contrary to law.

¶33 Moreover, although framed as a challenge to the legality of the Board's decision, it is apparent NextMedia is actually challenging the sufficiency of the evidence supporting the Board's reconsideration decision. The test on certiorari for analyzing the sufficiency of the evidence is the substantial-evidence test. ***Stacy v. Ashland Cnty. Dep't of Pub. Welfare***, 39 Wis. 2d 595, 602-03, 159 N.W.2d 630 (1968). The substantial evidence test asks "whether, taking into account all the evidence in the record, 'reasonable minds could arrive at the same conclusion as the agency.'" ***Madison Gas & Elec. Co. v. PSC***, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982) (quoting ***Sanitary Transfer & Landfill, Inc. v. DNR***, 85 Wis. 2d 1, 15, 270 N.W.2d 144 (1978)). When evaluating the sufficiency of the evidence, we do not pass on credibility or "assay the evidence to determine which view preponderates or what evidence supporting a theory is of the greater weight." ***Stacy***, 39 Wis. 2d at 603.

¶34 NextMedia argues the Board could not have been mistaken about the DOT's acquisition of NextMedia's sign rights because there was "specific testimony presented at the May 10, 2012 hearing about the fact that the DOT was having communications with the Village that they [DOT] would acquire the sign rather than relocate the sign." However, the cited testimony generally related to the DOT's acquisition of the sign site, *not* NextMedia's permit rights that it needed to retain in order to seek realignment under the applicable statute and the Ordinance. In addition, nowhere in the cited testimony did witnesses indicate that the DOT's purchase of NextMedia's permit rights had, in fact, been completed months before the May 2012 hearing. The mere knowledge that NextMedia was "in discussions" with the DOT regarding a possible acquisition of NextMedia's

sign rights is a far cry from the Village knowing (as NextMedia clearly did) that NextMedia had, in fact, already transferred its sign rights to the DOT.

¶35 Instead, there was substantial evidence that the Board's May 2012 decision to reverse the Village's decision was premised upon mistaken beliefs about the identity of the sign permit's owner and the nature of the DOT's actions. The Board's original decision presupposed that NextMedia was the owner of the permit rights, for without such rights, realignment would have been unavailable. The original decision also expressed the Board's understanding that the DOT proposed to realign NextMedia's nonconforming sign under WIS. STAT. § 84.30(5r). The documentary evidence submitted with the Village's motion for reconsideration and testimony at the reconsideration hearing provided an adequate basis for the Board's conclusion that these beliefs were in error.

¶36 First, there was substantial evidence that NextMedia no longer owned the permit rights, such that realignment under WIS. STAT. § 84.30(5r) and the Ordinance was necessarily unavailable. Exhibit A to the Village's reconsideration motion was an email from DOT attorney John Sobotik, who objected to the Board's decision because "WisDOT acquired all signing rights [including permit rights] for the property when it recorded its award of damages for the property on February 10, 2012." Exhibit B, the jurisdictional offer, showed $75,800 of the purchase price allocated to "Other – Survey; off premise sign," and Exhibit C consisted of the award of damages recorded on February 10.[12] Van Erem, the DOT's project manager, testified at the reconsideration hearing that

[12] This evidence was consistent with WIS. STAT. § 32.05(7)(c), which provides that the property rights acquired by condemnation vest at the time of recording in the office of the county register of deeds.

the DOT acquired NextMedia's sign site, its state and local permits, and its leasehold interest, all of which rights were included in the $75,000 payment. The DOT did not acquire the actual structure, so it paid relocation expenses exceeding $37,000 to have the sign physically removed from the condemned parcel. Sobotik concurred with Van Erem's testimony, stating, "[W]e acquired the right to apply for a permit at this location and we acquired the permit rights. The right to continue that nonconforming use was acquired by the [DOT]."

¶37 Second, substantial evidence supports the conclusion, necessarily implicit in the Board's reconsideration decision, that the DOT purchased the property in lieu of proposing realignment under WIS. STAT. § 84.30(5r). Sobotik testified the DOT "in this case didn't propose to realign this sign." According to Sobotik, NextMedia objected to the DOT's proposed purchase and NextMedia requested realignment instead. The DOT did not view realignment as practical because, given the height of the new road, the sign would be "useless … because no one can see it." Further, the DOT did not believe that the structural modifications necessary to make the sign visible would be allowed under the Village Code. Under these circumstances, the DOT advised NextMedia it would forgo condemnation and propose realignment only if NextMedia agreed to release the State from any inverse condemnation claims related to the sign. Sobotik testified that "NextMedia was not interested in waiving their rights," so the DOT chose to acquire the site in lieu of proposing realignment. This acquisition was proposed in the form of the DOT's January 13, 2012 jurisdictional offer and accomplished by the recording of its Award of Damages with the Register of Deeds in Brown County on February 10, 2012.

¶38 Sobotik's testimony regarding the procedure the DOT utilized is consistent with the terms of both WIS. STAT. § 84.30(5r) and the Ordinance.

Subsection 84.30(5r) is triggered in the first instance by the DOT's decision to propose realignment. *See* WIS. STAT. § 84.30(5r)(c). If the DOT elects not to seek realignment, but instead chooses to acquire the sign leasehold and permit rights, § 84.30(5r)(c) is inapplicable. If § 84.30(5r)(c) is inapplicable, so too is that portion of the Ordinance under which NextMedia sought realignment. The Ordinance is triggered only when the DOT "causes the realignment of a nonconforming sign per Section 84.30(5r) …." In all events, the DOT controls the availability of realignment for nonconforming signs. There was ample testimony upon which the Board could conclude that, contrary to its earlier belief, the DOT did not propose realignment of the Wallaby's sign.

¶39 NextMedia asserts Van Erem's testimony actually supports the notion that the DOT proposed realignment. NextMedia takes liberties with the record in this regard. The project manager testified that the DOT paid "*relocation* benefits" of $37,625. (Emphasis added.) Realignment is not synonymous with relocation; realignment is a term of art defined by statute that means "relocation on the same site." WIS. STAT. § 84.30(5r)(a). In that sense, and as NextMedia surely knows, relocation is much broader than realignment. The DOT paid NextMedia to move the physical sign out of the path of the highway, but not necessarily for "realignment" as that term is used in § 84.30(5r).[13] Indeed, if the DOT had proposed realignment, it would not have paid NextMedia $75,800 to obtain its permit and leasehold rights to the sign on the property at issue.

[13] NextMedia attempts to show that the DOT proposed realignment by citing the testimony of NextMedia's general manager, Don Snyder. Once again, NextMedia takes liberties with the record. In fact, Snyder testified only that the DOT wanted to move the sign, not that it proposed to move the sign to a different location on the same parcel. Accordingly, Snyder's testimony can be read only as evidence that the DOT proposed relocation, not realignment.

¶40 NextMedia also argues the Board's conclusion that NextMedia's permit rights were taken is "completely undermined by the Wisconsin Supreme Court's decision in [***Lamar Co. v. Country Side Restaurant, Inc.***, 2012 WI 46, 340 Wis. 2d 335, 814 N.W.2d 159]." The contours of NextMedia's argument, however, are difficult to discern. As we understand it, NextMedia claims that, pursuant to ***Country Side***, it has somehow preserved its right to seek realignment even though DOT has already acquired NextMedia's permit rights in the sign. We do not read ***Country Side*** as tacitly approving NextMedia's realignment request in this case, especially after the DOT's undisputed acquisition of the permit rights to the sign in February 2012.

¶41 A careful examination of ***Country Side*** demonstrates that decision actually supports the Board's reconsideration decision. In ***Country Side***, the DOT acquired certain of Country Side's land in Oshkosh. ***Id.***, ¶7. Country Side had leased a portion of that land to Lamar, which maintained a billboard at that location. ***Id.*** The DOT issued a total jurisdictional offer of $2 million to Country Side and Lamar, $65,100 of which was designated for "Other: Sign."[14] ***Id.***, ¶8. A subsequent valuation by the DOT indicated the sign site was worth $65,000, and the billboard structure $65,079. ***Id.***, ¶10.

¶42 After the DOT made the damages award, the parties agreed that Country Side should receive all but $120,000, which was the amount of the

[14] When there are multiple owners of a property, the condemnor is generally required to value property according to the "unit rule," which states that the condemnor must provide compensation by paying the value of an undivided interest in the property rather than by paying the value of each owner's partial interest. ***Lamar Co. v. Country Side Rest., Inc.***, 2012 WI 46, ¶28, 340 Wis. 2d 335, 814 N.W.2d 159. The condemnor then makes a single payment, which is apportioned among the multiple owners. ***Id.***

damages award Lamar claimed it was owed. ***Id.***, ¶12. The $120,000 was deposited with the circuit court for eventual distribution by court order, and Country Side then appealed the total damages award, challenging its adequacy. ***Id.***, ¶¶13-15. Lamar did not join Country Side's appeal. ***Id.***, ¶15. However, Lamar submitted a relocation claim seeking $83,525 in relocation expenses from the DOT, including over $75,000 for the cost to construct a new billboard and over $8,000 in relocation and take-down costs. ***Id.***, ¶15.

¶43 Country Side and Lamar could not agree on a division of the $120,000 on deposit, and Lamar ultimately filed a claim for partition seeking the full amount. ***Id.***, ¶17. Lamar claimed this amount was the fair market value of its billboard and the "bundle of rights" accompanying it. ***Id.*** Country Side, however, asserted that it alone was entitled to the full amount on deposit, arguing among other things that only the value of the billboard rights was compensable and that Lamar had already received compensation for the physical sign by virtue of the DOT's $83,525 relocation award. ***Id.***, ¶18. The circuit court and the court of appeals agreed with Country Side, and Lamar petitioned for supreme court review. ***Id.***, ¶¶19-21.

¶44 The principal issue before our supreme court was whether Lamar lost its right to seek a share of the damages award by either "failing to join in Country Side's appeal of the award, as the circuit court concluded, or by [agreeing to the amount stated in the relocation claim], as the court of appeals concluded." ***Id.***, ¶22. Perhaps this framing of the issue is what NextMedia refers to when arguing it "did not lose its rights to seek relocation as the Village claims." However, ***Country Side*** does not stand for the proposition that realignment is available even if the owner of a nonconforming sign sells his or her permit rights to the DOT.

¶45 Instead, our supreme court answered the question presented in part by observing that when the DOT condemns property, it is liable both for the fair market value of the property taken *and* relocation payments under WIS. STAT. § 32.19(3). ***Country Side***, 340 Wis. 2d 335, ¶¶25, 37. Fair market value includes the value of a billboard permit, as well as the leasehold or fee interest and the ownership interest in the billboard itself. ***Id.***, ¶24.

¶46 Here, NextMedia received $75,800 in compensation for these rights; as in ***Country Side***, NextMedia's "property interest, derived from both its lease and permit, was completely taken by the DOT by virtue of the DOT's acquisition of the land on which [NextMedia's] billboard was located." *See* ***id.***, ¶24. In addition, NextMedia received a distinct $37,625 relocation payment. Thus, NextMedia has been fully compensated for the taking under ***Country Side***. Realignment under WIS. STAT. § 84.30(5r) was not at issue in ***Country Side***, and therefore it is unclear why, precisely, NextMedia believes that decision confers a right to proceed with its municipal realignment request in light of the taking. Indeed, at no point in its appellate brief does NextMedia address the fact of DOT's separate, $75,800 payment to it, nor does NextMedia explain how it could obtain realignment rights attendant to a sign permit and leasehold it no longer owned.

¶47 NextMedia also argues the Board should be estopped from reconsidering its earlier decision because the Village and the Board failed to comply with certain time limitations for rendering a decision contained within the Village Code. Specifically, NextMedia asserts that the Board failed to timely hear NextMedia's December 14, 2011 appeal of Korotev's decision, and that the "five-month delay [between the time the appeal was filed and the May 10, 2012 hearing date] is the only reason the February 10, 2012 condemnation award came into play." NextMedia buttresses its argument by alleging several other instances of

ordinance noncompliance that supposedly violate what NextMedia suggests is a First Amendment right to prompt judicial review.[15]

¶48 NextMedia's estoppel argument is a nonstarter. First, its factual basis is not entirely accurate, because it is undisputed that both the DOT's January 13, 2012 jurisdictional offer and the registering of the award of damages related to the DOT's condemnation occurred within the sixty-day window by which the Board was to act on NextMedia's December 14, 2011 appeal. Thus, the facts which ultimately rendered realignment unavailable to NextMedia occurred before the Board was required to act.

¶49 More important, however, is that equitable relief such as estoppel is not available in a certiorari action. ***State ex rel. Greer v. Wiedenhoeft***, 2014 WI 19, ¶77, 353 Wis. 2d 307, 845 N.W.2d 373, *reconsideration denied*, 2014 WI 50, 354 Wis. 2d 866, 848 N.W.2d 861. The broad equitable powers of courts are "incompatible with the limited nature of common-law certiorari review." ***Id.*** To the extent a case calls for a balancing of equitable principles, it is the agency, not the certiorari court, which must exercise discretion. ***Id.***, ¶79.

¶50 In this case, the Board was presented with evidence that allowing realignment under a factual reality disclosed only after its initial decision in May 2012 would result in a windfall for NextMedia. Sobotik testified NextMedia "wanted to have its cake and eat it, too. It wanted to be paid for the sign site and it wants to have the sign, and you can't have both." Sobotik continued:

[15] To the extent NextMedia wishes to raise a First Amendment argument outside the context of its argument regarding estoppel, we decline to consider the argument because it is insufficiently developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

> As a practical matter, there is no reason for the State to spend the $75,000 to buy the sign site at that point [if NextMedia is able to realign the sign]. … They waited until they got paid, until we bought the sign site, and then they … come to the Village and asked will you now give us permission to put another sign there. We bought the right to have that sign there. That's what we paid the $75,000 for.

NextMedia's counsel responded that if the Board approved realignment, NextMedia would return the DOT's $75,000 payment. By this comment, counsel effectively conceded that the DOT owned the permit rights at the same time NextMedia was seeking realignment premised on the notion that NextMedia still owned those rights.[16]

¶51 Finally, NextMedia asserts the Board's reconsideration decision was "unreasonable and contrary to the concepts of due process and fair play."[17] It is true that, on certiorari review, determining whether a body "acted according to law" encompasses not only the applicable statutes but common law concepts such as due process and fair play. ***State v. Goulette***, 65 Wis. 2d 207, 215, 222 N.W.2d 622 (1974). "Due process requires that there be an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." ***State ex rel. Schatz v. McCaughtry***, 2003

[16] Sobotik declined to speculate how the DOT secretary or governor would respond to NextMedia's request to rescind the damages award, but stated the DOT has not historically sold permit rights as surplus property.

[17] Although NextMedia frames this argument as a due process challenge, most of its argument on this point is again directed at the sufficiency of the evidence for the reconsideration decision. For reasons previously stated, we conclude the Board's decision was supported by substantial evidence.

NextMedia also vaguely suggests, as a component of its due process argument, that the Board's decision was arbitrary and capricious. This argument is inadequately developed, and thus we decline to address it. *See* ***Pettit***, 171 Wis. 2d at 646.

WI 80, ¶18, 263 Wis. 2d 83, 664 N.W.2d 596. NextMedia does not assert it lacked adequate notice of any relevant proceedings or was prohibited from presenting relevant evidence. Nor does NextMedia claim it received anything other than a "fair and impartial hearing." *See* ***Nova Servs., Inc. v. Village of Saukville***, 211 Wis. 2d 691, 695, 565 N.W.2d 283 (Ct. App. 1997). That a reconsideration proceeding occurred is not, in and of itself, a violation of due process, which is what NextMedia seems to suggest.

¶52 In sum, the Board was entitled to reconsider its May 12, 2012 decision and deny NextMedia realignment, after the real owner of the rights attendant to the sign's location on the property at issue—the DOT—objected and explained two critical facts that NextMedia knew at all times but failed to disclose to the Village or the Board. Namely, that the DOT had not proposed realignment of the sign under WIS. STAT. § 84.30(5r) but, rather, the DOT had acquired, through condemnation, NextMedia's permit and leasehold rights to the sign on the property at issue, compensating NextMedia $75,800 for those property interests. These mistakes amply warranted the Board's reconsideration decision, which it had inherent authority to make.

By the Court.—Judgment reversed.

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