COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1674

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

AMBROSE H. WILGER, AND GERALDINE WILGER,

PLAINTIFFS-RESPONDENTS,

v.

DODGE COUNTY PLANNING AND DEVELOPMENT DEPARTMENT, AND DODGE COUNTY BOARD OF ADJUSTMENT,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed and cause remanded with directions.*.

Before Dykman, P.J., Roggensack and Deininger, JJ.

ROGGENSACK, J. The Dodge County Board of Adjustment (the board) appeals an order of the circuit court granting summary judgment in favor of Ambrose and Geraldine Wilger and reversing the board's decision denying the

Wilgers' request for a "variance"[1] to DODGE COUNTY ZONING ORDINANCE § 6.2 (1994). The circuit court reversed the board's decision because it concluded that the board had proceeded on an incorrect theory of law and because its decision represented its will and not its judgment. We conclude that the board did not proceed on a correct theory of law because it limited its review to whether the Wilgers' retaining wall constituted a detached accessory structure without deciding whether the retaining wall also constituted landscaping, which is excluded from the set-back provisions of § 6.2. Because we conclude that under the undisputed facts of this case, this retaining wall is landscaping, we affirm and remand to the circuit court so that it can order the board to direct the Administrator to issue the land use permit the Wilgers requested.

BACKGROUND

The Wilgers applied for a land use permit to reconstruct a retaining wall on their property. The retaining wall they proposed was located four inches inside of the Wilgers' north property line and was twenty-eight feet long varying in height from four feet above grade at its tallest, to grade level at its shortest. The Deputy Land Use Administrator denied the land use permit because he determined that the wall was an accessory structure which failed to comply with DODGE

[1] The Wilgers, who proceeded *pro se* prior to filing an appeal in circuit court, were told by the Administrator that they needed a land use permit in order to lawfully construct their retaining wall, so they applied for a land use permit. When the Administrator denied their request, they used the standard form for appeals to the board and filled in the first section of the form, which was labeled "**VARIANCE**." However, their application to the board was not from the denial of a request for a variance, but rather from the denial of the request for a land use permit. On appeal before this court, the imprecise use of the form was noted by their counsel, and we were asked to determine whether the board should have overturned the Administrator's denial of the land use permit the Wilgers requested. The board does not object to this potential procedural irregularity.

COUNTY ZONING ORDINANCE § 6.2 (1994), which he concluded required accessory structures to be set-back at least three feet from the lot line.

The Wilgers appealed the denial of the land use permit to the board. The board affirmed the Administrator's conclusion that the proposed retaining wall constituted an accessory structure which was subject to the set-back provisions of the ordinance. The board did not explain why the paragraph of the ordinance which exempts landscaping from the set-back provisions should not be applied to the retaining wall.

The Wilgers then commenced an action in the circuit court seeking § 59.694(10), STATS., *certiorari* review of the board's decision. Thereafter, the Wilgers moved for summary judgment. Following a hearing, the circuit court granted summary judgment to the Wilgers and reversed the board's decision on the grounds that the board proceeded on an incorrect theory of law and that its decision represented its will and not its judgment. This appeal followed.

DISCUSSION

Standard of Review.

On *certiorari*, we review the decision of the board, not the circuit court. ***Bettendorf v. St. Croix County Bd. of Adjustment***, 224 Wis.2d 735, 738, 591 N.W.2d 916, 918 (Ct. App. 1999). Our review in this case is limited to the record[2] before the board and includes, among other things, whether the board proceeded under a correct theory of law. ***Id.*** at 739, 591 N.W.2d at 918.

[2] Section 59.694(10), STATS., permits the circuit court to take additional evidence, but that was not done here.

The interpretation of a zoning ordinance under a set of uncontested facts is a question of law. ***Hansman v. Oneida County***, 123 Wis.2d 511, 514, 366 N.W.2d 901, 903 (Ct. App. 1985). Although the board's interpretation is generally entitled to some weight, we are not bound by its interpretation if a more reasonable alternative exists. ***Id.***; ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 32-33, 498 N.W.2d 842, 850 (1993).

Zoning Ordinance.

The zoning ordinance in question is DODGE COUNTY ZONING ORDINANCE § 6.2 (1994). That section provides:

> Accessory Uses and Detached Accessory Structures in aggregate, shall not exceed 960 square feet in platted residential subdivisions or on individual residential lots of one (1) acre or less. On residential lots over one (1) acre in size which are not in residential subdivisions, accessory uses and detached accessory structures in aggregate may exceed 960 square feet in area, but in no case shall exceed 1,400 square feet in area.
>
> ….
>
> Detached accessory structures shall not be closer than ten (10) feet to the principal structure; shall not exceed fifteen (15) feet in height and shall not be closer than three (3) feet to any lot line or five (5) feet to any alley line.
>
> ….
>
> Landscaping and Vegetation are exempt from the yard requirements of this Ordinance.

The board's record includes definitions of the relevant terms. For example, the DODGE COUNTY ZONING ORDINANCE § 12 (1994) defines "accessory structure" as a "detached structure subordinate to the principal use of a structure, land or water, and located on the same lot or parcel serving a purpose customarily incidental to the principal structure," and defines "structure" as "[a]ny erection or

construction…." The board also adopted a development book definition of a "retaining wall" as "[a] structure constructed to hold back or support an earthen bank." Based on these definitions, the board concluded that the Wilgers' retaining wall was a detached accessory structure subject to the set-back provisions of DODGE COUNTY ZONING ORDINANCE § 6.2 (1994). While the ordinance did not define "landscaping," the record contains a photocopy of a page from a dictionary, defining[3] the term "landscaping," as "adorn[ing] or improv[ing] (a section of ground) by contouring the land and planting flowers, shrubs, or trees." However, the record does not reflect whether the board concluded that landscaping, which also fits the definition of an accessory structure, is nevertheless subject to the ordinance set-back requirements, or whether it did not come to any conclusion in regard to whether the Wilgers' retaining wall was landscaping, in the first instance.

Public policy favors the free and unrestricted use of property. ***Crowley v. Knapp***, 94 Wis.2d 421, 434, 288 N.W.2d 815, 822 (1980). Accordingly, restrictions contained in a zoning ordinance must be strictly constructed. ***Id.*** A provision in a zoning ordinance, which restricts the use of property, must be in clear, unambiguous, and peremptory terms. ***Hansman***, 123 Wis.2d at 514, 366 N.W.2d at 903. In the interpretation of an ordinance, we apply the same rules of construction as we apply with statutory interpretation. ***Marris***, 176 Wis.2d at 32, 498 N.W.2d at 850. An ordinance is to be interpreted so none

[3] The rules for the construction of statutes and ordinances are the same. ***Bettendorf v. St. Croix County Bd. of Adjustment***, 224 Wis.2d 735, 739, 591 N.W.2d 916, 918 (Ct. App. 1999). As such, non-technical terms not defined in the ordinances must be given their ordinary and accepted meaning and that meaning may be ascertained from a recognized dictionary. *See* ***State v. Williquette***, 129 Wis.2d 239, 248, 385 N.W.2d 145, 149 (1986).

of its provisions are superfluous and to do otherwise is not a reasonable construction of the ordinance. ***Id.*** at 34, 498 N.W.2d at 851.

The board concluded that the retaining wall was an accessory structure and that decision is not challenged on appeal. However, we must also determine whether it is landscaping, because if it is, the conclusion that it is an accessory structure is not dispositive of whether it must comply with the yard set-back requirements. This is so because DODGE COUNTY ZONING ORDINANCE § 6.2 (1994) unambiguously provides an exclusion from the set-back requirements for accessory structures which also are determined to be landscaping: "Landscaping and Vegetation are exempt from the yard requirements of this Ordinance."

We have been presented with an undisputed description of the particular retaining wall at issue here. We also note that on appeal the board does not argue that this retaining wall is not landscaping, even though that was the basis on which the circuit court concluded that the board had operated under an incorrect theory of law and the respondent's brief also asserted that the retaining wall is landscaping and therefore excluded from compliance with the set-back requirements of DODGE COUNTY ZONING ORDINANCE § 6.2 (1994). Instead, the board contends only that the terms "landscaping" and "retaining wall" are not defined terms in the ordinance. However, the lack of a definition within the ordinance itself is not conclusive of the issue we must decide.

The dictionary[4] definition of "landscaping," which the board had before it, included "contouring the land." The definition of "retaining wall," from

[4] The dissent contends that the majority opinion has overlooked the dictionary definition of landscaping. However, we have applied the dictionary definition the board had before it.

the board's development book was "support[ing] an earthen bank." These two definitions are similar. Because the board does not contend that this retaining wall is not landscaping, and because we must give effect to all provisions of an ordinance, it is reasonable to conclude that this retaining wall is landscaping. Furthermore, under the cannons of construction, this conclusion is more reasonable than failing to address the landscaping exclusion in the ordinance, as the board did. ***Marris***, 176 Wis.2d at 32-33, 498 N.W.2d at 850. Accordingly, we conclude that the board erroneously interpreted DODGE COUNTY ZONING ORDINANCE § 6.2 (1994), which interpretation must be overturned. Because we have concluded that the Wilgers' retaining wall is landscaping; and therefore exempt from the set-back provisions of § 6.2, we remand to the circuit court with directions that it issue an order requiring the board to direct the Administrator to issue the land use permit the Wilgers requested.

CONCLUSION

The board did not proceed on a correct theory of law because it limited its inquiry to whether this retaining wall constituted a detached accessory structure without considering whether it also constituted landscaping which is exempt from the set-back provisions of DODGE COUNTY ZONING ORDINANCE § 6.2 (1994).

By the Court.—Order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

No. 98-1674(D)

DYKMAN, P.J. *(dissenting).* There are two problems with this case, one procedural and one substantive. The procedural problem began when Wilger presented an application for a variance to the Dodge County Board of Adjustment. The board heard Wilger's evidence and denied the variance. It probably was not until the circuit court heard the case on review that the issue arose as to whether Wilger's wall fell within the "landscaping" exception to the side-yard setback requirements of DODGE COUNTY ZONING ORDINANCE § 6.2 (1994). It is therefore not surprising that the "landscaping" exception played a small part in the board's findings of fact and conclusions of law. Even Wilger concedes that if we conclude that the real issue is whether the board improperly denied his petition for a variance, he cannot prevail.

The majority unfairly criticizes the board and reverses the board's decision because it failed to address the landscaping exclusion to the side-yard setback requirements. I recognize that Wilger was pro se, but in my view, that is no reason to unfairly treat the board as if it had failed to address the issue the majority now concludes is dispositive. The board addressed the issue Wilger raised. Nonetheless, I conclude that the real issue is whether Wilger's wall is subject to Dodge County's side-yard setback requirements. Fairness requires a remand to permit the board to decide the real issue. However, the majority has decided that even were the board to conclude that Wilger's wall was not "landscaping," the majority would decide otherwise. I will therefore explain why, given the choice of affirmance or reversal, I would reverse.

This is a certiorari review. As we noted in ***State ex rel. Ortega v. McCaughtry,*** 221 Wis.2d 376, 386, 585 N.W.2d 640, 646 (Ct. App. 1998), the test on certiorari review is "whether reasonable minds could arrive at the same conclusion the committee reached." A municipal body's adverse decision in a zoning case may be set aside on certiorari review if the action is arbitrary, oppressive, or unreasonable, representing an act of will instead of judgment. *See* ***Eternalist Found., Inc. v. City of Platteville***, No. 98-1944, slip op. at 8 (Wis. Ct. App. Mar. 18, 1999, order published Apr. 21, 1999). On certiorari review, we determine whether: (1) the board kept within its jurisdiction; (2) the board proceeded on a correct theory of law; (3) the board acted in an arbitrary, oppressive or unreasonable manner, representing its will and not its judgment; and (4) the evidence was sufficient for the board to reasonably make the order or determination in question. *See* ***Schroeder v. Dane County Bd. of Adjustment***, No. 98-3615, slip op. at 6 (Wis. Ct. App. May 13, 1999).

In reviewing decisions of an adjustment board, we are to keep in mind that courts should be hesitant to interfere with administrative decisions. *See* ***Snyder v. Waukesha County Zoning Bd.***, 74 Wis.2d 468, 476, 247 N.W.2d 98, 103 (1976). We are to accord the decision of the board of adjustment a presumption of correctness and validity. *See* ***Miswald v. Waukesha County Bd. of Adjustment***, 202 Wis.2d 401, 408, 550 N.W.2d 434, 436 (Ct. App. 1996). Wilger carries the burden of overcoming this presumption of validity and correctness. *See* ***Miswald***, 202 Wis.2d at 411, 550 N.W.2d at 437. We may not substitute our discretion for that committed to the board by the legislature. *See* ***Snyder***, 74 Wis.2d at 476, 247 N.W.2d at 103.

The majority concludes that the board founders on the second of the four appellate rocks, which requires that the board proceed on a correct theory of

law. That makes this case really not that difficult. It is undisputed that the wall in question is a "detached accessory structure," as that term is defined in the DODGE COUNTY ZONING ORDINANCE § 6.2. Therefore, the only question is whether the wall is "landscaping," which is exempt from the ordinance's side-yard setback requirements.

While the interpretation of an ordinance is a question of law, *see* ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 32, 498 Wis.2d 842, 850 (1993), we give various degrees of deference to a board of adjustment's interpretation of a county zoning ordinance. *See* ***id*** at 33, 498 N.W.2d at 850. We are to give due weight to the board's experience, technical competence and specialized knowledge. When a legal question is intertwined with factual determinations or with value or policy determinations, a court should defer to the board. *See* ***Marris***, 176 Wis.2d at 33, 498 N.W.2d at 850 (citing ***West Bend Educ. Ass'n. v. WERC***, 121 Wis.2d 1, 12, 357 N.W.2d 534, 539 (1984)).

The board impliedly concluded that Wilger's wall was not "landscaping," and therefore was not exempt from the ordinance's side-yard setback requirements.[5] While the board's decision could be clearer, the question is not whether the board repeated some magic language, but whether the evidence was such that the board "might reasonably make the order in question." ***Marris***, 176 Wis.2d at 24, 498 N.W.2d at 846 (footnote omitted). If the majority's real disagreement with the board is that it failed to explain itself well enough, the remedy is not to affirm, but to remand so that the board can provide the necessary

[5] It is not possible to know whether the board considered the "landscaping" exception, and rejected the majority's conclusion that the wall was "landscaping" or whether, since Wilger requested a variance, it did not consider the question. Certiorari review assumes the former, and therefore, so will I.

explanation. *See* ***Thorp v. Town of Lebanon***, No. 98-2358, slip op. at 23 (Wis. Ct. App. Mar. 11, 1999, ordered published, Apr. 21, 1999); *see also* ***State ex rel. Lomax v. Leik***, 154 Wis.2d 735, 741, 454 N.W.2d 18, 21 (Ct. App. 1990).

The evidence is more than sufficient. The wall in question is twenty-eight feet long and four feet high (at its highest point), and is made of concrete block. A fence is constructed atop the wall. The only question is whether this wall fits the definition of "landscaping." The ordinance does not define "landscaping." We therefore look to standard dictionaries to ascertain its meaning. *See* ***State v. Shea***, 221 Wis.2d 418, 427, 585 N.W.2d 662, 665 (Ct. App. 1998). A dictionary definition of "landscaping" found in the record is: "To adorn or improve (a section of ground) by contouring the land and planting flowers, shrubs or trees." Another dictionary defines "landscaping" as "to modify or ornament (a natural landscape) by altering the plant cover." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 654 (10th ed. 1993). Neither description can reasonably be stretched enough to include a twenty-eight foot long, four foot high concrete block wall, though that is not the test we use on certiorari review.

The majority rejects these definitions, reviewing de novo the board's implied decision accepting them. This ignores the very definition of a certiorari review, as being an inquiry into whether a board *could have* reasonably made the decision that it did. *See* ***Miswald***, 202 Wis.2d at 410-11, 550 N.W.2d at 437. I conclude that it could have. "The necessity of looking to a standard dictionary to ascertain the usual meaning of a word does not render the word ambiguous as used in a statute." ***Shea***, 221 Wis.2d at 427, 585 N.W.2d at 665. The board could have used either or both of the dictionary definitions of "landscaping" found earlier in this opinion to conclude that the wall was not landscaping.

Whether we would sustain the board had it used the majority's assumption that there is an identity of meaning between "retaining wall" and "landscaping" is not before us. But whether that assumption is more reasonable than using a dictionary definition implicates the judicial standard of review of board decisions that the supreme court set out in ***Marris***. I conclude that a standard dictionary definition of a word, in this case, "landscaping" is a reasonable interpretation of a word. I conclude that an unsupported assertion that "retaining wall" and "landscaping" have the same meaning is not, or at least is not more reasonable than the standard dictionary meaning.

Under the majority's definition of "landscaping," which uses the concept of "supporting an earthen bank," bridge and railroad abutments would qualify as landscaping, as would basements and mine shafts. But piling dirt against a wall does not make the wall "landscaping." I cannot accept that the majority's definition, essentially an *ipse dixit,* is more reasonable than the one found in the dictionary.[6] And that is the test the majority's decision must pass. Under the standard of review set out in ***Marris***, we are to defer to an adjustment board's conclusion as to the meaning of its county ordinance. The majority's review of the board's decision does not do so, and it is not a certiorari review.

Were I writing for the majority, I would remand this case to the trial court to remand to the board with instructions to consider whether Wilger's wall is

[6] The majority notes "Because the board does not contend that this retaining wall is not landscaping … it is reasonable to conclude that this retaining wall is landscaping." This is not my understanding of the board's brief. Although the board argues extensively that it properly denied Wilger's request for a variance, it also asserts: "The Court of Appeals must review the board's October 2, 1997 Decision in which the board determined that the … wall that the Wilgers constructed … is an "accessory structure" and not "landscaping" under the relevant provisions of the Zoning Ordinance." Though perhaps myopic, this assertion cannot be interpreted as a failure to contend that the wall is not landscaping.

"landscaping," thereby exempting it from the ordinance's side-yard setback requirements. Failing in that, I would reverse because under the limited review provided by certiorari, the four requirements of certiorari have been met. Because the majority does neither, I respectfully dissent.