COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP517 **Cir. Ct. No. 2015CV93**

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

ROBERT COOK,

PLAINTIFF-APPELLANT,

V.

TOWN OF SPIDER LAKE ZONING BOARD OF APPEALS AND TOWN OF SPIDER LAKE PLAN AND REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sawyer County: JOHN M. YACKEL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Robert Cook appeals a circuit court order affirming a decision of the Town of Spider Lake Zoning Board of Appeals (the Board). The Board concluded Cook lacked standing to challenge a decision of the Town of Spider Lake Plan and Review Commission (the Commission) approving a certified

survey map. We agree that Cook lacked standing to challenge the Commission's decision. Accordingly, we affirm.

BACKGROUND

¶2 Cook owns two condominium units at Teal Lake Quiet Shores Condominiums in the Town of Spider Lake. Access to Cook's units is provided by Ross Road. For the first .22 miles off of State Highway 77, Ross Road is a public road that is maintained by the Town. The remaining portion of Ross Road, however, is private. We refer to this portion of Ross Road as the "private access road." Cook and the other owners of units in Teal Lake Quiet Shores Condominiums have easements allowing them to use the private access road to access their units. The private access road also provides access to multiple lots in the neighboring Teal Lake Shores Subdivision.[1]

¶3 As of 2015, Chippewa Valley Bank owned property adjacent to Teal Lake Quiet Shores Condominiums. The property, which consisted of nine government lots, had formerly been used as a resort and golf course. The bank sought to subdivide the property into two lots—Lot 1, comprising the golf course area, and Lot 2, comprising the resort area. Both lots would be accessed using the private access road.

¶4 The bank needed to obtain the Commission's approval in order to subdivide its property. Accordingly, the bank submitted a Certified Survey Map (CSM) to the Commission, which held a hearing to consider the CSM on April 1, 2015. During the hearing, Cook objected to the CSM, arguing that if it were

[1] The record does not reveal who owns the private access road.

approved, the private access road would not meet town ordinance requirements in that it would exceed the length and lot number limitations for private roads. Cook expressed concern that the bank would sell Lots 1 and 2 to two different owners, and, as a result, he and other property owners who had easements over the private access road would have to negotiate with a greater number of parties in order to reach a maintenance agreement regarding the road. Despite Cook's objections, the Commission approved the CSM. Shortly thereafter, the bank sold Lot 1.

¶5 Cook appealed the Commission's decision to the Board, which took up the issue at a hearing on June 11, 2015. However, before addressing the merits of Cook's appeal, the Board considered whether Cook had standing to challenge the Commission's decision. Following arguments by both Cook's attorney and an attorney for the Town, the Board made the following "findings of fact": (1) the Commission's approval of the CSM did not affect Cook's ability to access his condominium units; (2) approval of the CSM did not make any changes to the private access road; and (3) the Teal Lake Quite Shores Condominium Association was the proper party to appeal the Commission's decision, not Cook. Based on these findings, the Board concluded Cook was not "a person aggrieved" by the Commission's decision, and, as such, he lacked standing to appeal it. The Board therefore dismissed Cook's appeal.

¶6 Cook sought certiorari review of the Board's decision. The circuit court affirmed, concluding the CSM's creation of two lots had "no articulable negative impact" on Cook. The court further concluded the condominium association, not Cook, was "potentially the proper party to any challenge to the CSM." Cook now appeals.

STANDARD OF REVIEW

¶7 On appeal from a circuit court's decision in an action for certiorari review of a municipal board's decision, we review the decision of the board, not that of the circuit court. ***Roberts v. Manitowoc Cty. Bd. of Adj.***, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499. Our review is limited to determining: (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the Board might reasonably make the determination in question. *See* ***id.***, ¶11.

¶8 Cook argues the Board proceeded on an incorrect theory of law when it determined he lacked standing to challenge the Commission's approval of the CSM. "Standing presents a question of law for our de novo review." ***Metropolitan Builders Ass'n of Greater Milwaukee v. Village of Germantown***, 2005 WI App 103, ¶12, 282 Wis. 2d 458, 698 N.W.2d 301. Resolution of Cook's appeal also requires us to interpret two statutory provisions. This likewise presents a question of law that we review independently. ***State v. Ozaukee Cty. Bd. of Adj.***, 152 Wis. 2d 552, 559, 449 N.W.2d 47 (Ct. App. 1989).

DISCUSSION

I. Cook was not "aggrieved" by the Commission's decision.

¶9 WISCONSIN STAT. § 62.23(7)(e)4. provides that "[a]ppeals to the board of appeals may be taken by any person aggrieved" by a plan commission's

decision.[2] Cook argues he was aggrieved by the Commission's decision to approve the CSM, and he therefore had standing to appeal that decision to the Board. A person "is aggrieved by an administrative decision when that decision has a direct effect on his or her legally protected interests." ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cty. Bd. of Adj.***, 125 Wis. 2d 387, 390, 373 N.W.2d 450 (Ct. App. 1985) (***Brookside Poultry I***), *aff'd*, 131 Wis. 2d 101, 388 N.W.2d 593 (1986).

¶10 In support of his argument that he was aggrieved by the Commission's approval of the CSM, Cook first observes that the stated purpose of the subdivision control section of the Town of Spider Lake's land use ordinance is "to regulate and control the division and subdivision of land within the Town … in order to promote the public health, safety and general welfare and to encourage the most appropriate use of land." TOWN OF SPIDER LAKE, WIS., LAND USE ORDINANCE, Part III, § 1.2 (May 8, 2013) (hereinafter, LAND USE ORDINANCE). He further notes that the ordinance prohibits a person, firm, or corporation from dividing land for the purpose of sale, transfer, or development "without complying with all of the provisions of this Ordinance." ***Id.***, Part III, § 3.2(A). Based on these provisions, Cook argues the ordinance "necessarily implies that if the Subject CSM failed to strictly comply with the Ordinance, then the [Commission] … put the general welfare of the Town's property owners at risk" by approving the CSM.

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

¶11 To the extent Cook intends to argue he was aggrieved by the Commission's approval of the CSM based solely on his status as an owner of property in the Town, we disagree. As noted above, a person is aggrieved by a municipality's decision when the decision has a "direct effect on his or her legally protected interests." ***Brookside Poultry I***, 125 Wis. 2d at 390. Although we acknowledge that the stated purpose of the Town's land use ordinance is to promote "the public health, safety and general welfare," Cook fails to explain how the specific decision at issue in this case—approval of the CSM—directly affects the legally protected interests of all landowners in the Town.

¶12 Cook next argues he was aggrieved by the Commission's decision because its approval of the CSM "devalu[ed] his property interest." However, Cook failed to raise this argument before either the Board or the circuit court. We therefore decline to address it. *See* ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810 ("Arguments raised for the first time on appeal are generally deemed forfeited.").

¶13 Cook also argues he was aggrieved by the Commission's decision because the bank, by subdividing its property into two lots and selling one of them, increased the number of owners of the property from one to two. Cook observes that the land use ordinance places the burden on landowners to maintain private roads. *See* LAND USE ORDINANCE, Part I, § 4.2(D)(3). He argues increasing the number of property owners who use the private access road will make it more difficult to reach an agreement regarding maintenance of the road. He also asserts that the increase in the number of property owners has increased his "potential liability" because, under the ordinance, if a private road is not maintained so as to provide safe access for emergency equipment, a property

owner "may be liable for damages to [the] equipment," and the Town "will not be liable if emergency equipment is unable to gain access to the property." *See* ***id.***

¶14 This argument is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). Cook fails to cite any evidence regarding who owns the access road, who maintains the road, whether there is currently a maintenance agreement regarding the road, whether he is a party to that agreement, and the number of other parties who use the road to access their properties. Absent evidence on these points, we cannot meaningfully address Cook's claim that the subdivision of the bank's property has directly affected his legally protected interest in using the road to access his condominium units.

¶15 Moreover, Cook's alleged injuries regarding maintenance of the private access road are purely speculative. Cook points to no evidence, beyond mere conjecture, that increasing the number of owners of the property that is subject to the CSM from one to two will make it appreciably harder to negotiate a maintenance agreement regarding the private access road. Notably, the record reflects that the private access road is used not only by Cook and the owners of the property subject to the CSM, but also by other owners of units in Teal Lake Quiet Shores Condominiums and by owners of lots in the Teal Lake Shores subdivision. Given that there are already multiple parties involved in negotiating a maintenance agreement, it is not self-evident that adding one more property owner will make the negotiations significantly more difficult. Further, it is pure speculation to assert that the purported increase in the difficulty of reaching a maintenance agreement will result in the private access road falling into disrepair, thus hindering access by emergency vehicles and exposing Cook to liability. Such

speculation is insufficient to show that the Commission's approval of the CSM has a direct effect on Cook's legally protected right to access his condominium units.

¶16 Finally, Cook asserts in his reply brief that ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Board of Adjustment***, 131 Wis. 2d 101, 388 N.W.2d 593 (1986) (***Brookside Poultry II***), supports his argument that he was aggrieved by the Commission's approval of the CSM. He claims that, in that case, seventy-three Jefferson County residents were "deemed to have been 'aggrieved'" by the issuance of a conditional use permit for an egg-laying facility. However, Cook's characterization of ***Brookside Poultry II***'s holding is not strictly correct. In ***Brookside Poultry II***, our supreme court simply noted that Brookside Poultry "[did] not contend that the Residents [were] not 'aggrieved' within the meaning of the statute and ordinance." ***Id.*** at 110. Accordingly, the court did not address whether the residents were aggrieved. Instead, it proceeded directly to Brookside Poultry's argument that the residents could not appeal the planning and zoning committee's decision regarding the conditional use permit because the residents were not parties in the hearings before the committee. ***Id.*** ***Brookside Poultry II*** therefore fails to support Cook's argument that he was aggrieved by the Commission's decision to approve the CSM.[3]

[3] Our decision in ***Brookside Poultry I*** similarly fails to support Cook's position. *See* ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cty. Bd. of Adj.***, 125 Wis. 2d 387, 373 N.W.2d 450 (Ct. App. 1985) (***Brookside Poultry I***), *aff'd*, 131 Wis. 2d 101, 388 N.W.2d 593 (1986). In ***Brookside Poultry I***, we rejected Brookside Poultry's argument that the residents were not "aggrieved" by the decision approving the conditional use permit. ***Id.*** at 390. However, our entire analysis in support of that conclusion was that "[t]he trial court, after taking evidence on the point, held that the residents were aggrieved because of the effect a large egg-laying facility would have on their property interests, and that conclusion is supported by the record." ***Id.*** We did not explain what evidence supported the lower court's conclusion that the residents were aggrieved.

(continued)

¶17 Here, the Board specifically found that the Commission's approval of the CSM did not change the private access road, nor did it affect Cook's ability to access his condominium units. Substantial evidence supports these findings. *See* ***Clark v. Waupaca Cty. Bd. of Adj.***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994) (board's factual findings will be upheld on certiorari if supported by substantial evidence). In other words, the evidence is "of such convincing power that reasonable persons could reach the same decision" as the Board. *See* ***id.*** The Board's findings support its conclusion that Cook was not aggrieved by the Commission's decision, and none of Cook's appellate arguments convince us otherwise.

II. Cook does not have standing by virtue of his status as a taxpayer.

¶18 In the alternative, Cook argues he has standing to challenge the Commission's decision by virtue of his status as a taxpayer. As noted above, WIS. STAT. § 62.23(7)(e)4. provides that "any person aggrieved" by a plan commission's decision may appeal that decision to the board of appeals. However, Cook observes that, under § 62.23(7)(e)10., "[a]ny person or persons, jointly or severally aggrieved by any decision of the board of appeals, *or any taxpayer* … may … commence an action seeking the remedy available by certiorari." (Emphasis added.) Cook correctly asserts that, pursuant to § 62.32(7)(e)10., all taxpayers have standing to bring certiorari actions challenging decisions made by a board of appeals. Cook contends this

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Consequently, there is no basis to conclude the CSM's effect on Cook's interests in this case is analogous to the effect the conditional use permit had on the residents' interests in ***Brookside Poultry I***. As a result, ***Brookside Poultry I*** does not compel a conclusion that Cook was aggrieved by the Committee's decision to approve the CSM.

> necessarily implies that taxpayers have the right to file an appeal to the board of appeals, as it would be illogical for a taxpayer to have the right to bring a certiorari action appealing any decision of the board of appeals … without the same taxpayer having the right to appeal an issue to the board of appeals.

¶19 Cook's argument disregards the plain language of the statute. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (statutory interpretation begins with statute's plain language). While WIS. STAT. § 62.23(7)(e)10. expressly permits *both* aggrieved persons and taxpayers to challenge a board of appeals' decisions via certiorari, § 62.23(7)(e)4. merely states that aggrieved persons may appeal a plan commission's decisions to the board of appeals, without mentioning taxpayers. Given the legislature's choice to expressly grant taxpayers the right to appeal in subd. (7)(e)10., but not in subd. (7)(e)4., we must assume the legislature intended to give all taxpayers the right to appeal a board of appeals' decisions via certiorari, but it intended to limit the right to appeal a plan commission's decisions to persons actually aggrieved by those decisions. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 284, 528 N.W.2d 502 (Ct. App. 1995) ("We assume that the legislature deliberately chooses the language it uses in a statute.").

¶20 Cook argues this interpretation produces an illogical result because it permits a taxpayer to appeal a board of appeals' decision to the circuit court, without having the right to appeal the plan commission's underlying decision to the board of appeals in the first place. *See* ***Kalal***, 271 Wis. 2d 633, ¶46 (statutory language is interpreted to avoid absurd or unreasonable results). However, we do not agree that this result is illogical or unreasonable. The legislature could have reasonably decided that only parties actually aggrieved by a plan commission's decisions should be able to appeal those decisions to the board of appeals because

those parties will be best able to present relevant evidence to the board regarding the decisions' negative effects. The legislature could have also reasonably concluded permitting all taxpayers to appeal a plan commission's decisions to the board of appeals would be unworkable in practice because it would result in boards of appeals being inundated with challenges brought by individuals not actually affected, or only tangentially affected, by plan commissions' decisions.

¶21 Conversely, the legislature could have reasonably concluded that, once a board of appeals has either affirmed or reversed a plan commission's decision in a challenge brought by a person aggrieved by that decision, any taxpayer should then have the right to challenge the board of appeals' decision by certiorari. The legislature could have reasonably determined it made sense to allow all taxpayers to appeal at that stage of the proceedings, given the limited scope of the issues considered on certiorari review. *See* ***Roberts***, 295 Wis. 2d 522, ¶11. For these reasons, the result produced by our interpretation of WIS. STAT. § 62.23(7)(e)4. is not inherently illogical. Accordingly, based on the plain language of the statute, we reject Cook's argument that he had standing to challenge the Commission's approval of the CSM based solely on his status as a taxpayer.[4]

[4] The parties also dispute whether Cook or the condominium association was the proper party to appeal the Commission's decision. Because we conclude Cook lacked standing to appeal the Commission's decision, we need not address this additional argument. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

By the Court.—Order affirmed.

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