COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP590 **Cir. Ct. No. 2015CV1680**

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

OAK PARK QUARRY, LLC,

PLAINTIFF-APPELLANT,

V.

DANE COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Oak Park Quarry, LLC, appeals a circuit court order that affirmed a decision of the Dane County Board of Adjustment regarding Oak Park's claim that its property has a legal non-conforming use status allowing mineral extraction without a conditional use permit. Oak Park contends that: (1)

the quarry on its property qualifies as a registered non-conforming use; (2) the Board's procedural rules prevented Oak Park from fully presenting its case; (3) Oak Park's challenge to the zoning administrator's 1969 rejection of an application for a registered non-conforming use on the property was timely under the unique facts of this case; and (4) the Board erred by determining that it was not the proper venue to resolve disputes over Oak Park's land use. We affirm the Board's determination for the reasons set forth below.

¶2 In 1968, Dane County adopted an ordinance providing that mineral extraction operations that existed prior to 1969 and were registered with and approved by the Dane County Zoning Administrator would be deemed legal non-conforming uses. ***Schroeder v. Dane Cty. Bd. of Adjustment***, 228 Wis. 2d 324, 326-27, 596 N.W.2d 472 (Ct. App. 1999). Dane County required that, to qualify for non-conforming use status, the mineral extraction operation had to have been in operation before the ordinance and had to be registered within one year of the 1968 ordinance. ***Smart v. Dane Cty. Bd. of Adjustments***, 177 Wis. 2d 445, 449-50, 501 N.W.2d 782 (1993).

¶3 In 1969, a quarry operator attempted to register a mineral extraction operation on the property now owned by Oak Park ("the property"). The zoning administrator did not approve the registration, and neither the quarry operator nor the property owner appealed the zoning administrator's decision. Accordingly, there was no legal non-conforming use recorded for the property in Dane County's book of mineral extractions.

¶4 Oak Park acquired the property in 2010. Oak Park then sought a decision by the zoning administrator that the quarry on the property is a legal non-conforming use. In March 2015, the zoning administrator issued a letter to Oak

Park stating that the property does not possess legal non-conforming use status. Oak Park appealed to the Board of Adjustment, which upheld the decision of the zoning administrator. The Board found that the zoning administrator properly determined that the property does not have a registered legal non-conforming use, and that Oak Park had not presented sufficient evidence to establish that the property has a legal non-conforming use allowing mineral extraction without a conditional use permit. It also found that Oak Park had not appealed the 1969 registration decision within a reasonable time. It determined that Oak Park was required to continue to follow the procedure for obtaining conditional use permits as set by the county board. Oak Park then sought certiorari review in the circuit court, which affirmed the decision of the Board. Oak Park appeals.

¶5 In this appeal, we review the decision of the Board, not the circuit court. *See* ***Klinger v. Oneida Cty.***, 149 Wis. 2d 838, 845 n.6, 440 N.W.2d 348 (1989). We review only whether: (1) the Board stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable, representing its will instead of its judgment; and (4) the evidence was such that the Board might reasonably have made the determination under review. *See* ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 24, 498 N.W.2d 842 (1993). "The phrase 'acted according to law' has been interpreted as including 'the common-law concepts of due process and fair play.'" ***Id.*** (quoted source omitted).

¶6 Oak Park contends that the Board's decision was based on incorrect theories of law and not supported by the evidence. It argues that it established that the quarry on the property possesses registered legal non-conforming use rights based on evidence that: (1) the quarry existed prior to 1969; and (2) the quarry operator attempted to register the quarry in 1969, but the registration material

wrongly identified the location of the quarry such that the zoning administrator may have inspected a separate, incorrect location, which Oak Park attributes to mistakes by the quarry operator and the zoning department. Thus, according to Oak Park, the quarry would have been registered as a legal non-conforming use except for the errors in the registration papers. Oak Park contends that the Board made an error of law by failing to correct the mistakes in the registration process as mutual mistake or scrivener's error. *See* ***Frantl Indus., Inc. v. Maier Const., Inc.***, 68 Wis. 2d 590, 594, 229 N.W.2d 610 (1975) (court may reform a contract when a mutual mistake has occurred "to make a writing express the bargain which the parties desired to put in writing" (quoted source omitted)); ***Schlutz v. Rudie***, 275 Wis. 99, 103, 80 N.W.2d 804 (1957) (error by scrivener gives rise to a mutual mistake by parties to a contract); ***Gielow v. Napiorkowski***, 2003 WI App 249, ¶22, 268 Wis. 2d 673, 673 N.W.2d 351 ("Mutual mistake exists where both parties to a contract are unaware of the existence of a past or present fact material to their agreement."). Oak Park contends that these concepts from contract law apply because, according to Oak Park, the 1968 ordinance created a contract between quarry owners and Dane County that the existing quarries would have legal non-conforming use status if properly registered. Oak Park argues that, once the mistakes are corrected, Oak Park has established that the quarry on its property is a registered legal non-conforming use.

¶7 The Board responds that it properly determined that the property does not possess a registered legal non-conforming use. It argues that its decision was supported by substantial evidence that, whether or not the quarry existed prior

to 1969,[1] the quarry was not registered and approved by the zoning administrator within one year of the 1968 ordinance. It points to the undisputed evidence that the registration of the quarry was rejected in 1969, and that the decision was not appealed by the quarry operator or the owner of the property.[2] Thus, the Board asserts, it properly determined that, under the 1968 Dane County Ordinance, the property does not possess legal non-conforming use because the attempted registration was not approved by the zoning administrator in 1969.

¶8 We conclude that the Board properly affirmed the zoning administrator's determination that the quarry is not a registered legal non-conforming use of the property. The Board relied upon the requirements to establish registered legal non-conforming use under the 1968 Dane County Ordinance and the evidence that the registration of the quarry was not approved in 1969. In reaching this conclusion, we reject Oak Park's contention that the Board was required to apply contract law in its review of the attempted registration from 1969. We are not persuaded by Oak Park's assertion that contract law applies to zoning determinations.[3] Rather, under our well-settled standard of review of the

[1] The Board points out that there was conflicting evidence presented to the Board as to whether or not the quarry existed prior to 1969. The Board argues, however, that the dispositive issue is that it is undisputed that the registration of the quarry was not approved by the zoning administrator in 1969.

[2] The Board points out that, beginning in the 1980s, the quarry on the property has operated under conditional use permits.

[3] In reply, Oak Park raises, for the first time, the issue of "contract zoning." We generally do not consider arguments raised for the first time in a reply brief. In any event, we are not persuaded that the 1968 ordinance amounted to "contract zoning."

In a related argument, Oak Park argues for the first time in its reply brief that the principles of equitable estoppel require reformation of the legal non-conforming use registration. Again, we generally do not consider arguments raised for the first time in reply. In any event, the argument is unpersuasive.

Board's decision to affirm the zoning administrator, we conclude that the Board acted according to law and reached a reasonable determination based on the evidence before it.[4]

¶9 Oak Park also contends that the Board's procedural rules prevented it from fully presenting its arguments. It contends that it was prevented from fully presenting its legal arguments on scrivener's error and mutual mistake because the Board's rules limited it to five minutes of opening and closing arguments, and that it was unreasonable to expect it to present all of its arguments in that amount of time. It then asserts that the Board's allowing neighbors the same amount of time to make statements to the Board was unfair and denied Oak Park due process. It argues that the Board acted unreasonably by preventing Oak Park from fully presenting its argument and then rejecting those arguments as unpersuasive. However, the record reveals that Oak Park was afforded the opportunity to submit a written brief outlining its legal arguments and to present evidence at a lengthy hearing. As explained above, the Board relied on the evidence in the record and the appropriate law to reach a reasonable determination. We are not persuaded that the testimony by neighbors or the limited time for oral arguments denied Oak Park due process or a fair hearing.

¶10 Oak Park also contends that its 2015 challenge to the 1969 decision of the zoning administrator rejecting the quarry operator's application to register the quarry was timely under the unique historical facts of this case. It argues that

[4] Because we conclude that the Board properly affirmed the zoning administrator's determination that the quarry is not a legal non-conforming use, we do not reach Oak Park's argument that it may expand its claimed legal non-conforming use under the diminished assets rule.

the Board improperly determined that it could not correct an obvious error simply because forty-five years had passed, rendering its decision arbitrary and legally incorrect. Oak Park points out that the Dane County Ordinances allow an appeal of an error by the zoning administrator "within a reasonable time." DCO 10.26(3). It argues that, here, the forty-five years was reasonable given the mutual mistake by the parties in the quarry registration papers. It points out that, in ***Smart***, 177 Wis. 2d 445, the Board upheld a decision by the zoning administrator that corrected a registration decision from twenty years prior. Oak Park contends that the error in the registration papers was the zoning department's fault by identifying and verifying the wrong physical location of the quarry, and that Oak Park acted reasonably in promptly appealing the zoning administrator's March 2015 decision.

¶11 The Board responds that it properly determined that Oak Park's appeal of the zoning administrator's 1969 decision was not timely. It argues that an appeal forty-five years after a decision is not "within a reasonable time" as required by the Dane County Ordinances. It distinguishes ***Smart*** on the grounds that the property owner there, unlike Oak Park, had obtained a new zoning determination from the zoning administrator based on recent case law, which was then appealed to the Board. It argues that nothing in ***Smart*** supports Oak Park's argument that it may now appeal the 1969 zoning decision to the Board.

¶12 We agree with the Board's determination that Oak Park's current challenge to the 1969 decision of the zoning administrator was not "within a reasonable time." For obvious and commonsense reasons, forty-five years is simply not a reasonable time for appealing a zoning decision. In this regard, Oak Park's reliance on ***Smart*** is misplaced. In ***Smart***, 177 Wis. 2d at 449-51, a property owner had successfully registered a mining operation on its property as a

legal non-conforming use under the 1968 Dane County Ordinance. At the time, the zoning administrator denied registration of a legal non-conforming use as to the part of the owner's property not currently under mining operation. ***Id.*** In 1989, the property owner asked the zoning administrator to reassess the property's zoning status under recent case law "which held that when contiguous parcels are owned by the same entity and excavation operations are in existence on part of the land, all land constituting an integral part of the operation is deemed 'in use.'" ***Id.*** at 451. The zoning administrator issued a decision that the property owner was entitled to legal non-conforming use status as to its entire property. ***Id.*** A neighbor appealed to the Board, which affirmed, and the neighbor sought certiorari review. ***Id.***

¶13 In rejecting the neighbor's arguments that the property owner had failed to timely appeal the 1969 zoning administrator's decision, the ***Smart*** court explained that "[i]t is [the zoning administrator's] 1989 decision allowing a nonconforming use on the disputed 40 acres that is the subject of this proceeding, not the Zoning Department's 1969 decision." ***Id.*** at 456. Thus, ***Smart*** does not support Oak Park's argument that its challenge to the 1969 decision of the zoning administrator is within a reasonable time.

¶14 Finally, Oak Park argues that the Board erred by stating that it was not the proper forum to resolve the dispute over Oak Park's land use. However, that statement by the Board was clearly made in the context of its decision that the zoning administrator properly determined that the quarry is not a legal non-conforming use and that Oak Park must continue to seek conditional use permits to operate the quarry. The statement did not render the Board's decision erroneous. For the reasons set forth, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).