COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP2487 **Cir. Ct. No. 2014CV2827**

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

ADAMS OUTDOOR ADVERTISING LIMITED PARTNERSHIP,

PLAINTIFF-APPELLANT,

V.

CITY OF FITCHBURG,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: RHONDA L. LANFORD, Judge. *Affirmed*.

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

¶1 KLOPPENBURG, J. The City of Fitchburg denied Adams Outdoor Advertising Limited Partnership's application for a permit to "convert" the east-facing panel of an existing 300-square-foot paper billboard to a "digital sign" by installing a digital sign face on that panel. Adams filed this certiorari action

challenging the City's determination that the City's Sign Ordinance prohibited the digital sign and asserting that the City deprived Adams of due process during the administrative proceedings.[1] Adams also moved the circuit court to supplement the certiorari record with discovery related to Adams' due process claims. The circuit court denied Adams' motion to supplement the record and affirmed the City's decision to deny Adams' digital sign permit application.

¶2 On appeal, Adams argues that: (1) the City improperly interpreted and applied its Sign Ordinance to deny Adams' application for a permit to install a digital sign on its billboard; (2) the circuit court erred in denying Adams' motion to supplement the certiorari record; and (3) the City deprived Adams of due process during the administrative proceeding. As we explain: (1) Adams fails to convince us that the City's interpretation of its own ordinance was unreasonable; and (2) we take as admitted by Adams the City's arguments that the court properly exercised its discretion in denying Adams' motion to supplement the record and that Adams' due process claim fails because Adams fails to address those arguments in its reply brief. Accordingly, we affirm.

[1] We follow the parties' lead and refer to that part of the City's Code of Ordinances that applied to Adams' permit application, Chapter 26 Signs, as the City's Sign Ordinance. The Sign Ordinance has since been amended and all references in this opinion to the Sign Ordinance are to the 2009 provisions that were in place at the time relevant to Adams' permit application.

BACKGROUND

¶3 The record reveals the following undisputed facts. Adams leases property in the City of Fitchburg on which it maintains an "off-site" advertising sign that consists of a 300-square-foot "paper billboard."[2]

¶4 In June 2014, Adams applied for a permit to convert the east-facing panel of its billboard to a digital sign.

¶5 A digital sign is a display programmed by a computer that has the ability to hold a static image for a certain time period and then transitions to another static image. The sign proposed by Adams would change "from one static image to another, no more frequently than once every two minutes."

¶6 The City Zoning Administrator issued a written decision denying Adams' application because the proposed digital sign did not comply with Section 26-83(a) of the Sign Ordinance and the digital sign was inconsistent with an earlier variance.

¶7 Adams appealed to the Fitchburg Common Council. In September 2014, the Council conducted a hearing and the Administrator testified in support of his written decision. At the conclusion of the hearing, the Council voted unanimously to uphold the Administrator's decision denying Adams' permit application.

[2] "*Offsite advertising sign* means a sign which is permanently attached to the ground or a building and which directs attention to a business, commodity, service, or entertainment (not related to the premises at which the sign is located) or to a business, commodity, service, or entertainment which is conducted, sold or offered elsewhere than on the premises at which the sign is located." Sign Ordinance, Sec. 26.2.

¶8 In October 2014, Adams filed a "Petition for Certiorari Review, or in the Alternative, Complaint for Declaratory Judgment" seeking judicial review of "Fitchburg's erroneous interpretation and application of the Fitchburg Sign Ordinance." In September 2015, Adams moved the circuit court to supplement the record, alleging that comments made during the hearing and subsequent social media activity by two members of the Council demonstrated that the Council was biased and that prejudgment appeared to have improperly affected the Council's decision-making process. After a hearing, the circuit court denied Adams' motion to supplement the certiorari record.

¶9 In November 2016, the circuit court affirmed the City's decision to deny Adams' application for a permit to install a digital sign on one panel of its billboard. Adams appeals.

DISCUSSION

¶10 Adams raises three issues on appeal: (1) the City improperly interpreted and applied its Sign Ordinance to deny Adams' application for a permit to install a digital sign on its billboard; (2) the circuit court erroneously exercised its discretion in denying Adams' motion to supplement the record with discovery; and (3) the City deprived Adams of due process. We address and reject each of these issues as follows.

I. The City's Interpretation and Application of Its Sign Ordinance to Deny Adams' Application for a Permit to Install a Digital Sign on its Billboard

¶11 Adams argues that the City improperly interpreted and applied its Sign Ordinance to deny Adams' application for a permit to install a digital sign on its billboard. We first set forth the applicable standard of review and then explain,

pursuant to that standard of review, why Adams fails to show that the City unreasonably interpreted its Sign Ordinance to deny Adams' permit application.

A. Standard of Review

¶12 When reviewing a municipality's decision in a certiorari proceeding, the scope of review is the same as that of the circuit court. *See* ***O'Connor v. Buffalo Cnty. Bd. of Adjustment***, 2014 WI App 60, ¶11, 354 Wis. 2d 231, 847 N.W.2d 881. On certiorari review, the reviewing court evaluates only whether: (1) the municipality stayed within its jurisdiction; (2) it acted according to the law; (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) the evidence was sufficient to support the determination. ***Ottman v. Town of Primrose***, 2011 WI 18, ¶47, 332 Wis. 2d 3, 796 N.W.2d 411.

¶13 In conducting this evaluation, "Wisconsin courts have repeatedly stated that on certiorari review, there is a presumption of correctness and validity to a municipality's decision" and "the petitioner bears the burden to overcome the presumption of correctness." ***Ottman***, 332 Wis. 2d 3, ¶¶48, 50. With respect to a municipality's legal interpretations, our supreme court has held that a reviewing certiorari court should grant deference to a municipality's interpretation of its own ordinances if that interpretation is reasonable:

> A court should not defer to a municipality's interpretation of a statewide standard…. In other circumstances, however, the language of the municipality's ordinance appears to be unique and does not parrot a state statute but rather the language was drafted by the municipality in an effort to address a local concern. In such a case, the municipality may be uniquely poised to determine what that ordinance means. Then, applying a presumption of correctness, we will defer to the municipality's interpretation if it is reasonable.

Id., ¶¶59-60.

¶14 Contrary to this standard of review set forth in ***Ottman***, Adams argues that the City's interpretation of its Sign Ordinance is a question of law that this court reviews de novo. In its initial appellant's brief, Adams supports this proposition with a citation to ***Park 6 LLC v. City of Racine***, 2012 WI App 123, ¶6, 344 Wis. 2d 661, 824 N.W.2d 903, which states in pertinent part, "Whether the municipality correctly interpreted a *state statute* is a question of law this court reviews de novo." (Emphasis added.) That citation is inapposite because the City did not interpret a state statute here.

¶15 In response to the City's articulation in its respondent's brief of the ***Ottman*** standard of review—deference to the City's interpretation of its own ordinance if it is reasonable—Adams attempts to develop an argument against deference in its reply brief. Adams argues, for the first time in its reply brief, that it is the City's burden to demonstrate that the Sign Ordinance is unique and "there is simply nothing in the record to support Fitchburg's contention that its Ordinance is unique or that it was drafted to address a particular local concern. Signs and their regulation are not unique to Fitchburg." We decline to consider Adams' argument that it is the City's burden to demonstrate that its own Sign Ordinance is unique because that argument is unsupported by legal authority and is made for the first time in its reply brief on appeal. *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 considered."); ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.").

¶16 Alternatively, Adams argues that this court should liberally construe the Sign Ordinance in favor of the free use of private property. But, its reliance on ***Cohen v. Dane Cnty. Bd. of Adjustment***, 74 Wis. 2d 87, 91, 246 N.W.2d 112 (1976), and a litany of other cases to support that proposition, is misplaced. ***Cohen*** and the other cases cited by Adams stand for the proposition that "*[z]oning* ordinances are in derogation of the common law and, hence, are to be construed in favor of the free use of private property." ***Id.*** at 91 (emphasis added); *see also* ***Crowley v. Knapp***, 94 Wis. 2d 421, 435, 288 N.W.2d 815 (1980) ("*zoning* ordinance … operate[s] in derogation of the free use of property" (emphasis added)). Such a construction is appropriate for zoning ordinances because zoning ordinances, unlike other municipal ordinances, are exclusively concerned with, and often intrusively restrict, particular uses of *land*. *See* ***Town of Clearfield v. Cushman***, 150 Wis. 2d 10, 19-20, 440 N.W.2d 777 (1989) (holding that Town ordinance regulating installation of mobile homes outside of mobile home parks was not a zoning ordinance). Neither party here suggests that the Sign Ordinance was a zoning ordinance. In fact, it was precisely because the Sign Ordinance was not a part of the City's zoning ordinances that Adams' appeal of the Administrator's decision was directed to the Council under WIS. STAT. ch. 68 (2015-16).

¶17 In sum, Adams fails to establish that the ***Ottman*** standard of review does not apply here. Accordingly, we will defer to the City's interpretation of its Sign Ordinance if its interpretation was reasonable, and Adams has the burden of convincing us that the City's interpretation was unreasonable. ***Ottman***, 332 Wis. 2d 3, ¶50 ("On certiorari review, the petitioner bears the burden to overcome the presumption of correctness.").

B. Interpretation of the Sign Ordinance

¶18 As stated, we must defer to the City's interpretation of its own Sign Ordinance if we conclude that its interpretation was reasonable. A municipality's interpretation of its own ordinance is unreasonable if it is contrary to law, if it is clearly contrary to the intent, history, or purpose of the ordinance, if it is without a rational basis, or if it directly contravenes the words of the ordinance. ***Id.***, ¶62.

¶19 The City denied Adams' application for a permit to install a digital sign because, according to the City, the digital sign was an "alternating sign" prohibited by Section 26-83(a) of the Sign Ordinance.[3] Section 26-83(a) stated:

> No flashing, alternating, rotating, or swinging sign, operated by mechanical means or wind driven, whether illuminated or not, is permitted, except time and temperature signs may be permitted by issuance of a conditional use permit by the plan commission. No flashing, alternating, rotating or swing flood, spot or beacon light is permitted for the purpose of illuminating any sign.

Section 26-2, defined "[f]lashing sign" as "a sign where any part is varied in brightness, color or message at intervals more frequently than once every two minutes." The Sign Ordinance did not define "alternating."

[3] The Administrator also denied Adams' permit application because the digital sign contained "alternating illumination" that was prohibited by Section 26-83(a) of the Sign Ordinance, and because the digital sign was inconsistent with an earlier variance issued to Adams for the billboard. Because we affirm the City's determination that the proposed digital sign was an "alternating sign" prohibited by Section 26-83(a) of the Sign Ordinance, we do not address Adams' challenges to the City's other reasons for its denial of the permit application. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

¶20 The Administrator concluded that Adams' proposed digital sign was prohibited under the Sign Ordinance because the proposed digital sign "is considered an alternating sign, as it is changing in its message." The Administrator based this interpretation on the Merriam-Webster dictionary definition of "alternating" as "occurring ... in or forming a repeated series or used to describe something that happens one time, does not happen the next time, happens again, etc." and explained "that's what the sign would do. It would have a message, change its message, maybe change it to another one, and then at some point it goes back to its first one." The Administrator further explained that a digital sign is programmed by a computer to alternate the sign's message, and therefore is an alternating sign operated by mechanical means, which was prohibited by the Sign Ordinance. The Administrator also reasoned that in light of one of the purposes stated in Section 26-1 of the Sign Ordinance, "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays," "[a]n alternating sign, such as proposed, in message and/or illumination, becomes distracting to motorists and the public."

¶21 We conclude that it was reasonable for the City to determine that the digital sign proposed by Adams, which would change "from one static image to another, no more frequently than once every two minutes," was an alternating sign consistent with the dictionary definition stated above. *See* ***Garcia v. Mazda Motor of America, Inc.***, 2004 WI 93, ¶14, 273 Wis. 2d 612, 682 N.W.2d 365 ("if a word is not defined in a statute, we look … to recognized dictionary definitions to determine the common and ordinary meaning of a word."). That is, it was reasonable to determine that such a sign would display messages in a repeated series that would change from one message to another message and at some point

return to the initial message, thereby meeting the dictionary definition of "alternating."

¶22 Adams argues that the City's interpretation of "alternating sign" was unreasonable for five reasons: the interpretation was in "direct contradiction" to the language in the Sign Ordinance; the interpretation was inconsistent with the City's existing practices concerning signs; the interpretation conflicted with the City's own admissions before the circuit court; the City wrongly considered the purpose of the Sign Ordinance; and the City incorrectly characterized the purpose of the Sign Ordinance. We address and reject each argument in turn.

¶23 First, Adams argues that the City's interpretation "[stood] in direct contradiction to the actual language contained in the Ordinance." While Adams uses the phrase "direct contradiction," Adams' actual supporting argument appears to be that, under the City's interpretation, the term "flashing" was rendered superfluous. As stated in Section 26-83(a) quoted above, the Sign Ordinance prohibited "flashing" and "alternating" signs. Section 26-2, defined "[f]lashing sign" as "a sign where any part is varied in brightness, color or message at intervals more frequently than once every two minutes." Adams asserts that "If a prohibited 'alternating sign' were a sign that changes its message within some *unspecified* interval of time, then there is no need to prohibit a sign because it changes its message more frequently than once every two minutes." (Emphasis added.) According to Adams, the City's interpretation of "alternating sign" as a sign "that changes its message" included a "flashing sign" and thereby "violate[d] the fundamental principles of statutory interpretation requiring that every term in the statute be given meaning and that specific, defined terms control over general, undefined terms." We disagree with this analysis.

¶24 Adams correctly notes that the plain and ordinary meaning of "alternating" on which the City relied and the definition of "flashing" in Section 26-2 overlapped: "flashing" defined as "varied in … message," and "alternating" meaning "occurring ... in or forming a repeated series or used to describe something that happens one time, does not happen the next time, happens again." However, this legislative overlap did not render the City's interpretation of the word "alternating" any less reasonable. Adams' argument would render the term "alternating" superfluous and limit the City's prohibition of signs that vary in message only to flashing signs that change message at intervals less than two minutes. To conclude that the word "alternating" cannot mean changing in message regardless of time interval, despite its common and plain meaning, would require adding words—that "alternating" means changing in message *at some interval of time*—that were not in the ordinance. "[W]e will not insert those words into the [Sign Ordinance] to create such a result." *See* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶14, 316 Wis. 2d 47, 762 N.W.2d 652.

¶25 Adams' argument demands a level of precision from the City Ordinance's drafters that was not legislatively required. Rather, legislatures may create comprehensive laws, and comprehensive regulatory schemes "should be liberally construed to effectuate the purpose of the legislation and facilitate enforcement." ***Hannigan v. Sundby Pharmacy, Inc.***, 224 Wis. 2d 910, 928, 593 N.W.2d 52 (Ct. App. 1999). Here, the City's effort to be comprehensive in its prohibition against distracting signs by prohibiting both "alternating" and "flashing," did not defeat the plain language of "alternating" that the City used separately from "flashing" to prohibit the variation of a message at any interval. Moreover, the City's effort at creating a comprehensive prohibition on distracting signs was supported by the stated purpose of the Sign Ordinance. In sum, under

our deferential standard of review, Adams fails to show that the City unreasonably interpreted its own Sign Ordinance so as to prohibit the proposed digital sign as an alternating sign.

¶26 Second, Adams argues that the City's interpretation of "alternating signs" was "inconsistent with the City's existing practices concerning signs," specifically permitting gas station signs that Adams asserts "change the digital display," and was therefore arbitrary and unreasonable. During the hearing conducted by the Council, the Administrator explained that these signs were exempt: "Yeah, [Adams] brought up gas station signs. We do allow for auxiliary signs that are exempt if, when they have a certain type of secondary message, such as 'In' and 'Out', or in this case, as required by statute, the value of gas ...," and if they met the sixteen square-foot requirement for exempt signs. Adams does not refute that gas station signs were specifically exempted from the Sign Ordinance; nor does Adams argue that the exemption was unreasonable.

¶27 Third, Adams argues that "the City's proposed definition of 'alternating sign' ... conflict[ed] with its own admissions in briefing before the circuit court." The "admissions" to which Adams refers was, according to Adams, that the "City acknowledged below that 'the ordinance was drafted under different technology. An alternating sign was the three sided paper sign that would switch a message.'" We see no conflict. As the City responds, "while billboard technology has changed since the ordinance was enacted, a digital sign has the same fundamental characteristics as conventional alternating billboards." That a digital sign may be able to display a longer series of messages than a three-sided paper sign did not render the digital sign less of an alternating sign than the paper sign under the City's Sign Ordinance.

¶28 Fourth, Adams argues that the City wrongly considered the purpose of the Sign Ordinance, when it stated that the proposed digital sign, which would alternate in message, "[was] a distracting sign display" that violated "[t]he purpose and standards of the Sign Ordinance." We reject Adams' argument that it was improper for the City to consider the stated purpose of the Sign Ordinance because the argument is unsupported by legal authority. *See* ***Pettit***, 171 Wis. 2d at 646. Moreover, the pertinent legal authority we are aware of is to the contrary: the purpose of a statute is "perfectly relevant to a plain-meaning interpretation" of the statute, "as long as the ... purpose [is] ascertainable from the text and structure of the statute itself." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶48, 271 Wis. 2d 633, 681 N.W.2d 110. One of the stated purposes of the Sign Ordinance was to "eliminate hazards to pedestrians and motorists brought about by distracting sign displays." Section 26-1. Under ***Kalal***, it was proper for the City to determine that its interpretation of the language of the ordinance was supported by the underlying purpose of the ordinance. 271 Wis. 2d 633, ¶48. In particular, it was proper for the City to determine that a digital sign, which displays a series of changed messages, was the type of distracting hazard the Sign Ordinance sought to eliminate by prohibiting "alternating signs" and then to use that determination to support its interpretation. *Cf.* ***Ottman***, 332 Wis. 2d 3, ¶62 ("A municipality's interpretation of its own ordinance is unreasonable ... if it is clearly contrary to the ... purpose of the ordinance ....").

¶29 Fifth, Adams argues that the City incorrectly characterized the purpose of the Sign Ordinance. Adams argues that "[t]o the contrary, '[t]he purpose of [the Sign Ordinance] [was] *to provide standards* to safeguard life, health and property …,'" like many other sections of the City's Code of Ordinances. However, we do not see the conflict between this asserted purpose

and the purpose on which the City relied. Moreover, Adams' argument disregards the plain language of the Sign Ordinance which expressly stated that one of the purposes was to "eliminate hazards to pedestrians and motorists brought about by distracting sign displays." Section 26-1. Accordingly, the City properly considered whether its conclusion that a digital sign was a prohibited "alternating sign" was consistent with the stated purpose and intent of the Sign Ordinance.

¶30 In sum, we conclude that the City's determination that Adams' proposed digital sign was a prohibited "alternating sign" was reasonable, and that Adams fails to establish otherwise.

II. Adams' Motion to Supplement the Certiorari Record With Discovery and its Due Process Claim

¶31 Adams argues that the circuit court erroneously denied its motion to supplement the certiorari record with discovery, and that the City deprived Adams of due process by failing to consider its permit application in an unbiased manner. The City explains in its response brief why the circuit court properly exercised its discretion in denying Adams' motion to supplement and why Adams' due process claim fails. We take Adams' failure to respond to the City's arguments in its reply brief as a concession that the City's arguments are correct. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted."). Accordingly, we do not consider Adams' arguments further.

CONCLUSION

¶32 For the reasons stated, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.