COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2118 **Cir. Ct. No. 2016CV93**

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

LAGOON LANE, LLC,

PLAINTIFF-RESPONDENT,

V.

PAUL RICE A/K/A TOWN CHAIRMAN, TOWN OF WEST BEND, REBECCA SCHUSTER A/K/A TOWN CLERK, TOWN OF WEST BEND AND THE TOWN OF WEST BEND,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Lagoon Lane, LLC owns shoreland property in the Town of West Bend in Washington County that it sought to divide into several lots. The Town,[1] however, denied Lagoon Lane's certified survey map (CSM) seeking subdivision on the grounds that it failed to comply with the Town's setback, minimum lot size, and frontage requirements. This case comes to us following certiorari review in the circuit court. The question presented is whether the Town may enforce these ordinances and deny the CSM on these grounds. We conclude that the Town was without this authority.

¶2 Before proceeding further, we pause to address the limits of this ruling. Following an initial release of this opinion, the Town filed a motion to reconsider our decision based on recent statutory amendments adopted through the enactment of 2015 Wisconsin Act 41, effective July 3, 2015, creating WIS. STAT. §§ 60.61(3r) and 60.62(5) (2015-16).[2] These new subsections appear to modify our decision in ***Hegwood v. Town of Eagle Zoning Bd. of Appeals***, 2013 WI App 118, 351 Wis. 2d 196, 839 N.W.2d 111, interpreting WIS. STAT. § 59.692, and consequently, the statutory authority of towns to zone in shorelands. The Town indicated it became aware of these changes, which were effective two months before the Town's denial of the CSM, only after our opinion was released. After

[1] We will refer to the appellants collectively as the "Town."

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

reviewing the record, we agree that these statutory changes were not argued to this court or otherwise brought to our attention.[3]

¶3 As a general rule, we do not consider arguments raised for the first time on appeal. ***McKee Family I, LLC v. City of Fitchburg***, 2017 WI 34, ¶¶29, 32, 374 Wis. 2d 487, 893 N.W.2d 12. While we appreciate the candor of the Town in bringing these changes to our attention, we decline to grant what would amount to a complete appellate do over, particularly given that the Town failed to provide the applicable statutory provisions to its own decision-makers and circuit court when they were reviewing this case. The Town is effectively asking us to re-do their work as well, starting from scratch under the new statutory provisions. We see no reason to depart from our general rule and decline to address the effect of these statutory amendments. Thus, the parties and public should understand that this opinion does not consider these relevant statutory amendments, but rather proceeds under the assumption that ***Hegwood*** remains unaltered and the statutory authority of towns to zone in shoreland areas remains as it was at the time ***Hegwood*** was decided.[4] This opinion represents, then, a statement of the law prior to these recent legislative changes.

[3] Even further, both parties treated ***Hegwood*** as binding throughout their briefing and oral argument. In fact, the Town was explicitly asked in oral argument whether the state legislature had in any way modified ***Hegwood*** or its interpretation of WIS. STAT. § 59.692; the Town responded that no legislative changes had been made. Lagoon Lane also referenced the failed legislative attempt to modify ***Hegwood*** and town zoning authority generally. Moreover, the Town asked this court to "revisit ***Hegwood***" due to its alleged creation of a regulatory vacuum where the County had not acted. These statutory amendments appear to directly address the regulatory vacuum concern as well—again, arguments and legal authority that were not presented to this court.

[4] For this reason, the original opinion was withdrawn, and we are now issuing this slightly modified opinion as an uncitable per curiam decision.

¶4 With this understanding and the limited scope of our analysis in view, we conclude as follows. While towns generally possess the authority to enact zoning regulations, as we explained in ***Hegwood***, 351 Wis. 2d 196, ¶¶15-17, the legislature removed shoreland zoning authority for towns through the enactment of WIS. STAT. §§ 281.31 and 59.692. We conclude this means that the legislature has withdrawn all exercises of shoreland zoning authority that do not fall within the limited exception in § 59.692(2)(b)—including zoning power that overlaps with subdivision authority. The Town's setback and minimum lot size requirements are admittedly zoning enactments, and thus have plainly been removed of their efficacy in shoreland areas. The Town's frontage requirement was enacted under both its zoning and subdivision ordinances. Because the frontage requirement falls within the zoning power, we hold that it is without effect. Therefore, the Town erred by denying the CSM, and we affirm the circuit court's order so holding.

BACKGROUND

¶5 Lagoon Lane owns property located in the Town of West Bend in Washington County. The property is within 1000 feet of Big Cedar Lake and thus, is classified as shorelands. *See* WIS. STAT. §§ 59.692(1)(b), 281.31(2)(d). Lagoon Lane prepared a CSM proposing to divide the property into three lots corresponding to three residential structures already in place. The CSM was submitted to both Washington County and the Town for approval. The Washington County Planning, Conservation and Parks Committee approved the CSM; the Town had other thoughts.

¶6 The Town's Plan Commission recommended that the West Bend Town Board deny approval of the CSM for three reasons: (1) the proposed CSM

did not meet the Town's sixty-six foot frontage requirement per lot, (2) the lots were below the Town's minimum size requirements, and (3) "several encroachments" violated the Town's setback requirements. Based on these recommendations, the town board denied Lagoon Lane's proposed CSM. Though the plan commission did not specify the specific ordinances the CSM violated, the parties agree that the minimum lot size and setback requirements are found in the Town's zoning ordinance. The parties also agree that identical sixty-six foot frontage requirements appear in both the Town's zoning and subdivision ordinances.

¶7 Lagoon Lane responded to the denial of its CSM with an action for certiorari review in the circuit court.[5] The circuit court concluded that the Town lacked jurisdiction to zone shoreland areas within the Town's limits—like Lagoon Lane's property—pursuant to WIS. STAT. § 59.692 and our decision in ***Hegwood***. Because the town board denied the CSM "for zoning reasons," the court concluded that the CSM was improperly denied. The Town appeals.

DISCUSSION

¶8 On an appeal from a judgment on certiorari, we review the actions of the town board, not the circuit court. ***Herman v. County of Walworth***, 2005 WI App 185, ¶9, 286 Wis. 2d 449, 703 N.W.2d 720. We review whether the board (1) kept within its jurisdiction; (2) acted according to law; (3) acted in an arbitrary,

[5] In the alternative, Lagoon Lane requested a writ of mandamus on the grounds that the Town failed to act on the CSM within the statutory timeframe. The circuit court denied the writ of mandamus. On appeal, Lagoon Lane requests that we reverse the court's decision. However, Lagoon Lane concedes that this issue is moot if we affirm the circuit court's order. Because we affirm, we do not reach this issue.

oppressive, or unreasonable manner; and (4) whether the evidence was such that the town board "might reasonably have made the order or determination in question." ***Id.***

A. Legal Background

¶9 The issue before us involves the authority of counties and towns to zone. As a general matter, both towns and counties possess the authority to zone. *See* WIS. STAT. §§ 59.69 (counties), 60.22(3) (towns exercising village powers), and 60.62(1) (town board exercising village powers may adopt zoning ordinances). Though counties possess the power to zone, a county zoning ordinance "shall not be effective in any town until it has been approved by the town board." Section 59.69(5)(c).

¶10 However, in 1965, the legislature enacted what are now denominated WIS. STAT. §§ 281.31 and 59.692, thereby crafting an alternative statutory zoning scheme specifically applicable to shorelands. 1965 Wis. Laws, ch. 614, §§ 22, 42.[6] In order to "promote public health, safety, convenience and general welfare," § 281.31 generally authorizes "municipal shoreland zoning regulations." Sec. 281.31(1). The statute defines "municipality" as "a county, village or city," and in so doing conspicuously excludes towns from this enumerated grant of authority. *See* § 281.31(2)(c). The statute similarly defines "regulation" as only including ordinances enacted by counties, villages, and cities. *See* § 281.31(2)(e). Based on the deliberate exclusion of town regulation in § 281.31, this court

[6] 1965 Wis. Laws, ch. 614, §§ 22, 42 enacted WIS. STAT. §§ 59.971 and 144.26, which were the predecessors to WIS. STAT. §§ 59.692 and 281.31, respectively.

concluded that towns are not authorized to enact "municipal shoreland zoning regulations." *See* ***Hegwood***, 351 Wis. 2d 196, ¶¶10, 12, 15.

¶11 In contrast to towns, counties are specifically given the authority to zone in shoreland areas by WIS. STAT. § 59.692, which provides that "each county shall zone by ordinance all shorelands in its unincorporated area." Sec. 59.692(1c). In contrast to the general rule, § 59.692(2)(a) provides that a county shoreland zoning ordinance "shall not require approval or be subject to disapproval by any town or town board." Thus, county shoreland zoning ordinances are applied in towns without any need for town approval.

¶12 WISCONSIN STAT. § 59.692(2)(b) provides a limited grandfather clause when "an existing town ordinance relating to shorelands is more restrictive than an ordinance later enacted under this section affecting the same shorelands." In such cases, the town ordinance "continues as a town ordinance in all respects to the extent of the greater restrictions, but not otherwise." ***Id.***

¶13 Taking WIS. STAT. §§ 281.31 and 59.692 together, we held that the legislature has "deliberately exclude[d]" towns from enacting zoning ordinances over "shorelands except where such regulation f[alls] within the language of § 59.692(2)(b)." ***Hegwood***, 351 Wis. 2d 196, ¶¶15-16. Said another way, absent the limited statutory grandfather clause, shoreland zoning authority in towns resides in the county alone. *See* ***id.***

¶14 Although towns are prohibited from enacting zoning ordinances over shorelands, they do have the general authority to enact subdivision regulations. *See* WIS. STAT. § 236.45. WISCONSIN STAT. ch. 236 "delegates the power [to regulate the division of land] to local government[s] which have established planning agencies to approve subdivision plats." ***Town of Sun Prairie v. Storms***,

110 Wis. 2d 58, 61, 327 N.W.2d 642 (1983); *see also* WIS. STAT. § 236.45(2)(ac). Chapter 236 "sets out the minimum requirements that are imposed on subdividers," but "permits local government to legislate more intensively in the field of subdivision control." ***Sun Prairie***, 110 Wis. 2d at 61-63.

¶15 To sum up the Town's authority—and set the stage to explain the specific issue here—under our decision in ***Hegwood***, the Town may not enact a zoning ordinance in a shoreland area, but it may enact subdivision regulations. The power to zone shorelands in towns rests exclusively with counties.

B. Analysis

¶16 The issue here is whether the Town may enforce its frontage, minimum lot size, and setback requirements. If the Town has no authority to apply those requirements, the board proceeded under an incorrect theory of law by denying the CSM on that basis.

¶17 Though it acknowledges that the sixty-six foot frontage requirement appears in its zoning ordinance as well, the Town emphasizes its appearance in its subdivision ordinance and maintains that it may enforce the frontage requirement because it is an exercise of its subdivision authority under WIS. STAT. ch. 236. The Town reasons that even if it cannot enact a shoreland zoning ordinance, the frontage requirement is primarily an exercise of its subdivision authority under ch. 236 and therefore should be enforceable.

¶18 At first glance, the issue seems straightforward. Is the frontage requirement in the subdivision ordinance a valid land division ordinance? Or is it an effort to zone where the Town lacks power to zone? The parties' briefs largely

track this formulation and frame the issue as whether the frontage requirement is more like zoning or more like subdivision.

¶19 The problem is that the line between subdivision powers and zoning powers is bleary at best. Zoning and subdivision "are complementary land planning devices" containing significant overlap. *See* ***Sun Prairie***, 110 Wis. 2d at 68. Our cases have noted "there is no sharp distinction between zoning and platting," and both share common objectives like "dividing a municipality into districts and adoption of a comprehensive plan with regard to roads, streets, transportation facilities, schools, parks, etc., usually on recommendations by an appropriate commission." ***State ex rel. Albert Realty Co. v. Village Bd.***, 7 Wis. 2d 93, 97-98, 95 N.W.2d 808 (1959) (citation omitted). This means in practice, and as relevant here, a town can often enact the exact same restriction under both its subdivision and zoning authority.

¶20 Such appears to be the case with the Town's frontage requirement; the parties agreed as much at oral argument that, all things being equal, a frontage requirement would be a restriction authorized under both subdivision and zoning authority. Accepting the Town's assertion that the purpose of the frontage requirement is solely to provide sufficient access and ensure the orderly layout of roads, this objective is common to both zoning and subdivision. WISCONSIN STAT. § 62.23 states a number of broad purposes served by zoning—among them, lessening congestion, increasing safety, providing adequate light and air, preventing overcrowding, and facilitating "the adequate provision of transportation, water, sewerage, schools, parks and other public requirements." Sec. 62.23(7)(c). Similarly, WIS. STAT. § 236.01 explains that one of the purposes furthered by subdivision power is "to provide for proper ingress and egress." And our supreme court's decision in ***Albert Realty*** described "dividing a municipality

into districts and adoption of a comprehensive plan with regard to roads, streets, [and] transportation facilities" as an objective common to both zoning and subdivision. ***Albert Realty***, 7 Wis. 2d at 98. Thus—consistent with the Town's admission that it could enact frontage requirements under either its zoning or subdivision powers—access is not solely the province of subdivision regulation or zoning regulation.

¶21 Given this, the question is whether the frontage requirement over shorelands—which plausibly constitutes a proper subdivision power *and* an impermissible zoning regulation—is enforceable. This requires us to reconcile the general grant of subdivision authority in WIS. STAT. § 236.45 and the general grant of zoning power in WIS. STAT. § 60.62(1) with the specific withdrawal of shoreland zoning authority reflected in WIS. STAT. §§ 281.31 and 59.692. Given the overlapping nature of subdivision and zoning authority, these provisions create a certain degree of tension: § 59.692 purports to withdraw town zoning authority over shorelands—powers that in substantial part could be exercised as subdivision powers under WIS. STAT. ch. 236 as well.

¶22 The interpretation of statutes is a question of law we review de novo. ***State v. Holcomb***, 2016 WI App 70, ¶4, 371 Wis. 2d 647, 886 N.W.2d 100. Our goal in statutory interpretation is to say what the law is—reading the statutes together, making sense of the whole, and giving effect to all provisions. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶¶45-47, 271 Wis. 2d 633, 681 N.W.2d 110. We operate under the presumption that the legislature understood what it was doing, and that it was aware of existing law when enacting new statutes. *See* ***State v. Lalicata***, 2012 WI App 138, ¶15, 345 Wis. 2d 342, 824 N.W.2d 921.

¶23 WISCONSIN STAT. § 236.45 is a general grant of subdivision authority, including the general authority to enact a frontage requirement. WISCONSIN STAT. § 60.62(1) likewise is a general grant of zoning authority to towns, again including the general authority to enact a frontage requirement. In the midst of this statutory grant of authority, the legislature enacted WIS. STAT. §§ 281.31 and 59.692, in which—as we have explained—"towns would not have authority to regulate shorelands except where such regulation fell within the language of § 59.692(2)(b)." ***Hegwood***, 351 Wis. 2d 196, ¶16. As we held in ***Hegwood***, these enactments represent a specific withdrawal of authority to zone in shoreland areas. In order to give effect to this specific and express withdrawal of town zoning authority, we conclude that the Town may not enact any zoning ordinance in shoreland areas, even if such a measure would be otherwise permissible or is enacted under its separate grant of subdivision authority.

¶24 Allowing the Town to exercise its subdivision authority even where that authority would also fall under zoning authority would leave the legislative withdrawal of town zoning power in shorelands with little meaning. WISCONSIN STAT. § 59.692 would, under that interpretation, only withdraw a town's ability to enact and enforce ordinances in shorelands that are *solely* justifiable as zoning ordinances—an extremely small category, if such a category even exists. Thus, if the Town wished to enact a shoreland zoning ordinance (which it is not permitted to do), all it would have to do is recast the problematic zoning ordinance as an exercise of its subdivision authority. The best way to harmonize these statutes and to give full meaning to all provisions is to give full priority to the legislature's specific withdrawal of shoreland zoning power for towns. We therefore hold that the legislature has removed all exercises of shoreland zoning authority for towns, including those that overlap with subdivision authority.

¶25 The Town here seeks to enforce a frontage requirement that shares characteristics with both zoning and subdividing and may properly be—and in fact was—enacted under both powers.[7] Because this is, concededly, a town zoning regulation in shoreland areas where such power has been removed, we conclude that the Town may not enforce its frontage requirement in shoreland areas.[8]

¶26 Regarding its setback and minimum lot size requirements, the Town admits that these are zoning ordinances. Therefore, these measures are likewise unenforceable per ***Hegwood*** and WIS. STAT. §§ 281.31 and 59.692.

¶27 The Town makes one final plea, however. It maintains that it can enforce its zoning ordinances in shorelands—including its setback and minimum

[7] We leave for another day further clarification of which types of ordinances are within the zoning power and which are not. Here, the parties agree that the frontage requirement is a proper exercise of ordinary zoning power, as is clear by its dual enactment in the subdivision and zoning ordinances.

[8] Though dealing with a separate statutory scheme, ***Albert Realty*** is instructive. The case likewise dealt with land regulations that could be validly enacted as zoning ordinances or subdivision ordinances. The City of Milwaukee was embroiled in an annexation dispute with the Village of Brown Deer over property located in Milwaukee County, and the village sought to impose its minimum lot size requirement on property subject to the annexation dispute. ***State ex rel. Albert Realty Co. v. Village Bd.***, 7 Wis. 2d 93, 94-95, 95 N.W.2d 808 (1959). The applicable statute provided that in the event of an annexation dispute, the county zoning would prevail over any other zoning ordinance. ***Id.*** at 96. While Milwaukee County only required a minimum size of 10,000 square feet, the Town sought to impose a more restrictive 15,000 square foot minimum. ***Id.***

Our supreme court held that, although a minimum lot size requirement was "denominated an amendment to the village 'Subdivision Platting Ordinance'" and "does affect platting to some extent, it also affects, and is in fact, zoning." ***Id.*** at 98-99. Thus, given the fact the applicable statute "declares that the county zoning shall prevail, [the town] ordinance … cannot be permitted to change the county zoning ordinance." ***Id.*** at 99. This decision "recognized that an ordinance regulating minimum lot size has characteristics of both zoning and subdividing," and "gave precedence to the zoning nature of the statute because of the need to avoid conflicting local ordinances" per the statute. ***Town of Sun Prairie v. Storms***, 110 Wis. 2d 58, 70, 327 N.W.2d 642 (1983).

lot size requirements—because the Washington County Shoreland Zoning Ordinance "incorporates all [town] ordinances that are more restrictive, regardless of the date of adoption." Because the Town's zoning ordinances are more restrictive than the County's, the Town reasons that its zoning ordinances remain in full force and effect.[9] We reject this argument for two related reasons.

¶28 First, the County's zoning ordinance is not susceptible to the Town's desired construction. The ordinance provides that "[w]here a … town … zoning ordinance is more restrictive than the provisions contained in this chapter, or any amendments thereto, that ordinance shall continue in full force and effect to the extent of the greater restrictions." We read the "shall continue" language as echoing the grandfather clause contained in WIS. STAT. § 59.692(2)(b); it gives effect to preexisting, more restrictive town zoning ordinances. We do not read the ordinance as a license to enact more restrictive zoning ordinances after the adoption of the County's zoning ordinance. It is undisputed that the Town's frontage, setback, and lot size requirements were enacted after the County's zoning ordinance. Therefore, the County's grandfather clause does not apply.

¶29 Moreover, even if we were inclined to read the County's zoning ordinance as the Town does, the County cannot give authority to the Town that

[9] The Town also appears to suggest that it may nevertheless zone in shoreland areas as long as there is a regulatory "vacuum" where the County has not enacted a specific zoning regulation. In ***Herman***, we determined that the Town's lake frontage requirement could not fit within the grandfather clause of WIS. STAT. § 59.692(2)(b) because it did not predate the County's zoning ordinance, which addressed only lot width, not lake frontage. ***Herman v. County of Walworth***, 2005 WI App 185, ¶18 n.5, 286 Wis. 2d 449, 703 N.W.2d 720. It seems that this language in ***Herman*** forecloses any argument that a later-enacted town zoning ordinance addressing issues not addressed in a county's shoreland zoning ordinance can survive. This is consistent with our decision in ***Hegwood*** which is unequivocal; towns have no authority to enact zoning ordinances in shoreland areas unless falling within § 59.692(2)(b)'s grandfather clause.

has been withheld by the State. As ***Hegwood*** has made clear, the legislature has removed the Town's authority to enact zoning ordinances covering shorelands except where WIS. STAT. § 59.692(2)(b) allows it. The Town neither offers nor do we discern any argument that the exception applies. In short, the County has no power to enact an ordinance doing what the Town suggests the County's ordinance does, and this fact confirms our plain language reading of the ordinance as echoing § 59.692(2)(b).

CONCLUSION

¶30 To summarize, the Town denied Lagoon Lane's proposed CSM because it did not comply with the Town's setback, minimum lot size, and frontage requirements. However, the removal of shoreland zoning authority for towns through the enactment of WIS. STAT. §§ 281.31 and 59.692, as recognized by ***Hegwood,*** means that the legislature has withdrawn all exercises of shoreland zoning authority that do not fall within the exception in § 59.692(2)(b)—including zoning power that overlaps with subdivision authority. The Town does not have an argument that its ordinances, all of which fall within the zoning power, meet the statutory exception in § 59.692(2)(b). Therefore, the Town may not enforce these zoning requirements and acted contrary to law by denying Lagoon Lane's CSM.

By the Court.—Order affirmed.

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