

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 30, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0489

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

T.R. THOMPSON BUILDERS, INC.,

PLAINTIFF-APPELLANT,

V.

**CITY OF MADISON ZONING BOARD OF APPEALS, CITY
OF MADISON COMMON COUNCIL, FRANCOIS OIL
COMPANY, INC., AND STATE BANK OF MT. HOREB,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Johnston, JJ.¹

¹ Circuit Judge William D. Johnston is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. T.R. Thompson Builders, Inc., appeals from an order reversing decisions of the Madison Plan Commission and Madison Zoning Board of Appeals. The court vacated the permit granted to the Francois Oil Company to enlarge a service station on the property adjacent to Thompson's apartment building. However, Thompson remained aggrieved by the terms of the court's remand, and on appeal presents several claims of trial court error. We affirm.

¶2 Francois owns and operates a gas station and convenience store on the southeast corner of Cottage Grove Road and Acewood Boulevard in Madison, in a commercial area zoned C-1. Thompson owns an eight-unit apartment building on Acewood Boulevard, directly south of Francois in a residential R-4 district.

¶3 The original Francois gas station was thirty-five feet from the south property line, which was the rear lot line of its property. The Thompson building was also thirty-five feet from the line. In 1996 Francois applied for permission to replace its existing structure with a much larger gas station and store, extending closer to the lot lines of the property. The commission, over Thompson's opposition, approved the proposed building conditioned on a twenty-foot-wide rear yard, as required by what the commission believed was the appropriate requirement under Madison ordinances.²

¶4 Subsequently, the Madison Zoning Administration allowed Francois to deem its rear yard to be the area east of its new building. The zoning

² We quote and construe the applicable ordinances as they were at the times relevant to this action. Some of the wording in current versions of the ordinances differs slightly. However, none of the rewording is substantive, nor does it affect our analysis.

administrator and the Madison Department of Planning also approved a ten-foot side yard to the south, although the plan approved by the commission provided for a fourteen-foot side yard.

¶5 Thompson appealed the administrator's decision to the zoning board, which affirmed it. Thompson also appealed the commission's approval of the plan to the Madison Common Council, again without success.

¶6 Thompson then commenced judicial review proceedings challenging the commission and council decisions and the zoning board decision. The trial court ruled that the City erred by allowing a twenty-foot rear yard when the applicable ordinance required a thirty-foot set back. The court also set aside the decision to allow less than a fifteen-foot side yard and remanded for a determination whether the applicable city ordinance required a minimum fifteen-foot side yard. The trial court affirmed on several other challenges to the municipal decisions, resulting in this appeal.

¶7 On appeal, Thompson contends that the trial court erred because it did not construe and apply Madison ordinances to bar less than a fifteen-foot side yard; affirmed the decision to allow a ten-foot side yard; did not hold the permit unlawful under the "continuous commercial zone" requirement for gas stations in C-1 zones; did not set aside the decision to allow Francois to move its rear yard to the east; and, alternatively, did not remand for rehearing on Thompson's appeal to the council, during which Thompson asserts it was denied due process.

¶8 On certiorari review of municipal decisions our review is identical to that in the trial court. *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 102, 604 N.W.2d 870 (Ct. App. 1999), *review denied*, 2000 WI 21, 233 Wis. 2d 84, 609 N.W.2d 473, *cert. granted*, 120 S. Ct. 2687 (2000). We

confine our review to whether the municipal board kept within its jurisdiction; acted according to law; acted arbitrarily, oppressively, or unreasonably; and from the evidence could reasonably make the order or determination in question. *Id.*

¶9 Construing an ordinance under the facts of the case is a question of law. *Hansman v. Oneida County*, 123 Wis. 2d 511, 514, 366 N.W.2d 901 (Ct. App. 1985). The first step is examining the language of the ordinance. *See Seep v. Pers. Comm’n*, 140 Wis. 2d 32, 41, 409 N.W.2d 142 (Ct. App. 1987). If the language in the ordinance is unambiguous, we look no further, but apply its ordinary and accepted meaning. *See State ex rel. Nekoosa Papers, Inc. v. Bd. of Review*, 114 Wis. 2d 14, 17, 336 N.W.2d 384 (Ct. App. 1983). Although we may consider a municipal board’s interpretation of its ordinance, we are not bound by that interpretation. *Hansman*, 123 Wis. 2d at 514.

¶10 Under the applicable ordinances, a fifteen-foot side yard was not required for the new station. MADISON GEN. ORDINANCE § 28.09(2)(g)2 provides that in C-1 districts “[a] yard shall be provided where a side lot line coincides with ... an adjacent residence district. Such yard ... shall be equal in dimension to the minimum side yard ... required ... for a residential use opposite ... the adjacent residential lot.” The minimum side yard for a residential R-4 district is five feet. MADISON GEN. ORDINANCE § 28.08(5)(f)2. However, Thompson points out that the minimum side yard for a two-story eight-unit apartment building in R-4 districts is fifteen feet. Therefore, in Thompson’s view, it is fifteen feet that § 28.09(2)(g)2 requires in this particular case as the “minimum side yard ... for a residential use.” We disagree. Section 28.09(2)(g)2 plainly and unambiguously requires the minimum side yard for “a” residential use, not “the” residential use as it actually exists on site. No other interpretation is reasonably available.

¶11 The zoning administrator properly issued an amended permit allowing a ten-foot side yard. MADISON GEN. ORDINANCE § 28.12(10)(h)2 provides that the zoning administrator, with approval by the director of planning and development, may allow minor alterations to building permits.³ Here, under any reasonable view, the four-foot reduction in the side yard was of minimal consequence, and was therefore a minor alteration. It reduced the distance between the Thompson building and the planned station from forty-nine to forty-five feet, a reduction that was hardly, if at all, noticeable. Thompson provided no evidence during the administrative proceedings that the four-foot reduction had any significant impact on its property, which is separated from the gas station by a wall and dense vegetation.

¶12 We also conclude that Madison ordinances plainly allow a gas station at the Francois location. At issue is MADISON GEN. ORDINANCE § 28.09(2)(d)2 and 1.a allowing gas stations in C-1 districts only if the district “as one district or in combination with other commercial or manufacturing districts, extends continuously for at least five hundred (500) feet on one side of a street.” Here, Thompson contends that the five-hundred-foot requirement is not met because Acewood Boulevard bisects the seven-hundred-foot business strip along Cottage Grove Road where the Francois station is located. Again, we disagree. We construe ordinances in context such that related sections are to be considered in the interpretation of any given ordinance. *See Waukesha State Bank v. Vill. of Wales*, 188 Wis. 2d 374, 382, 525 N.W.2d 110 (Ct. App. 1994). MADISON GEN. ORDINANCE § 28.06(2)(b) provides without ambiguity that streets are included in

³ MADISON GEN. ORDINANCE § 28.12(10)(h)2 has been renumbered to MADISON GEN. ORDINANCE § 28.12(11)(h)2.

zoning districts. Acewood Boulevard at its intersection with Cottage Grove Road is not excluded from Francois' C-1 district. The express language of the ordinances referenced above therefore establishes that the five-hundred-foot criterion has been satisfied.

¶13 The City properly allowed its zoning administrator to determine that Francois' rear lot line could be to the east. MADISON GEN. ORDINANCE § 28.03(2) provides that a rear lot line is the line opposite from the front lot line. The ordinance further provides that the owner of a corner lot has "the privilege of electing any street lot line the front lot line, providing that such choice, in the opinion of the Zoning Administrator, will not be injurious to the existing ... adjacent properties." Thompson did not show that switching the rear lot to the east would injure its property. In fact, there was evidence that Thompson benefited from the switch, because Francois planned to place a parking lot to the south if required to have its rear lot there.

¶14 Finally, we conclude that the council proceeding did not violate Thompson's due process rights. Thompson received a public hearing on its appeal, with adequate notice and an opportunity to be heard. A representative spoke at the hearing and presented Thompson's concerns. Others appeared in support of the Francois plan. All relevant documents were before the council. Thompson cites no authority for the proposition that this procedure violated its due process rights. Although Thompson now complains that the council only gave its representative five minutes to present his case, that assertion is not a fact of record, nor does the record show that the Thompson representative objected to the time he was given or asked for more time to present his case.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (1997-98).

