COURT OF APPEALS DECISION DATED AND FILED

February 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2009AP3056 **Cir. Ct. No. 2008CV116**

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

WILDERNESS WATERS & WOODS PRESERVE, LLC,

PETITIONER-APPELLANT,

V.

ONEIDA COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County: MARK MANGERSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Wilderness Waters & Woods Preserve, LLC, owns a resort that does not conform to applicable zoning regulations but continues as a legal preexisting use. An Oneida County zoning ordinance terminates any legal preexisting use that has been discontinued for twelve consecutive months. The

Oneida County Board of Adjustment concluded that the resort's legal preexisting use discontinued during the 2006 calendar year, and rejected an application to convert the resort to condominiums. Wilderness Waters appeals a judgment of the circuit court upholding the Board's decision on certiorari review. We affirm.

BACKGROUND

¶2 Roger Van Prooien has owned and operated the Sunset Resort on Bear Lake since the early 1950s. Although the resort was apparently successful for many years, business tapered off after 2000. By 2006, the resort was winding down; the visitor log shows only eight reservations that entire year. The business collected no sales tax in 2006, and federal tax records show it earned zero income. Wilderness Waters purchased the resort in December 2006 and began an extensive cleanup that continued into the summer.

¶3 After restoring the resort, Wilderness Waters applied to the Oneida County Planning and Zoning Committee to convert the resort to condominium ownership. The Bear Lake Protection and Rehabilitation District opposed the application under ONEIDA COUNTY ZONING AND SHORELAND PROTECTION ORDINANCE Art. 10, § 9.99(C)(2) (2009), which terminates any legal preexisting use that has been discontinued for twelve consecutive months.[1] The district asserted that "as a result of the Van Prooiens' nonuse or casual and sporadic use of their property … over an extended period of time, any grandfathered status the

[1] The ordinance is the county's codification of WIS. STAT. § 69.69(10)(a), which requires future compliance with zoning ordinances if a nonconforming use is discontinued for a period of twelve months.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

property might have enjoyed has been lost." Wilderness Waters did not present any evidence of continued use, and the zoning committee denied its conversion application.

¶4 Wilderness Waters appealed to the Board, which held an evidentiary hearing. As proof of the resort's continued use, Wilderness Waters relied on the visitor log and nine affidavits from individuals who purportedly stayed at the resort during 2006. The affidavits were materially the same, stating, "I was a guest at the Sunset Resort on Bear Lake in the Town of Hazelhurst, Wisconsin in [various months of 2006]." Steve Metz, a certified public accountant, indicated that the resort's 2006 tax records showed no business income and were inconsistent with Van Prooien's visitor log.[2] Other than deductions for taxes and licenses and a nominal amount for maintenance and repairs, the tax records do not identify any operating expenses; no deductions were taken for salaries or wages, depreciation, or advertising. The Board gave great weight to the 2006 tax returns and comparatively little weight to Wilderness Waters' exhibits. It concluded that the resort had been discontinued for the entire calendar year of 2006 and had lost its status as a legal preexisting use.

¶5 Wilderness Waters sought certiorari review in the circuit court pursuant to WIS. STAT. § 59.694(10). The circuit court determined that the Board properly weighed the evidence and reached a reasonable conclusion.

[2] Van Prooien testified at the hearing that some guests paid for their stay in kind, but it is not clear from the record how many guests paid that way, nor what they provided or the value of their service.

DISCUSSION

¶6 "On appeal from an order or judgment entered on certiorari, a reviewing court reviews the record of the agency, not the findings or judgment of the circuit court." ***FAS, LLC v. Town of Bass Lake***, 2007 WI 73, ¶8, 301 Wis. 2d 321, 733 N.W.2d 287 (citation omitted). We presume the Board's decision is valid and correct. *See* ***Klinger v. Oneida Cnty.***, 149 Wis. 2d 838, 844, 440 N.W.2d 348 (1989). Our review is limited to four components of a board's decision:

> (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 board might reasonably make the order or determination in question based on the evidence.

State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjust., 2004 WI 23, ¶14, 269 Wis. 2d 549, 676 N.W.2d 401.

¶7 Wilderness Waters asserts the Board failed to state its findings of fact or give a rationale for its decision, which, if true, would violate the third prong of certiorari review. *See* ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals of Milwaukee***, 2005 WI 117, ¶26, 284 Wis. 2d 1, 700 N.W.2d 87. However, the Board adopted lengthy findings of fact in its order denying Wilderness Waters' application.[3] Consequently, this case is not like ***Lamar***, where the board "stated in conclusory fashion that Lamar's application was denied because it did not meet

[3] That order was later reversed by the circuit court after it concluded that the Board applied the wrong legal standard to Wilderness Waters' application. However, at a subsequent hearing on remand, the Board relied on the same facts elicited at the earlier evidentiary hearing, with the exception of some brief additional testimony from Van Prooien.

various statutory criteria." ***Id.***, ¶27. The Board's order and hearing minutes make clear it was persuaded by the absence of income on the resort's 2006 tax filings. Essentially, Wilderness Waters' argument on the third certiorari prong is that the Board acted "unreasonably" by crediting the 2006 tax filings instead of other evidence, including the nine affidavits, that the resort was in continual use.

¶8 Wilderness Waters' argument in this regard wholly ignores our standard of review. "When a court on certiorari considers whether the evidence is such that the [Board] might reasonably have made the order or determination in question, the court is not called upon to weigh the evidence; certiorari is not a de novo review." ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). "A certiorari court may not substitute its view of the evidence for that of the [Board]." ***Id.***

¶9 Our inquiry is limited to whether there is substantial evidence to support the Board's decision. *See* ***id.*** Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Stacy v. Ashland Cnty. Dep't of Pub. Welfare***, 39 Wis. 2d 595, 603, 159 N.W.2d 630 (1968) (citation omitted). Our role is to evaluate the evidence found credible by the trier of fact and determine whether it is sufficient to support the Board's conclusion. *See* ***id.***

¶10 Here, the Board placed substantial weight on the resort's 2006 tax filings. Metz testified that the 2006 federal income tax return disclosed no reportable rental income, which, when coupled with the absence of a 2006 state sales tax return, suggested that either the income was being under-reported or that, more likely, the resort was a nonoperating business.

¶11 The Board also found that evidence of the resort's operation in 2006 was virtually nonexistent.[4] The resort had only eight reservations that entire year and was clearly struggling. The terse affidavits submitted by Wilderness Waters did not reveal specific dates of stay, and some of the affiants were members of the same families. No affiant appeared personally before the Board, and the absence of reported income in the tax records suggests that no guest paid to stay at the resort.

¶12 Based on the evidence before it, the Board reasonably concluded that use of the resort had been discontinued for the 2006 calendar year. Accordingly, the Board properly denied Wilderness Waters' conversion application.

By the Court.—Judgment affirmed.

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

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[4] Nonconforming uses are suspect and therefore circumscribed. ***Waukesha Cnty. v. Pewaukee Marina, Inc.***, 187 Wis. 2d 18, 522 N.W.2d 536 (Ct. App. 1994). The owner bears the burden of proving that a nonconforming use is still valid. ***Id.*** Therefore, the Board properly considered the absence of evidence supporting Wilderness Waters' position that the resort was in use during 2006.