COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP170 **Cir. Ct. No. 2008CV1041**

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

GORDON MICHAELS AND KATHY MICHAELS,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF FARMINGTON, GARY SCHREIBER, IKE ROELL, ART SEYFERT, NORBERT DETTMANN, KENT THEUSCH, CALVIN STEINERT, ELMER BELGER AND DARRYL PREE,

DEFENDANTS-RESPONDENTS,

RURAL MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Gordon and Kathy Michaels appeal from a judgment affirming the Town of Farmington Board of Zoning Appeals' (BOZA) decision denying their request for an area variance. The Michaelses argue that they were denied a fair hearing and that the Town's ordinances effectively impose a permanent moratorium on growth. They also seek attorney fees as "prevailing parties" under 42 U.S.C. § 1988 because of an earlier victory in their efforts to have BOZA consider their variance request. We reject their claims and affirm.

¶2 The Michaelses have operated a 340-acre dairy farm in the Town since the 1970s and hoped to develop or sell the land to fund their retirement. In 2005, the Town adopted a new zoning code and revised its subdivision ordinance. *See* WIS. STAT. §§ 60.22(3), 61.35 and 62.23(7) (2009-10).[1] The zoning ordinance established five-acre minimum lot sizes. The subdivision ordinance limited the number of building permits that could be issued on an annual basis.

¶3 The Michaelses sought a variance to allow them to develop their acreage into 1½-acre lots. They claimed they could not sell their farm as a working dairy farm due to a unique and unnecessary hardship, undisputed stray voltage issues, and now could not sell to a developer because of the ordinances. The Town board refused to convene BOZA,[2] the Michaelses commenced a certiorari action, and the circuit court ordered the Town to convene BOZA and allow the Michaelses a hearing. BOZA denied their appeal on the basis that their actual goal was rezoning, a matter within the purview of the Town board.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

[2] The subdivision ordinance provides that a party seeking relief from the limitation on the number of permits issued may seek a variance from the Town board.

¶4 The Michaelses successfully petitioned for a writ of mandamus to force BOZA to conduct a hearing. The court held in abeyance their motion for attorney fees pursuant to 42 U.S.C. § 1988(b). *See* ***Hartman v. Winnebago Cnty.***, 216 Wis. 2d 419, 432, 574 N.W.2d 222 (1998).

¶5 BOZA again denied the Michaelses' request for a variance. On certiorari review, the court found that the stray voltage uniquely affected and limited the Michaelses' property rights but concluded that determining "unnecessary hardship" was not possible because the board's decision was insufficient under ***Lamar Central Outdoor, Inc. v. Board of Zoning Appeals***, 2005 WI 117, ¶14, 284 Wis. 2d 1, 700 N.W.2d 87. The court thus remanded the case to BOZA and ordered it to reconvene and issue a supplemental decision stating its reasons for denying the variance.

¶6 BOZA's expanded decision clarified that the evidence indicated that the Michaelses' desire for a variance was impermissibly based solely on economic considerations. The circuit court concluded that the stray voltage problem did not qualify as an unnecessary hardship because the Michaelses still operated their dairy farm. It also concluded that BOZA ultimately proceeded on a correct theory of law, that its decision was not arbitrary, oppressive or unreasonable, and that BOZA reasonably could deny the Michaelses' variance request. The court also rejected the Michaelses' claim for attorney fees. The Michaelses appeal.

¶7 The Michaelses first assert that, as they spent six years to finally get the court-ordered hearing, it was unfair for the circuit court to allow BOZA a "do-over" to bolster its earlier insufficient decision. We disagree. For certiorari review to be meaningful, "a board must give the reviewing court something to review." ***Id.***, ¶26. The court properly remanded to the board for it to reconsider

the facts and more adequately express its reasoning on the record to allow for meaningful certiorari review. *See* ***id.***, ¶39. We turn to the merits.

¶8 Determining whether an area variance imposes unnecessary hardship turns on whether strict compliance with the restrictions would unreasonably prevent the owner from using the property for a permitted purpose or "would render conformity with [the] restrictions unnecessarily burdensome." ***State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment***, 2004 WI 23, ¶7, 269 Wis. 2d 549, 676 N.W.2d 401. Whether this standard is met in a given case depends upon the purpose of the particular restriction, its effect on the property, and how a variance would affect the neighborhood and larger public interest. ***Id.***

¶9 BOZA noted that to grant a variance to the zoning ordinance, it had to find beyond a reasonable doubt the existence of all five of the following criteria: (1) preservation of the intent of the ordinance; (2) "exceptional, extraordinary, or unusual circumstances or conditions"; (3) preservation of the property rights of others; (4) the variance request was not due to self-imposed hardship or solely on the basis of economic hardship; and (5) the absence of decrement.

¶10 BOZA found that the Michaelses proved none of the five. It found: the primary permitted use for the Michaelses' property is agricultural; granting a variance to allow over 200 residential building sites is not consistent with the primary zoning; the Michaelses continue to farm the property despite the stray voltage problem; the Michaelses' motivation was based solely on economic considerations because the evidence was that the property could be sold for less than they hoped without a variance, not that it is unsalable; granting a variance is not necessary to preserve their property rights to farm their land consistent with the rights of other owners of land zoned agricultural; and granting an area variance

is contrary to the purpose and spirit of the zoning code because it would change the area within which agriculture may be conducted and would alter the density and distribution of the Town's population.

¶11 On certiorari review, we review BOZA's decision, not the circuit court's. ***Roberts v. Manitowoc Cnty. Bd. of Adjustment***, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499. Its decision is presumptively correct and valid and our inquiry is limited to whether it: (1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) acted arbitrarily, oppressively or unreasonably and in a manner representing its will and not its judgment; and (4) might reasonably have made the determination in question based on the evidence. ***State ex rel. Ziervogel***, 269 Wis. 2d 549, ¶¶13-14. The wisdom underlying the zoning ordinance is not before us; our review is limited to whether BOZA acted in excess of its power or under error of law. *See* ***Willow Creek Ranch, L.L.C. v. Town of Shelby***, 2000 WI 56, ¶¶40-41, 235 Wis. 2d 409, 611 N.W.2d 693.

¶12 BOZA acted within its jurisdiction and proceeded, if only after judicial prompting, on a correct theory of law. The supplemental decision fleshed out BOZA's rationale, satisfying this court that it did not act arbitrarily, oppressively or unreasonably. The Michaelses have not shown that BOZA's refusal to accept their arguments reflects bias rather than a simple difference of opinion. Finally, a reasonable view of the evidence satisfies us that BOZA rationally might have made the determination it did. As we may not substitute our discretion for that committed to BOZA by the legislature, we will not disturb its findings. ***Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976).

¶13 Directing us to a Massachusetts case, the Michaelses next assert that the 2005 ordinance so severely limits growth with no sunset provision that in effect it is an unconstitutional permanent moratorium. *See* ***Zuckerman v. Town of Hadley***, 813 N.E.2d 843, 849 (Mass. 2004). There, the challenge was to a rate-of-development (ROD) bylaw enacted fifteen years earlier that, similar to the Town's subdivision ordinance, limited the number of building permits the town could issue in a year. But the ROD ordinance is not at issue here. The Michaelses never applied for a specific number of building permits over the limit.

¶14 In any event, the problem is not the absence of a sunset provision but that the Michaelses failed to demonstrate unnecessary hardship. They assert that "nothing in the record … support[s] the proposition that five-acre zoning will preserve agricultural uses any more effectively than 1- or 1½-acre zoning," and speculate that the future portends a "vista of scattered, unregulated McMansions." True or not, the burden was theirs to establish beyond a reasonable doubt that the variance they seek unreasonably restrains them from using their property for a permitted purpose or that conformity with the ordinance is unnecessarily burdensome. They did not do so.

¶15 Lastly, the Michaelses contend they are entitled to attorney fees under 42 U.S.C. § 1988(b) in this action to enforce their civil rights because, while they did not win the war, they won a battle by obtaining orders requiring a due process hearing before BOZA. *See* ***Eberle v. Dane Cnty. Bd. of Adjustment***, 227 Wis. 2d 609, 641, 595 N.W.2d 730 (1999). Whether to allow a prevailing party reasonable attorney fees is a matter within the court's discretion. ***Id.*** at 640.

¶16 The circuit court concluded that the Michaelses' procedural and substantive due process rights were not abridged. They were afforded an adequate

remedy, certiorari review, *see* ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶54, 235 Wis. 2d 610, 612 N.W.2d 59, ultimately got the hearing to which they were entitled, and did not overcome the presumption that public officers discharge their duties fairly, impartially and in accordance with law, *see* ***State ex rel. Wasilewski v. Board of School Directors***, 14 Wis. 2d 243, 266, 111 N.W.2d 198 (1961).

¶17 They also did not establish either that the 2005 ordinance is "clearly arbitrary and unreasonable," with "no substantial relation to the public health, safety, morals or general welfare," *see* ***Thorp***, 235 Wis. 2d 610, ¶45, or that they were the victim of administrative action that "shocks the conscience," *see* ***Eternalist Foundation, Inc. v. City of Platteville***, 225 Wis. 2d 759, 777, 593 N.W.2d 84 (Ct. App. 1999). The concept of public welfare embraces orderliness of community growth, land value and aesthetic objectives. ***Step Now Citizens Grp. v. Town of Utica Planning & Zoning Comm.***, 2003 WI App 109, ¶31, 264 Wis. 2d 662, 663 N.W.2d 833. The minimum-lot size ordinance bears a substantial relation to that concept. And even if the Town initially wrongly denied the Michaelses an appeal, we agree with the circuit court that the error is not so grievous as to shock the conscience. The Michaelses have not shown that the circuit court erroneously exercised its discretion in denying their bid for attorney fees. The additional authority they submitted does not persuade us otherwise.

By the Court.—Judgment affirmed.

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