COURT OF APPEALS
DECISION
DATED AND RELEASED

May 14, 1997

NOTICE

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

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

No. 95-2302

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

JOHN A. SEITZ AND PEWAUKEE MARINA, INC.,

PLAINTIFFS-APPELLANTS-
CROSS RESPONDENTS,

V.

WAUKESHA COUNTY AND WAUKESHA COUNTY PARK AND PLANNING COMMISSION,

DEFENDANTS-RESPONDENTS-
CROSS APPELLANTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. John A. Seitz and Pewaukee Marina, Inc., appeal from an order upholding a conditional use permit issued by the Waukesha County

Park and Planning Commission. The Commission cross-appeals the modifications made by the circuit court to nine of the conditions. We affirm on the appeal and affirm in part and reverse in part on the cross-appeal.

This is the third time litigation between these parties has brought an appeal before this court. *See* ***Waukesha County v. Seitz,*** 140 Wis.2d 111, 409 N.W.2d 403 (Ct. App. 1987) (***Seitz I***); ***Waukesha County v. Pewaukee Marina, Inc.,*** 187 Wis.2d 18, 522 N.W.2d 536 (Ct. App. 1994) (***Seitz II***). In ***Seitz II,*** we affirmed an order invalidating all nonconforming uses of Seitz's property. Following that appeal, Seitz applied for a conditional use permit authorizing him to maintain marina operations as well as the six residential units on his property on Pewaukee Lake.

The Commission granted the permit with thirty conditions of operation, including the razing of or modification to five residential units on the property.[1] Seitz sought certiorari review in the circuit court. The circuit court sustained the Commission's decision but modified or overturned some of the conditions imposed.

We apply the traditional common law certiorari standard of review in this case. *See* ***Edward Kraemer & Sons, Inc. v. Sauk County,*** 183 Wis.2d 1, 7, 515 N.W.2d 256, 259 (1994). Certiorari review requires us to consider one or more of the following factors: (1) whether the Commission 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 evidence was such that it might reasonably make the order or

[1] Seitz stipulated that he would abandon one of the residential units.

determination in question. *See* ***id.*** The Commission's decision is entitled to a presumption of validity, *see* ***id.*** at 8, 515 N.W.2d at 259, and we, like the circuit court, are to defer to the decision of the Commission unless that decision is "'unreasonable and or without a rational basis.... Thus, the findings of the [Commission] may not be disturbed if any reasonable view of the evidence sustains them.'" *See* ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County,*** 131 Wis.2d 101, 120, 388 N.W.2d 593, 601 (1986) (quoting ***Snyder v. Waukesha County,*** 74 Wis.2d 468, 476, 247 N.W.2d 98, 103 (1976)).

Seitz first argues that the Commission did not follow the proper procedure in granting the permit because it did not conduct a public hearing. WAUKESHA COUNTY SHORELAND AND FLOODLAND PROTECTION ORDINANCE § 3.07(3) requires that upon receipt of an application for a conditional use permit, the staff of the county zoning agency "shall establish a date for a joint public hearing by the town planning commission and the county zoning agency." Here, a joint public hearing was conducted on September 16, 1993, between the Town of Delafield Planning Commission and the County Commission. A staff member of the Commission attended the public hearing. The Commission's staff submitted a report to the Commission summarizing the content and scope of the public hearing in a paragraph. Seitz contends that a staff member may not conduct the public hearing in lieu of attendance by Commission members.

The Commission argues that Seitz has waived any objection to the manner in which the public hearing was conducted. We agree. Although Seitz did not personally appear at the public hearing, his interests were represented by a marina representative and Seitz's attorney. There was no objection at the public hearing or the three subsequent meetings held by the Commission. Seitz was provided ample opportunity to present his position at the meetings conducted by

the Commission after the hearing. He did not object to the manner in which the public hearing was conducted and waived any potential defect.[2]

Seitz contends that the conditions of the permit which require the razing of residential structures on the property are based on an incorrect theory of law and are arbitrary and capricious. Specifically, he claims that the Commission incorrectly assumed that as a result of the decision in ***Seitz II*** he had no legal right to continue the nonconforming residential uses of the property. He argues that ***Seitz I*** and ***Seitz II*** only invalidated the enlarged or expanded marina activities on the property and did not address the use of the property for residential purposes.

We reject Seitz's attempt to sever the uses to which he puts his property. In ***Seitz I*** we noted that Seitz was engaged in cottage rentals and that Waukesha County's "piecemealing" of Seitz's activities on the property was unrealistic. *See* ***Seitz I***, 140 Wis.2d at 116, 409 N.W.2d at 406. There, Seitz benefited from the acknowledgment that the marina activities related to the cottage rental and "gave the enterprise its true resort and marina flavor." *See* ***id.*** He cannot not now try to break away some of those activities. *See* ***Godfrey Co. v. Lopardo***, 164 Wis.2d 352, 363, 474 N.W.2d 786, 790 (Ct. App. 1991) (judicial estoppel prohibits a party from asserting in litigation a position that is contrary to, or inconsistent with, a position asserted previously in the litigation by that party).

In ***Seitz II***, we affirmed the circuit court's order that "former nonconforming use status for each and every activity conducted on [Seitz's property] are terminated." Our decision specifically addressed whether the illegal expansion of a nonconforming use could invalidate the prior legal nonconforming

[2] In his reply brief, Seitz does not respond to the Commission's assertion of waiver.

use as well. *See* ***Seitz II***, 187 Wis.2d at 30, 522 N.W.2d at 541. We held that all legal nonconforming uses would be invalidated by an illegal change and that such a remedy is consistent with the policy fostering the eventual elimination of the nonconforming use. *See* ***id.*** at 31, 522 N.W.2d at 542.

Seitz's appeal in ***Seitz II*** only focused on saving the marina activities. Seitz did not challenge the loss of the nonconforming residential uses which were part and parcel of the enterprise. We conclude that he has waived the right to challenge the invalidation of nonconforming residential uses. ***Seitz II*** has become the law of the case with respect to the loss of all nonconforming uses of the property. *See* ***State ex rel. Blackdeer v. Township of Levis***, 176 Wis.2d 252, 261, 500 N.W.2d 339, 342 (Ct. App. 1993) ("It is axiomatic that 'a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'") (quoted source omitted).

We turn to consider whether the condition requiring the destruction or removal of residential buildings on Seitz's property is arbitrary or unreasonable. We reject at the outset Seitz's contention that the Commission failed to consider the criteria which establish a basis for considering an application for a conditional use permit. Although the Commission's ultimate determination may not have expressed consideration of the appropriate factors, the record establishes that the Commission was apprised of the circumstances and gave all deliberation due the decision regarding Seitz's use of his property. The Commission was circumspect in trying to give Seitz uses that would permit a viable business enterprise (in a residential zone) and still satisfy its concerns over the intensity of use of the property.

Seitz's principal claim regarding the razing of buildings is that the Commission did not consider the economic impact, or the "obvious economic waste," caused by such requirements. He contends that the requirements are vindictive. We conclude that the conditions are reasonably related to the proper goal of regulating use of the property. The conditions regarding the residential structure were based on overuse of the property and a desire to bring the floor area ratio in line with the property's residential zoning.

We will not attribute a sinister motive to the conditions imposed. Indeed, ***Seitz I*** and ***Seitz II*** acknowledged that the illegal expansion of a nonconforming use would invalidate such use. It follows that the illegal expansion is done at the owner's risk and that he or she should bear the burdens of corrective measures. It is not the obligation of the Commission to avoid economic hardship which is self-created. *See* ***Snyder,*** 74 Wis.2d at 476, 247 N.W.2d at 103 ("Any hardship or practical difficulty claimed by appellant relating to the removal of the substantially completed porch is self-created, and as such cannot qualify as a basis for a grant of a variance."). We affirm the circuit court's refusal to invalidate the conditions relating to the residential structures.

On the Commission's cross-appeal, we will review in sequence the conditions of the permit which the circuit court either modified or remanded to the Commission for further consideration. There are nine in all. The standard of review is whether the conditions imposed are reasonable. *See* ***Delta Biological Resources, Inc. v. Board of Zoning Appeals***, 160 Wis.2d 905, 910, 467 N.W.2d 164, 166 (Ct. App. 1991). It is for the zoning authority, not the courts, to determine the weight to be accorded the facts surrounding an application for a conditional use permit. *See* ***id.*** at 915, 467 N.W.2d at 168. A reviewing court may

not substitute its discretion for that committed to the zoning authority. *See* ***Snyder,*** 74 Wis.2d at 476, 247 N.W.2d at 103.

Condition 6F permits a vending machine for the sale of ice only. The circuit court modified that condition to permit "at least one vending machine which may sell ice, soft drinks, or snacks or packaged foods" and remanded the condition to the Commission for further consideration of whether more than one machine is reasonable. The circuit court opined that two to four vending machines is reasonable. We sustain the circuit court's action. The use of a vending machine for sale of items other than ice is not related to density of use. Because the sale of soft drinks, snacks or packaged foods is a permitted use under the permit and people would be coming to the marina for those items anyway, it does not matter whether sales are by vending machine or otherwise. The vending machine restriction is not supported by the record. The Commission should reconsider whether more than one vending machine should be allowed.

Condition 8B requires boat and trailer storage and parking stalls to be at least ten feet from the east property line or that a variance be sought if parking is to be closer. On the ground that the restaurant next door is allowed to have parking up to the lot line, the circuit court modified this condition to permit parking up to the east line and remanded it to the Commission for a determination as to whether any screening is needed at the line. The record reflects that before the Commission, Seitz did not object to the parking condition or to the need to

apply for variance to park closer than ten feet.[3] He waived any objection and the circuit court should not have addressed the unobjected to condition. We reverse the circuit court's modification of condition 8B.

Conditions 9 and 12 restrict boat storage during the boating season and off-season. The circuit court remanded these conditions for further consideration by the Commission in terms of the size of boats and available stacking methods of storage to fit several boats in the place of one boat. The Commission was also directed to consider increasing permitted storage during the winter months when activity at the marina would be less intense. We reverse the circuit court's determination on these conditions. The real concern of the Commission was intensity of use of Seitz's property. The number of boats, regardless of size, is directly related to intensity of use. In focusing on the size of boats and how that may allow for higher numbers, the circuit court was merely substituting its judgment for that of the Commission.

Condition 9C forbids the commercial cleaning of boats at the marina. Concluding that such activity, as it pertains to boats stored at the marina, did not increase intensity of use, the circuit court modified the condition to permit the commercial cleaning of boats launched or stored at the marina and the owner's

[3] The minutes of March 29, 1994, reflect the seriatim objections made by Seitz through his attorney. The final vote on the conditions was had at the April 7, 1994 Commission meeting. Neither before the circuit court nor in his cross-respondent's brief does Seitz dispute the Commission's assertion that there was no objection to this condition. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (respondents cannot complain if propositions of appellants are taken as confessed which respondents do not undertake to refute).

boats. Seitz did not object to this condition before the Commission.[4] Any objection is waived. We reverse the circuit court's modification.

Condition 19 limits boat engine repair to only those boats owned by the marina. The circuit court found the condition unreasonable and remanded it to the Commission for consideration of restrictions on hours, decibel levels, types of repairs, and equipment used rather than a total ban on repair services. We reverse the circuit court's determination. The Commission is the body vested with authority to determine the manner of restricting nonconforming uses. The circuit court's determination that perhaps time, decibel and manner restrictions would be less intrusive on the marina's business is merely a substitution of judgment as to reasonableness.

Condition 21 bans live or amplified music on the property. The circuit court found this to be an arbitrary condition and remanded it to the Commission for consideration of decibel level or hour restrictions instead of a total ban. As with the engine repair ban, the circuit court has substituted its judgment as to a reasonable manner of limiting the nonconforming use. We reverse the circuit court's determination with respect to the ban in condition 21.

Condition 24 forbids any other activity on the property not specifically authorized under other conditions, including group picnics, parties and fishing tournaments. The circuit court concluded that the condition was too broad to be reasonable. It modified the condition to permit activities "which are an expected and necessary incident to activities which are permitted." The condition was remanded to the Commission to develop specific guidelines limiting events

[4] See *supra* n.3.

and gatherings at the property, if the Commission desired to do so. Again, Seitz raised no objection before the Commission about this condition.[5] Any objection was waived. We reverse the circuit court's modification of this condition in the face of Seitz's waiver.

Condition 28 provides that the conditional use permit is not transferable to another owner. The circuit court vacated this condition as unreasonable. We affirm the circuit court on this point. The permit is transferable as a matter of law. The Commission acknowledges this but contends that Seitz's "extensive history" toward zoning violations on this property justifies a condition tied to ownership. The Commission's concern regarding Seitz's unwillingness to abide by the conditions imposed does not justify creating an impediment to sale by requiring a new conditional use permit. A new owner would not have the "extensive history" which would suggest any need to reexamine the conditions by an application for a new conditional use permit.[6] A condition tied to ownership is arbitrary and an oppressive exercise of the Commission's will rather than its judgment.

In conclusion, we affirm the circuit court's order on the issues raised in Seitz's appeal. We affirm in part and reverse in part on the Commission's cross-appeal. This means that under the affirmed portions of the circuit court's order, condition 6F is modified and remanded to the Commission for further

[5] See *supra* n.3.

[6] Indeed, as the Commission suggests, under new ownership many of the conditions may be waived.

action in accordance with the circuit court's order and condition 28 is vacated.[7] No costs will be awarded to either party.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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

[7] The circuit court's modification to conditions 9B, 14 and 16C have not been challenged in this appeal and stand as made.