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SUPREME COURT OF WISCONSIN

Eagle Cove Camp & Conference
Center, Inc., Arthur G. Jaros, Jr.,
Wesley A. Jaros and Randall S.
Jaros,

Appeal No.
2022AP001069

Plaintiffs-Appellants,

v.

Oneida County Board of
Adjustment,

Defendant-Respondent,

County of Oneida,

Defendant.

**DEFENDANT-RESPONDENT'S RESPONSE
TO PETITION FOR REVIEW**

**From Court of Appeals District III Decision Affirming
Order Dated 05/23/2022, Oneida County Circuit Court,
Case No. 2013-CV-345, Hon. Michael H. Bloom, Presiding**

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INTRODUCTION

The Oneida County Board of Adjustment (the “Board” or “Board of Adjustment”) opposes the petition for review,¹ and submits this response in opposition to the petition for review filed by Plaintiffs-Appellants Eagle Cove Camp & Conference Center, Inc., Arthur G. Jaros, Jr., Wesley A. Jaros, and Randall S. Jaros. (They are referred to collectively as “Eagle Cove.”)

This case is a certiorari action appealing from the decision of the Board of Adjustment issued in 2009 affirming the denial of Eagle Cove’s application for a conditional use permit (“CUP”) for its proposed year-round recreational Bible camp. The CUP was denied because recreational camps are not permitted uses in the zoning districts where the property is located, Zoning Districts 2 and 4 under the Oneida County Zoning and Shoreland Protection Ordinance (“OCZSPO”).

The Board of Adjustment affirmed the County’s denial of the CUP because recreational camps are not permitted in these districts, and because the proposed camp does not fall within other use categories that are permitted in these districts, such as schools or churches. The Board of Adjustment also held that the County zoning ordinance does not violate the Federal Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”) and an exemption to the ordinance is not justified based upon RLUIPA. Eagle Cove did not challenge these two

¹ The petition for review is cited herein as “Petition at ____.” The page number cites to the petition for review refer to the system-printed page numbers at the top right corner of each page of the document.

determinations on appeal to the Court of Appeals. Court of Appeals Decision (“Decision”) ¶ 20.

Because this is a certiorari action, this appeal reviews only the decision of the Board of Adjustment – not the decision of the circuit court (or the decision of the Court of Appeals). The Board’s CUP determination is reviewed under a highly deferential standard of review, being considered under the narrow certiorari factors. Eagle Cove challenged the decision, asserting that the Board proceeded under an incorrect theory of law. The Court of Appeals affirmed the denial of certiorari relief under the limited issues available under certiorari review.

Eagle Cove asks the Court to grant review to decide numerous issues of federal constitutional law² and Wisconsin constitutional law. It argues that this appeal presents questions of federal and Wisconsin constitutional law that are in conflict with controlling case law, and that this Court should grant review to develop the meaning and application of the “no preference clause” in Article I, § 18 of the Wisconsin Constitution. However, as shown below, this appeal simply represents a run-of-the-mill application of county zoning ordinances to a requested land use, where the proposed use is admittedly not permitted in the zoning districts encompassing the property.

The petition for review should be denied because this case does not merit Supreme Court review, especially considering that the Court of Appeals decision is per curiam,

² In fact, the issues identified in the petition for review do not raise questions of the U.S. Constitution.

the limited scope of certiorari review, and that the Court of Appeals decision properly affirmed the decision of the Board of Adjustment issued 14 years ago, followed by years of litigation in the federal and state courts challenging the constitutionality of the Board's decision.

The petition for review does not demonstrate that this case is appropriate for Supreme Court review. As it has all along, Eagle Cove once again disagrees with the Court of Appeals' ultimate decision and its reasoning. However, this Court is not an error-correcting court. *Cook v. Cook*, 208 Wis. 2d 166, 188–89, 560 N.W.2d 246 (1997). The petition should be denied because it does not set forth any proper basis for review. Rather, Eagle Cove merely seeks another round of appeals for the issues that it has been litigating for 13 years in the federal and state courts. The petition for review should be denied. Eagle Cove raised no issues on appeal to overcome the strong presumption of correctness of the Board of Adjustment's decision affirming the denial of the CUP application or to establish the narrow factors at issue on certiorari review.

STANDARD OF REVIEW

The procedural posture of this case and the applicable standard of review should first be considered. Here, they strongly weigh against Supreme Court review. The review of the Board of Adjustment's affirmance of the denial of the CUP to Eagle Cove is afforded highly deferential review.

In this certiorari action, the Court reviews the Board's decision – not the decision of the circuit court (or the Court of Appeals). *State ex rel. Earney v. Buffalo Cnty. Bd. of*

Adjustment, 2016 WI App 66, ¶ 10, 371 Wis. 2d 505, 512, 885 N.W.2d 167 (“On appeal from a circuit court’s decision in an action for certiorari review of a board’s decision, we review the decision of the board, not that of the circuit court.”); *Roberts v. Manitowoc Cnty. Bd. of Adjustment*, 2006 WI App 169, ¶ 10, 295 Wis. 2d 522, 529, 721 N.W.2d 499 (“On appeal, we review the Board’s decision, not the decision of the circuit court.”).³

Further, “[t]he standard of review . . . from the decision of a board of adjustment is highly deferential, and the scope of appellate review is quite narrow.” *See State ex rel. City of Waukesha v. City of Waukesha Bd. of Rev.*, 2021 WI 89, ¶ 19, 399 Wis. 2d 696, 967 N.W.2d 460. The decision of the Board of Adjustment is afforded a presumption of correctness and validity, and the party appealing the Board’s decision must overcome that presumption. *Ottman v. Town of Primrose*, 2011 WI 18, ¶¶ 48, 50, 332 Wis. 2d 3, 796 N.W.2d 411; *Earney*, 371 Wis. 2d 505, ¶10; *see also Roberts*, 2006 WI App 169, ¶ 10 (“The decision to grant a conditional use permit is discretionary; we hesitate to interfere with administrative decisions and we will not substitute our discretion for that of the Board.”).

The scope of the Court’s certiorari review is narrowly defined. In the circuit court and on appeal, the scope of certiorari review is limited to: “(1) whether the Board kept

³ *See also Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶ 42, 362 Wis. 2d 290, 865 N.W.2d 162 (“We do not review the judgment or findings of the circuit court but rather we review the record of the City to whom certiorari is directed.”).

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 determination in question.” *Ottman*, 2011 WI 18, ¶ 47; *Earney*, 2016 WI App 66, ¶ 10; *see also Kapischke v. County of Walworth*, 226 Wis. 2d 320, 327-28, 595 N.W.2d 42 (1999).

In this action, Eagle Cove argues that the Board’s decision proceeded on an incorrect theory of law. The other certiorari factors are not raised here.

**PETITIONER’S STATED ISSUES DO NOT MERIT
SUPREME COURT REVIEW**

As noted, Eagle Cove did not appeal the only questions the Board decided: (1) that the proposed use -- a year-round recreational camp -- is not a permitted use in the zoning districts; and (2) that the zoning ordinance does not violate RLULPA and an exemption from the ordinance is not justified. Eagle Cove fails to identify other issues in this certiorari action that require consideration by this Court and that merit Supreme Court review. Fundamentally, Eagle Cove disagrees with the decision of the Court of Appeals and argues that it should have ruled in its favor. However, that does not provide a basis for Supreme Court review.

The Board of Adjustment briefly responds to the five issues raised in the petition for review. As shown below, none of them merit this Court’s review. The shotgun approach of the petition for review fails to identify any issues

in this case upon which the Supreme Court should be called to speak or provide guidance.

I. Issue 1 Does Not Provide a Basis for Supreme Court Review.

Eagle Cove's Issue 1 is not one that arises from the decision of the Board of Adjustment and does not set forth that the Board denied the CUP under an incorrect theory of law. Rather, Eagle Cove merely takes issue with passing reasoning of the Court of Appeals, Decision ¶¶ 35-36. That portion of the Court of Appeals decision simply applies established case law that generally applicable laws such as zoning laws are "normally acceptable" under the Wisconsin Constitution, Article 1, § 18, and the zoning ordinance at issue here qualifies as normally acceptable. The zoning regulations do not seek to inhibit Eagle Cove's religious activity; rather, they merely encourage an area of quiet seclusion for residents.

Eagle Cove argues that strict scrutiny must be applied to the facially neutral zoning ordinance, but the Board of Adjustment did not apply strict scrutiny. Petition at 30. However, as the parties agreed before the Board's decision, the Board of Adjustment had no authority to determine the constitutionality of the zoning ordinances. Decision ¶ 29. Therefore, it had no basis to apply strict scrutiny since it was not determining the constitutionality of the zoning ordinance. Moreover, strict scrutiny was not argued to the Board of Adjustment.

Additionally, as noted by the Court of Appeals, Eagle Cove failed to argue Wisconsin Constitution, Art. 1, § 18

before the Board of Adjustment and also failed to argue this issue before the circuit court within its certiorari review claim. Decision ¶ 30. The certiorari brief contained no mention of Art. 1, § 18. *See* R.235.

Notably, in the federal court litigation challenging the Board of Adjustment's decision, Eagle Cove did raise the Wisconsin Constitution, Art. 1, § 18. Decision ¶ 31. Eagle Cove argued that the protection afforded under the Wisconsin Constitution is greater than that offered under federal law. *Eagle Cove Camp & Conf. Ctr., Inc. v. Town of Woodboro (Eagle Cove I)*, 734 F.3d 673, 683 (7th Cir. 2013). Eagle Cove then brought the same or similar claims before the state courts by adding constitutional claims to its amended complaint in this action. Affirming the circuit court's dismissal, the Court of Appeals held that such claims were all barred by claim preclusion and the proceedings in this state court action are limited to the certiorari claim. *Eagle Cove Camp v. County of Oneida (Eagle Cove II)*, No. 2018AP940, 2019 WL 6121352, ¶¶ 2-4 (WI App Nov. 19, 2019).

Accordingly, the Court of Appeals held that in this certiorari action, it would not independently address Art. 1, § 18 of the Wisconsin Constitution. Decision ¶ 32.

As the court explained:

At the very least, this issue was one that might have been litigated in the prior proceedings. *See Teske*, 387 Wis. 2d 213, ¶ 23. Thus, this claim was properly dismissed on claim preclusion grounds. It is not appropriate for Eagle Cove to now attempt to advance this argument again—or to develop a differently nuanced constitutional argument—under the certiorari

review umbrella where the argument was already denied on the merits. Furthermore, the record before us is not sufficient to enable a facial constitutional review of this issue, and it is not appropriate, at this juncture of the proceedings, to provide Eagle Cove another opportunity to do so.

Decision ¶ 32.

Further, the Court of Appeals considered the issue and held that the argument fails. Eagle Cove's claim of violation of free exercise of religion has no merit for several reasons. First, Eagle Cove is not being prohibited from using its land to advance its religious beliefs – a church or parochial school would be an allowed conditional use in Zoning Districts 2 and 4. The general zoning laws generally applicable to all County residents would qualify as “normally acceptable” under the Wisconsin Constitution, Art. 1, § 18. The zoning ordinances here do not seek to inhibit Eagle Cove's religious activity but rather to encourage quiet seclusion for families. Decision ¶¶ 35, 36.

Issue 1 does not present any aspect of this case that requires Supreme Court review. The Wisconsin Constitution issue is barred by claim preclusion and is not properly considered in this certiorari action under the limited scope of review.

II. Issue 2 Does Not Provide a Basis for Supreme Court Review.

Issue 2 also does not present an issue that merits Supreme Court review. This issue is unclear and does not point to any aspect of the Board of Adjustment's decision that can be set aside under the deferential certiorari review. Eagle

Cove argues that the certiorari proceeding has completely and totally interfered with its religious beliefs upon which it seeks to operate a year-round recreational Bible camp. Petition at 31-32. It argues that it is impermissible for the Wisconsin courts to dictate the manner in which religious persons and organizations may or may not practice their religion.

This does not provide a basis meriting Supreme Court review given the narrow issues at hand in a certiorari action. As noted on Issue 1, the claim under the Wisconsin Constitution, Art. 1, § 18 is barred by claim preclusion and cannot be raised in this certiorari action. As held in *Eagle Cove II*, the claims under the federal and Wisconsin Constitution are barred by claim preclusion. The determination did not distinguish between facial and as-applied challenges – both could and should have been raised in the federal litigation and are now precluded. Further, as the Court of Appeals held, the certiorari claim cannot be used to re-argue the constitutional claims arising from the denial of the CUP where such claims have already been denied on the merits.

The Seventh Circuit held that the zoning ordinance passes strict scrutiny. Under that standard, the regulation must be necessary to serve a compelling state interest and be narrowly drawn to serve that interest. Oneida County has a compelling state interest in preserving the rural nature around Squash Lake by a neutral zoning ordinance, which is the least restrictive means. *Eagle Cove I*, 734 F.3d at 683. It therefore passes strict scrutiny.

III. Issue 3 Does Not Provide a Basis for Supreme Court Review.

Similarly, Issue 3 does not merit Supreme Court review. Under this issue, Eagle Cove again attempts to assert a claim under the Wisconsin Constitution's "no preference" clause, Wisconsin Constitution Art. 1, § 18. Eagle Cove argues that year-round Bible camps having a single structure are prohibited from the entire County and that this violates Wisconsin Constitution Art. 1, § 18. Petition at 33.

However, this issue is not properly preserved and presented in this action. As the Court of Appeals noted, it was never decided or determined by the Board of Adjustment that any recreational camps with one principal structure are either allowed or prohibited anywhere in Oneida County. Decision ¶ 24. Further, it was not determined by the Board that Eagle Cove's specific proposed camp was prohibited in all zoning districts in the County, and it was never determined that the Bible camp was a recreational camp with only one principal structure. Moreover, the court questioned whether the proposed camp would be considered to have just one structure, given that it has a large lodge, outdoor tent camping sites, and a visitor center/service building. Decision ¶ 24. None of these questions were answered by the Board for purposes of certiorari review. Thus, these questions are not available on appeal.

On the contrary, the question before the Board of Adjustment was whether Eagle Cove's proposed use was allowed on specific property, and the Board determined only that it was not a use allowed as a permitted or conditional use

on the specific parcel of property, located in Zoning Districts 2 and 4. Decision ¶ 25.

Accordingly, since Issue 3 was not determined by the Board of Adjustment, it provides no basis for Supreme Court review.

IV. Issue 4 Does Not Provide a Basis for Supreme Court Review.

Issue 4 also does not provide a basis for Supreme Court review. Under this issue, Eagle Cove argues that the Board of Adjustment improperly “truncated” its review proceeding, denying it procedural due process. This issue is not an available one that can be raised in this certiorari action appealing from the Board’s denial of the CUP. First, this issue was not raised before the Board of Adjustment. Second, it was not raised in the circuit court on certiorari review. Finally, in the Court of Appeals it was asserted for the first time in its reply brief on appeal. Petition at 23, 34. An argument cannot be raised for the first time in reply.⁴

As noted, the Board of Adjustment affirmed the denial of the CUP for the proposed year-round Bible camp and reached that decision after deciding the two questions discussed at page 4, above. Eagle Cove did not challenge the nature of this determination before the Board. Indeed, in its brief to the Board, Eagle Cove agreed that a “recreation

⁴ “[W]e do not consider matters argued for the first time in a reply brief because that precludes the respondent from being able to address those arguments.” *Techworks, LLC v. Wille*, 2009 WI App 101, ¶ 28, 318 Wis. 2d 488, 770 N.W.2d 727 (“A developed argument and supporting citations must be in an appellant’s main brief.”).

camp” is not a conditional use in Zoning Districts 2 or 4 and if the proposed use is found by the Board to be a recreation camp, then there would be no need for further proceedings on the CUP application. *See* R.197—80, 81.

In Issue 4, Eagle Cove argues that by the Board’s deciding just the two questions, Eagle Cove was denied the opportunity to be heard on OCZSPO Section 9.20.F. and the total-exclusion-unconstitutionality-under-state-law argument. Petition at 34. As noted above, Eagle Cove agreed that the determination of the recreational camp question was dispositive and if it was determined to be such a camp, no further proceedings on the CUP would be necessary. Thus, Eagle Cove agreed to the questions to be decided and did not argue to the Board of Adjustment that further questions must be determined after determination of the two questions. Additionally, as noted under Issue 3, the Board of Adjustment only reviewed the denial of a CUP for the Bible camp on the specific parcel of property. It did not have before it the question of placement of the proposed camp on other properties in the County.

Thus, Issue 4 is not properly preserved or presented for review in this case and it is not a proper issue for Supreme Court review.

V. Issue 5 Does Not Provide a Basis for Supreme Court Review.

Issue 5 is a sub-issue arising from Eagle Cove’s argument that OCZSPO Section 9.20.F. permitted the Board of Adjustment to allow the proposed year-round camp as an unclassified or unspecified use, upon a showing of

compatibility with the uses listed for the zoning district in which the land is located. As the Court of Appeals held, Eagle Cove did not demonstrate that the Board of Adjustment was required to consider the proposed use under OCZSPO Section 9.20.F. as an unclassified or unspecified use. Decision ¶ 39. Further, the court reasoned, the certiorari record does not provide support for application of Section 9.20.F. in favor of Eagle Cove. The County staff report specifically stated it could not recommend that the proposed year-round camp would be compatible with the purposes stated in Section 9.22.A. for residential Zoning District 2. Decision ¶ 41.

As OCZSPO Section 9.22.A. explains: “The purpose of the Single Family Residential District is to provide an area of quiet seclusion for families. This is the county’s most restrictive residential zoning classification. Motor vehicle traffic should be infrequent and people few.” R.218-2: 24. Thus, the proposed camp, serving 350 people with a train, was not compatible with an area of quiet seclusion for families, where motor vehicle traffic should be infrequent and people few.

In its argument under OCZSPO 9.20.F., Eagle Cove is thus asking the Court to reweigh the evidence to reach a different conclusion than that reached by the County decisionmakers. Decision ¶ 42. However, reweighing the evidence is improper under the highly deferential certiorari standard of review, under which the Board’s decision is presumed correct and valid. As the Court of Appeals held: “The Board could reasonably conclude that Eagle Cove’s

proposed use was not compatible with the allowed uses in zoning Districts 2 and 4.” Decision ¶ 42.

Thus, Issue 5 does not merit Supreme Court review. The Court of Appeals properly applied the controlling standard of review and certiorari factors, and correctly declined to reweigh the evidence and applied the presumption that the Board’s decision is correct. Further, Eagle Cove has failed to show that the Board of Adjustment’s decision must be overturned upon certiorari review for failing to approve the use as an unclassified use under OCZSPO Section 9.20.F.

Eagle Cove argues that under a proper application of OCZSPO Section 9.20.F. and Section 9.22, the Board was required to specifically compare the proposed use to all the permitted uses in the residential district, and it was insufficient to simply conclude that the proposed use is contrary to the purpose of the residential zoning district (to provide a quiet area with limited traffic and few people). Eagle Cove suggests that this runs afoul of the principle that a specific statute (here, ordinance) controls over a general statute. Petition at 36. That assertion is incorrect. The referenced rule of construction actually holds that a specific statute should be harmonized with a general statute, and, if there is a conflict between the two statutes, the specific statute controls. *State v. Amato*, 126 Wis. 2d 212, 217, 376 N.W.2d 75, 78 (Ct. App. 1985).

The Board’s decision in this case follows the rules of construction. Here, OCZSPO Section 9.22 provides the approved residential uses in Zoning District 2, first stating the purpose of the district, and then identifying permitted,

conditional, and administrative uses. The Board of Adjustment could properly find that the proposed use would be inconsistent with the overall purposes of Zoning District 2, and it is not otherwise a permitted or conditional use. This analysis is consistent with controlling rules of construction.

This appeal simply involves the straightforward application of a county zoning ordinance to a particular set of facts. Under the deference afforded the Board of Adjustment's determination, there is no basis to set it aside, and this mundane application of law to facts does not give rise to an issue meriting Supreme Court review.

CONCLUSION

Plaintiff-Appellant's petition for review should be denied.

Dated this 19th day of January, 2024

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ATTORNEY CERTIFICATION

I hereby certify that this response conforms to the rules for a response to a petition for review contained in Wis. Stat. § 809.62(3) and (4) and Wis. Stat. § 809.19(8)(b), (bm), and (8g). The length of this response is 3,787 words.

Dated this 19th day of January, 2024.

Electronically signed by

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