STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0095

Scott Tompkins,
Appellant,

vs.

Lake County,
Respondent.

Filed January 13, 2009
Affirmed
Lansing, Judge

Lake County District Court
File Nos. 38-CV-06-236, 38-CV-07-128

Patrick Dinneen, 5554 Highway 61, Silver Bay, MN 55614 (for appellant)

James R. Andreen, Erstad & Riemer, P.A., Suite 200, 8009 - 34th Avenue South, Minneapolis, MN 55431 (for respondent)

Considered and decided by Lansing, Presiding Judge; Klaphake, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

Lake County's planning-and-zoning administrator ordered Scott Tompkins to cease and desist structural repair to a nonconforming structure located on his lakefront property. The Lake County Board of Adjustment twice denied Tompkins's appeal, and

the district court affirmed the denial. In this appeal, Tompkins questions the scope of the cease-and-desist order, argues that his construction complies with the county's land-use ordinance, asserts that Minn. Stat. § 394.36 (2008) permits repair to the cabin, and requests reversal for errors in the board's administrative procedures. Because the evidence supports the board's determination and Tompkins has not demonstrated either a reversible error of law or procedure, we affirm.

F A C T S

This appeal arises from Lake County's interpretation and enforcement of the sections of its land-use ordinance that apply to alteration of nonconforming structures. Scott Tompkins owns approximately two acres of property in Lake County on the north shore of Lake Superior. The property was formerly operated as a resort and restaurant, and seven structures remain on the property. Under the Lake County Comprehensive Plan and Land Use Ordinance, the property is zoned "Resort Commercial."

After Tompkins purchased the property in 2003, he began making improvements to a cabin on the property that is referred to in hearing exhibits as "building #1." Based on reports of construction without a permit, Lake County's planning-and-zoning administrator visited Tompkins's property and determined that the improvements he was making to building #1 violated the county's land-use ordinance. The administrator issued Tompkins a cease-and-desist order. Tompkins appealed the order to the Lake County Board of Adjustment. The board held a hearing and affirmed the cease-and-desist order in February 2006. Tompkins appealed the board's decision to the district court in March 2006.

While the appeal was pending with the district court, Tompkins requested that the administrator reconsider his decision to issue the cease-and-desist order based on a 2006 amendment to Minnesota Statutes chapter 394. The administrator determined that the 2006 amendment did not affect the validity of the cease-and-desist order. Tompkins appealed, and, following a hearing, the board affirmed the administrator's second determination. Tompkins filed an appeal with the district court in February 2007 to challenge the board's second determination, and the district court consolidated Tompkins's two appeals.

The district court affirmed both of the board's determinations in November 2007. Tompkins filed a motion for amended findings, and the district court denied the motion in January 2008. In this appeal from the district court's November 2007 order, Tompkins challenges the board's decisions to affirm the cease-and-desist order.

D E C I S I O N

Minnesota law provides a landowner the right to appeal a decision made by a board of adjustment to the district court in the county in which the land is located. Minn. Stat. § 394.27, subd. 9 (2008). On appeal from the district court's order, we independently review the board's decision. *Town of Grant v. Washington County*, 319 N.W.2d 713, 717 (Minn. 1982); *see also Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006) (noting that review involves independent examination of record and conclusions). We will sustain the board's decision unless the board exceeds its jurisdiction; proceeds on a mistake of law; makes a decision that is not

reasonably supported by the evidence; or acts arbitrarily, oppressively, or unreasonably. *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008).

Tompkins essentially raises four issues: he questions the scope of the cease-and-desist order; argues that the construction complies with the county's land-use ordinance, asserts that Minn. Stat. § 394.36 permits repair to the cabin, and requests reversal for errors in the board's administrative procedures. We address each of these issues.

I

Tompkins challenges the validity of the cease-and-desist order based on over-breadth. He contends that the order affirmed by the board applies a blanket prohibition that unjustifiably limits construction on all buildings on the property rather than applying only to building #1.

Under the Lake County Land Use Ordinance, the land-use administrator is authorized to "issue cease and desist orders requiring the cessation of any building, moving, alteration or use which is in violation of the provisions of [the] [o]rdinance." Lake County, Minn., Land Use Ordinance § 29.01(B) (2004). The cease-and-desist order issued in this case identified only one specific violation of the ordinance. It noted that Tompkins had added "a foundation to a structure that was previously held up by a [fifty-five-] gallon drum." From the other documents in the record, it is clear that the structure referred to in this sentence is building #1.

Because the cease-and-desist order specifies only the ordinance violation in the construction on the foundation to building #1, we interpret the order as applying only to building #1. We read the remainder of the cease-and-desist order as an indication that

Tompkins may reasonably anticipate that the land-use administrator will initiate future enforcement actions for comparable modifications on similarly situated structures or for other violations of the Lake County Land Use Ordinance.

II

Tompkins's second argument is that the cease-and-desist order is invalid because the improvements he made to building #1 did not violate the county's land-use ordinance. The Lake County Land Use Ordinance requires that structures be set back forty feet from the vegetation line on Lake Superior. Lake County, Minn., Land Use Ordinance § 7.03 (2004).

It is undisputed that Tompkins's building #1 is not set back forty feet from the vegetation line of Lake Superior. In general, structures that do not conform to this setback provision may continue, under specified conditions, to be used and occupied if they were built before the provision was enacted. Lake County, Minn., Land Use Ordinance § 27.00(B), (C) (2004). It is also undisputed that building #1 was erected before the setback provision was enacted and, therefore, the building may continue to be used and occupied.

But, in an effort "to regulate nonconformities, lessen their impact and provide for their gradual elimination where reasonable," the county places significant restrictions on a landowner's ability to alter these nonconforming structures. *Id.* (A) (2004). Article 27.0 of the ordinance generally prohibits structural alterations but sets forth a few, specific exceptions. Section 27.00(E) (2004) provides that "[o]nly structural alterations required by law and any nonstructural repairs and incidental alterations for normal

maintenance may be made on any nonconforming structure." And the subsequent sections allow a few other specifically delineated exceptions. Lake County, Minn., Land Use Ordinance §§ 27.01-.04 (2004).

Tompkins does not dispute that the improvements he made to building #1 constitute "structural alterations." Tompkins contends instead that, if the improvements are structural alterations, they are permissible under three of the specifically delineated exceptions to the general prohibition on structural alterations. He asserts that the improvements are permissible under section 27.00(E) because they are "required by law"; that the improvements are permissible because they meet the requirements for improving "structural nonconformities" under section 27.02(B); and that the improvements are permissible because they meet the requirements for "residential alterations" under section 27.01(B). None of these three arguments withstands analysis.

First, Tompkins has not demonstrated that the improvements he made are required by law as provided in section 27.00(E). Tompkins argues that the improvements are required by law because, if he did not make the improvements, he would be exposed to liability under the attractive-nuisance doctrine. *See Croaker v. Mackenhausen*, 592 N.W.2d 857, 860 (Minn. 1999) (discussing attractive-nuisance doctrine, which imposes liability for physical harm to children trespassing on land). Tompkins's argument that the risk of civil liability equates to "required by law" is tenuous on its face. But whether or not the argument is viable, Tompkins has not demonstrated that the *only* way for him to avoid liability is to make the otherwise prohibited structural improvements. Thus, Tompkins has not shown that the improvements he made are required by law.

Second, Tompkins argues that the improvements are permissible under the exceptions for structural nonconformities listed in section 27.02(B). Although section 27.02(B) allows structural alterations to some nonconforming structures that are not within the general setback requirement, it specifically provides that "[n]o intrusion shall be allowed closer than . . . forty (40) feet from the vegetation line on Lake Superior."

It is undisputed that Tompkins's structural alterations are occurring closer than forty feet from the vegetation line on Lake Superior. Photographs in the record show that Tompkins installed beams and other braces underneath building #1 and that the installed braces make contact with the ground where there had previously been no contact. The land-use administrator testified at the hearing that Tompkins's structural alterations include

> a wood foundation that comes down all the way out, you know, propping up the whole thing . . . it might not be a foundation of pillars or it might not be a course of block going 60 inches down, but there's definitely a new foundation holding it up . . . [a]nd it extends back to the veg[etation] line.

Tompkins argues that, even though the alterations are within forty feet of the vegetation line, they are permissible because the braces do not intrude farther below ground or farther into the setback area than the existing foundation of building #1. But the requirement in section 27.02(B)(3) expressly states that "[n]o intrusion shall be allowed closer than . . . forty (40) feet from the vegetation line on Lake Superior." And Tompkins's new foundation made new contact with the ground within the setback area. Based on the evidence, it was reasonable for the board to conclude that Tompkins's

improvements violated the ordinance because they constitute an intrusion within forty feet of the vegetation line.

Tompkins's third argument is predicated on the county ordinance's separate provisions for nonconforming *structures* and nonconforming *uses*. Tompkins contends that, even if his alterations to building #1 did not satisfy the requirements for *structural* nonconformities under section 27.02(B), the alterations were permissible because his use of building #1 was a nonconforming use and he has satisfied the alteration requirements for *use* nonconformities under section 27.01. This argument relies on an assumption that a building that is a nonconforming structure and has a nonconforming use may be altered so long as it complies with *either* the structural-nonconformity requirements under section 27.02 *or* the use-nonconformity requirements under section 27.01. Whether this is a correct interpretation of the ordinance is a question of law, which we review de novo. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980).

"The rules that govern the construction of statutes are applicable to the construction of ordinances." *Smith v. Barry*, 219 Minn. 182, 187, 17 N.W.2d 324, 327 (1944). If the text is unambiguous, we apply its plain meaning. *Risdall v. Brown-Wilbert, Inc.*, 753 N.W.2d 723, 732 (Minn. 2008). When we must otherwise consider the intent behind an ordinance, we may interpret the language in light of the underlying policy. *Frank's Nursery*, 295 N.W.2d at 609.

The ordinance does not specifically state whether a landowner must comply with the alteration requirements in both sections 27.01 and 27.02 when a building is both a nonconforming structure and a nonconforming use. The absence of a provision

indicating that satisfaction of one set of requirements is sufficient for both the nonconforming structure and the nonconforming use would logically give rise to an inference that both must be satisfied. But in any event, the intent expressed in the ordinance is plainly stated. Article 27.0 is expressly directed at reducing the impact of nonconformities and providing "for their gradual elimination where reasonable." Lake County, Minn., Land Use Ordinance § 27.00(A). And each of the article's five sections serves a distinct purpose: section 27.00 sets forth general rules governing nonconformities, section 27.01 separately addresses use nonconformities, section 27.02 separately addresses structural nonconformities, section 27.03 separately addresses lot nonconformities, and section 27.04 separately addresses nonconforming sewage-treatment systems. Thus, based on the article's separate provision for each type of nonconformity and its stated policy of eliminating nonconformities where reasonable, it is evident that the article requires compliance with both sections 27.01 and 27.02 when a building contains a structural nonconformity *and* a use nonconformity. Consequently, even if Tompkins's use of building #1 was a nonconforming use and he satisfied the alteration requirements for use nonconformities under section 27.01, his alteration is impermissible because it does not comply with the alteration requirements for structural nonconformities under section 27.02.

In summary, none of Tompkins's three arguments provides an adequate basis for concluding that the structural alterations to building #1 are in compliance with the county's land-use ordinance.

III

Tompkins also challenges the board's rejection of his argument that Minn. Stat. § 394.36, subd. 4, affects the validity of the cease-and-desist order. As amended in 2006, Minn. Stat. § 394.36, subd. 4, provides generally that, when residential real estate is nonconforming, the nonconformity may be continued "through repair, replacement, restoration, maintenance, or improvement, but not including expansion." *See* 2006 Minn. Laws ch. 270, art. 1, § 5 at 920 (adding specific provision to statute). But, "[i]f the nonconformity or occupancy is discontinued for a period of more than one year . . . any subsequent use or occupancy of the land or premises must be a conforming use or occupancy." Minn. Stat. § 394.36, subd. 4. The board determined that, because occupancy of building #1 had been discontinued for a period of more than one year, Tompkins was prohibited from continuing with his construction activity on building #1 notwithstanding the new language in Minn. Stat. § 394.36.

Sufficient evidence in the record supports the conclusion that no one has occupied building #1, even on a seasonal basis, for more than one year. The record contains a letter and a photograph from an assistant area supervisor at the Minnesota Department of Natural Resources dated August 1997. The supervisor describes building #1 as "a dilapidated cabin" that is "supported by a [thirty]-gallon drum perched on a rock." He states that the "foundation has been eroded away by Lake Superior," that the "door is open and the interior is a shambles," that the "ceiling is mostly rotted away and collapsed," and that "the floorboards can't be far behind." The record also contains photographs from September 2004 and November 2005 that show building #1 in the

same general state of disrepair as the photograph from 1997. The photographs also show a significant drop-off directly in front of the door facing the lake that would prevent entry from that side of the building. Presumably, at one time front steps or a porch allowed entry, but the photographs indicate that neither steps nor a porch has been there for several years. Finally, the record contains a tax assessment for 2005 indicating that the total value of all seven buildings on Tompkins's property is $1,500. This combined evidence supports the conclusion that building #1 remained unoccupied, even on a seasonal basis, for a period of more than twelve months and that the validity of the cease-and-desist order is therefore not affected by Minn. Stat. § 394.36, subd. 4.

In response, Tompkins argues that building #1 has been continually occupied because, even if the building was not *actually* occupied, it was intended, designed, or arranged to be used or occupied. He relies on language in Lake County's land-use ordinance stating that "unless the context clearly requires otherwise . . . the word 'used' or 'occupied' includes the words intended, designed or arranged to be used or occupied." Lake County, Minn., Land Use Ordinance § 3.00 (2004). There is, however, no basis for a claim that the Minnesota legislature, in enacting Minn. Stat. § 394.36, subd. 4, intended to use Lake County's definition of "occupied." Courts must construe the legislature's language according to its ordinary and commonly accepted meaning. Minn. Stat. § 645.08 (2008). And the supreme court has previously determined that the "the ordinary and commonly accepted meaning of 'occupy' [is] to take possession of a place or to be resident or established in a place." *Allied Mut. Ins. Co. v. W. Nat'l Mut. Ins. Co.*, 552 N.W.2d 561, 563 (Minn. 1996). Thus, the board did not err when it examined whether

building #1 had actually been occupied rather than whether Tompkins and the previous owners had intended, designed, or arranged to occupy it.

IV

Finally, Tompkins argues that the board violated the procedural requirements of Minn. Stat. § 15.99 (2008) and article 24.0 of the Lake County Land Use Ordinance. We conclude that the statute does not apply and that Tompkins has not demonstrated any prejudice from purported procedural violations of the ordinance.

Minn. Stat. § 15.99, subd. 2(a), requires counties to respond within sixty days to written requests "for a permit, license, or other governmental approval of an action." If a county does not meet the sixty-day deadline, the request is automatically granted. *Id.* A notice of appeal does not qualify as a request for governmental approval of an action under section 15.99. *Yeh v. County of Cass*, 696 N.W.2d 115, 131 (Minn. App. 2005) (declining to expand section 15.99 "beyond its clear meaning to include notices of appeal"), *review denied* (Minn. Aug. 16, 2005). The applications that Tompkins filed with the board are not requests for a permit or a license. They are most accurately characterized as notices of an appeal from the administrator's cease-and-desist order. Therefore, the time limits and other requirements set forth in section 15.99 are inapplicable.

Article 24.0 of the Lake County Land Use Ordinance sets forth procedural requirements for public hearings and requires that decisions by the board shall be filed within thirty days. Lake County, Minn., Land Use Ordinance §§ 24.03(B), 24.04(E) (2004). Tompkins asserts that the board did not comply with many of its own hearing

requirements and did not meet the filing deadline. "[T]he law does not mandate in all cases strict and literal compliance with all procedural requirements." *City of Duluth v. State*, 390 N.W.2d 757, 772 (Minn. 1986). Governmental action will not necessarily be overturned based on procedural defects that do not "reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures." *Id.* Tompkins does not allege that the board acted in bad faith or identify any specific way in which his rights were prejudiced. The record shows that Tompkins received a full hearing on both of his appeals and that he was promptly notified of the board's determinations. Consequently, any errors based on failure to strictly adhere to procedures or time requirements in the ordinance do not present a basis for reversal.

Affirmed.