Appeal No. 2006AP450 **Cir. Ct. No. 2004CV898**

WISCONSIN COURT OF APPEALS
DISTRICT II

TOWN OF RHINE,

PLAINTIFF-APPELLANT,

V.

BROCK O. BIZZELL, MATTHEW A. SCHUETTE, JONATHON W. THOMPSON, TIMOTHY J. VAN DER VAART, ANDREW S. WIESZ, SCOTT R. WIESZ, AND MANITOWOC AREA OFF HIGHWAY VEHICLE CLUB, INC.,

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

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

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Whether a zoning ordinance that creates a property classification for which there are no permitted uses other than those approved through a conditional use permit process is constitutional, particularly when the ordinance provides no specific standards or criteria for the conditional use of the property.

2. Whether the legal standard for establishing a public nuisance as set forth in ***State v. Quality Egg Farm, Inc.***, 104 Wis. 2d 506, 514-15, 311 N.W.2d 650 (1981), which rejected the "entire community" standard, has been overruled or modified by ***Physicians Plus Insurance Corp. v. Midwest Mutual Insurance Co.***, 2002 WI 80, ¶21, 254 Wis. 2d 77, 646 N.W.2d 777, and ***Milwaukee Metropolitan Sewerage District v. Milwaukee***, 2005 WI 8, ¶28, 277 Wis. 2d 635, 691 N.W.2d 658, which employ the "entire community" or "general public" standards.

BACKGROUND

In October 2003, the Manitowoc Area Off-Highway Vehicle Club (the Club) purchased property located in the Town of Rhine. The property had, at one time, been used as a gravel pit and the Club planned to use it for riding all-terrain vehicles, motorcycles, and snowmobiles, as well as for hunting. At the time the Club purchased the property, it was zoned "B-2 Commercial Manufacturing or Processing" with "no permitted uses in the B-2 District" except those available by conditional use permit. *See* TOWN OF RHINE, WIS., MUNICIPAL CODE § 4.08(2) (2005).[1]

The Club began using the property for riding and, not long afterward, neighbors complained to the Town about the noise. The Town requested that a Club representative appear at the town board meeting on January 6, 2004, and the Club president did attend. During that meeting, the board chair advised the Club president that "B-2 requires a [conditional use permit] for any

[1] The Town's B-2 District zoning underwent significant change in 2005. All references to the Town of Rhine municipal code are to the 2005 version unless otherwise noted.

use of the land." On May 19, 2004, the Club applied for a conditional use permit, which the town board denied. In October 2004, more complaints from neighbors prompted the Town to issue citations to six Club members for violating the Town's public nuisance ordinance. The Club members contested the citations and the municipal court dismissed them. The Town filed a de novo appeal in circuit court. In addition to the nuisance charges, the Town alleged that the Club violated the zoning ordinance by using its property without a conditional use permit. It sought a forfeiture from the Club as well as a temporary restraining order prohibiting the Club "from operation of any motor vehicles on the property, or engaging in any other bothersome or annoying activities."

Meanwhile, in March 2005, the Town amended the B-2 zoning description and added off-road vehicle parks as one of the conditional uses in the B-2 zone. The Club applied for a conditional use permit under the revised ordinance, but subsequently requested that its application be tabled while it proceeded to defend the dismissal of the nuisance citations. The nuisance matter, which included arguments on the constitutionality of the B-2 zoning, resulted in a two-day bench trial. Ultimately, the court held:

> Because the Town's zoning ordinance in question prohibits all uses within the use-district classification, the court concludes that such ordinance is unconstitutional and void. The court also holds that the [Town's] nuisance claim is, in reality, an action to abate a *private* nuisance, and as a result, the [Town] lacks standing to advance such claim.

The Town appeals from the circuit court's order invalidating its zoning ordinance and dismissing its complaint against the Club and its members.

On appeal, the Wisconsin Realtors® Association and the Wisconsin Counties Association each filed an amicus brief and participated at oral argument.[2]

DISCUSSION

Constitutionality of the B-2 Zoning Classification

The parties first ask whether the Town is empowered to zone certain property in a manner that requires the owner to obtain a conditional use permit to use the property. The ordinance underlying this dispute reads in relevant part:

> (2) B-2 COMMERCIAL MANUFACTURING OR PROCESSING
> (a) Permitted Uses. There are no permitted uses in the B-2 District, except that those uses permitted in the Agricultural Land Districts A-1, A-2 and A-3 may be authorized in conjunction with any conditional uses by express reference in the issued conditional use permit and upon such terms as the Plan Commission may recommend and the Town Board shall determine.
>
> (b) Conditional Uses. The following conditional uses may be authorized in the B-2 District pursuant to the provisions of Section 4.09 of this ordinance:
>
> 1. Fabrication of consumer or industrial commodities.
> 2. Garbage, rubbish, offal, industrial waste and dead animal reduction or disposal.
> 3. Quarrying: Gravel, sand, rock, and soil removal and processing. (Rev. 11/04/03)
> 4. Mining and ore processing.
> 5. Salvage yard for wood, metals, papers, and clothing.
> 6. Stockyards.
> 7. Off-road vehicle parks. (Rev. 03/01/05)

TOWN OF RHINE, WIS., MUNICIPAL CODE § 4.08(2).

[2] We appreciate the contributions of the WRA and the WCA; their briefs and their participation at oral argument were of great assistance to the court.

There are three troubling aspects of this ordinance: (1) there are no permitted uses as a matter of right, (2) there is no apparent correlation between the zoning restrictions and the purposes underlying the Town's zoning code, and (3) there are no ascertainable standards or criteria for obtaining a conditional use permit for B-2 property. The Town's ordinance describes the B-2 zoning as "Commercial Manufacturing or Processing" but does not permit any such use absent a conditional use permit. The ordinance directs the property owner to TOWN OF RHINE, WIS., MUNICIPAL CODE §4.09, which provides instructions for applying for a permit and information about the approval process. Section 4.09 directs the property owner to §4.01 for a list of criteria that will guide the plan commission's decision. Section 4.01 is a generic list of intents and purposes underlying the entire zoning code.

In Wisconsin, the use of one's property is a recognized property interest protected by the Due Process Clause of the Fourteenth Amendment. *See* ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997). A zoning regulation that interferes with a property owner's use of the property may violate the owner's due process rights. *See, e.g.*, ***Kmiec v. Town of Spider Lake***, 60 Wis. 2d 640, 652, 211 N.W.2d 471 (1973). A zoning ordinance violates constitutional due process protections if it is unreasonable or arbitrary. *See* ***Buhler v. Racine County***, 33 Wis. 2d 137, 143, 146 N.W.2d 403 (1966). Essentially, this case offers the court the opportunity to address whether it is reasonable to create a zoning district where the only uses are conditional uses, and if so, what standards or criteria must be included to avoid arbitrary enforcement.

The Town asserts that a governmental unit has the discretionary power to create zoning districts that have no permissible uses, provided conditional uses are available. It equates its B-2 district's conditional uses with

permitted uses. Thus, the Town argues, there is no deprivation of the "entire use value of [the] property" so long as the owner meets the requirements of the Town's conditional use process. *Cf.* ***State ex rel. Nagawicka Island Corp. v. City of Delafield***, 117 Wis. 2d 23, 27-28, 343 N.W.2d 816 (Ct. App. 1983) (zoning ordinance which deprived owners of all practical use of the land, a "complete confiscation," was unconstitutional).

The Club disputes the Town's assertion that a conditional use is essentially a permitted use and argues to the contrary that "few applicants for special use can expect that the use sought is theirs for the asking." *See* ***Delta Biological Res., Inc. v. Board of Zoning Appeals of City of Milwaukee***, 160 Wis. 2d 905, 913 n.5, 467 N.W.2d 164 (Ct. App. 1991). Particularly troubling is the fact that a prospective purchaser of B-2 district property has no standing to apply for a conditional use permit prior to the purchase; rather, he or she must take the risk, buy the property, submit an application to use the property, and only then learn whether the hoped-for use is approved.

Unreasonable classifications in zoning ordinances and restrictions that are not germane to legitimate objectives, or which prohibit a particular use of land ignoring its natural characteristics for such use, or which are arbitrary have been held to be unconstitutional in some circumstances. *See, e.g.*, ***Town of Hobart v. Collier***, 3 Wis. 2d 182, 185, 87 N.W.2d 868 (1958) (board zoned entire town residential "with the intention that various businesses would be permitted … at the pleasure of the members of the board"); ***Geisenfeld v. Village of Shorewood***, 232 Wis. 410, 417, 287 N.W. 683 (1939) (restricting lots to residential use for no apparent public health, safety or welfare reason); ***Rowland v. City of Racine***, 223 Wis. 488, 493, 271 N.W. 36 (1937) (residential zoning in "the heart of an industrial or business district").

Though zoning is a matter within legislative discretion, when the exercise of that power exceeds the bounds of discretion, the property owner is entitled to relief. *See* ***State ex rel. O'Neil v. Town of Hallie***, 19 Wis. 2d 558, 567, 120 N.W.2d 641 (1963). If a zoning district has no uses other than conditional uses, the standards and criteria for approval of a conditional use "should be clear and specific" and "should prescribe a definite standard and furnish a uniform rule of action to govern the conduct of administrative officials; and the application of the regulation may not be left to the arbitrary will of governing authorities." *See* ***Town of Hobart***, 3 Wis. 2d at 188.

Whether the Town of Rhine's B-2 zoning classification is constitutional is a question with statewide implications. The B-2 zoning is not unique and, as the Town observes, "similar language is used and appears to be applied without too much consternation in many sister communities."[3] The prevalence of this type of restrictive zoning indicates the issue is of widespread concern. The parties agree that no Wisconsin case has addressed the precise issue presented here.

Public Nuisance

The Town next argues that the circuit court employed the wrong legal standard when it concluded the noise from the Club's property did not

[3] The WCA offered dozens of examples of similarly restrictive ordinances throughout Wisconsin. The following ordinances, which authorize no permitted uses other than by conditional use permit, are representative: VILLAGE OF BAYSIDE, WIS., MUNICIPAL CODE § 106.198 (2006) (D and D-1 Business Districts Use Regulations); TOWN OF CEDARBURG, WIS., ZONING CODE §§ 320-19 through 320-21 (2007) (B1-B3 Business Districts); VILLAGE OF MENOMONEE FALLS, WIS., MUNICIPAL CODE § 122-289 (2006) (C-4 Suburban Retail Business District).

constitute a public nuisance. Specifically, the Town challenges the court's reasoning that

> a public nuisance is a condition or activity which interferes with the use of a public place or with the activities of an entire community. The subject parcel at issue is not a public place. Nor do the activities of the defendants affect the entire community. It follows, a fortiori, that the actions of the defendants *may* constitute a private nuisance. However, such actions do not constitute a public nuisance.

The law surrounding public nuisance in Wisconsin was summed up in ***Quality Egg***, where noxious odors coming from an egg farm prompted several complaints from the surrounding community. ***Quality Egg***, 104 Wis. 2d at 508-09. There, the State sought to abate the nuisance; the circuit court ultimately issued a permanent injunction to the farm because it determined the nuisance could not be abated. ***Id.*** at 511-12. The supreme court observed that the Wisconsin rule is that "a public nuisance exists whenever you have an injury to a number of persons *or* a public interest." ***Id.*** at 512, 514. The court distinguished Wisconsin law from other jurisdictions that require both an injury to a number of persons and to a public interest. ***Id.*** at 514. It rejected the notion that the "entire community" or "public at large" must be injured before a public nuisance can be established. ***Id.*** The supreme court remanded the case to the circuit court with directions that it make specific findings as to whether the egg farm was a *public* nuisance. ***Id.*** at 521. The court stated that "the character of the injury and of the right impinged upon, and not the number of persons injured, is the proper test." ***Id.*** at 520.

Subsequently, in ***Physicians Plus***, the supreme court considered a public nuisance claim arising from tree branches that obstructed the view of a stop sign at an intersection. ***Physicians Plus***, 254 Wis. 2d 77, ¶1. The offending tree

was on private property, but partially within the local municipality's right of way. ***Id.***, ¶6. The court offered this definition in its analysis: "A public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community." ***Id.***, ¶21. Thus, it resurrected the "entire community" language rejected in ***Quality Egg***. The ***Physicians Plus*** court, however, quoted ***Quality Egg*** for the proposition that many factors may be considered in a public nuisance analysis, including location of the property, degree of injury, or right impinged upon. ***Physicians Plus***, 254 Wis. 2d 77, ¶21.

Most recently, the supreme court considered a case involving the rupture of a City of Milwaukee water main, which caused the collapse of a Milwaukee Metropolitan Sewerage District's (MMSD) interceptor sewer. ***MMSD***, 277 Wis. 2d 635, ¶2. What at first blush might appear to be a public nuisance, for water mains and sewers certainly can affect the use and enjoyment of many a person's property, the court held the harm to be private in nature, stating that the damaged interceptor sewer was MMSD's private property. In its analysis, the supreme court cited ***Physicians Plus*** for the definition of a public nuisance, which "interferes with the use of a public place or with the activities of an entire community." ***MMSD***, 277 Wis. 2d 635, ¶28.

The Town asserts that ***Quality Egg*** is the controlling case on point, and resists any suggestion that it was modified, or that the "entire community" standard under ***Physicians Plus*** or ***MMSD*** should be applied. It rejects any attempt at analogy to ***Physicians Plus*** and ***MMSD*** because they involved tort claims; in contrast, the Town is exercising its police powers to enforce its own nuisance ordinance. The Club responds that ***Quality Egg*** does not apply because the more recent cases define a public nuisance as an act or condition that affects

public lands or interferes with a right common to the general public. *See* ***Physicians Plus***, 254 Wis. 2d 77, ¶21; ***MMSD***, 277 Wis. 2d 635, ¶24. Here, no public land is implicated and any alleged harm affects only a small number of nearby neighbors.

This case presents the supreme court with an opportunity to help the legal community navigate the "the impenetrable jungle" of nuisance law. *See* ***MMSD***, 277 Wis. 2d 635, ¶24 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS §86, at 616 (5th ed. Lawyers ed. 1984)). Specifically, it will allow the court to clarify whether the "entire community" standard, rejected in ***Quality Egg***, was resurrected by the ***Physicians Plus*** court's reference to the entire community and the ***MMSD*** court's approval of that standard.

CONCLUSION

The two issues in this case raise questions of statewide concern. The supreme court's guidance will assist municipalities in the drafting of enforceable restrictive zoning ordinances. Furthermore, the court's clarification of the legal rule to be applied in public nuisance claims will assist municipalities, the bench and the bar in identifying and addressing conduct that arises in the context of nuisance abatement ordinances. For these reasons we respectfully certify these issues to the supreme court.