COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2719 **Cir. Ct. No. 2013FO241**

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

TOWN OF TREMPEALEAU,

PLAINTIFF-RESPONDENT,

V.

WENDELL P. KLEIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

¶1 STARK, J.[1] Wendell Klein appeals a judgment that was entered after the circuit court denied his motions to dismiss a citation for operating a propane cannon, or "scare gun," on his farmland in violation of an ordinance

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

enacted by the Town of Trempealeau.[2] Klein argues the Town's scare gun ordinance is invalid for several reasons. We reject his arguments and affirm.

BACKGROUND

¶2 Klein, who owns and operates a farm in the Town of Trempealeau, uses scare guns on his property to deter blackbirds from damaging his crops. On July 11, 2013, the Town enacted Ordinance 2013-001, entitled "Town of Trempealeau Scare Gun Ordinance." The ordinance requires any person wishing to operate a scare gun within the Town to obtain a permit. Trempealeau, Wis., Ordinance 2013-001, § 5 (July 11, 2013). Section 6 of the ordinance provides that all scare gun permits are subject to the following conditions: (1) a permittee may operate scare guns only "between the hours of 6 a.m. and 8 p.m. and between July 1 and October 1 of a given year[;]" (2) scare guns may not be operated within 300 feet of any residence not owned or occupied by the permittee, unless the occupants of the residence provide advance, written consent to a different distance; and (3) all scare guns must be pointed at least forty-five degrees away from neighboring property lines. ***Id.***, § 6. The ordinance gives the town board authority to exempt a permittee from these conditions, upon receipt of a written request "stating the reasons why not granting an exemption would cause undue hardship on the permittee." ***Id.***, § 7.

¶3 Klein applied for, and apparently received, a permit to operate scare guns on his property. However, on August 10, 2013, Klein was cited for violating

[2] The ordinance defines a scare gun as "any device that is used to frighten birds and animals and which does so by producing a noise at regular or irregular intervals." Trempealeau, Wis., Ordinance 2013-001, § 4 (July 11, 2013).

the scare gun ordinance by operating a scare gun at an angle of less than forty-five degrees from a neighboring property line. Klein pled not guilty to the citation and also moved to dismiss, arguing the ordinance was invalid because it: (1) deprived him of a vested right to use scare guns on his property; (2) was preempted by the "Right to Farm Law," WIS. STAT. § 823.08; and (3) was enacted without approval by the Trempealeau County Board.

¶4 The Town submitted a brief in response to Klein's motion to dismiss, and the parties entered into a "Stipulation of Facts" for purposes of the motion. As relevant here, the parties stipulated that:

- The Town did not apply to the Trempealeau County Board for approval of the scare gun ordinance;
- Trempealeau County has "county wide zoning[,]" and, as a result, "action by the County Board … would be required" for the Town to enact a zoning ordinance in connection with scare guns;
- The county board did not take any action regarding scare guns;
- Klein's property lies "entirely within [the] exclusive agricultural zoning district in the Town of Trempealeau, Trempealeau County, Wisconsin[;]"
- Klein's production of crops for the purpose of producing an income or livelihood constitutes an "agricultural use[;]" and
- Klein's use of scare guns is "an agricultural use or practice under the Right to Farm Law … [b]ecause the practice is an activity associated with an agricultural use."

¶5 The circuit court denied Klein's motion to dismiss in a January 15, 2014 oral ruling. Thereafter, Klein filed a second motion to dismiss, again arguing that the scare gun ordinance was invalid under the Right to Farm Law and deprived him of a vested right to use scare guns on his property. Klein also argued

the ordinance conflicted with Trempealeau County's comprehensive zoning ordinance.

¶6 Klein submitted an affidavit in support of his second motion to dismiss, in which he averred that he has been a farmer "all [his] life," and he currently raises crops for sale, as well as for dairy feed and bedding. Klein averred that blackbirds "have always been a problem" on his property because "they want to feed on crops and are voracious consumers of corn." Klein asserted large numbers of blackbirds reside in the United States Fish and Wildlife Refuge located to the south of his property and in "bottom land along the Trempealeau River." The blackbirds "will attempt to feed on crops until they migrate for the winter, even feeding on corn cribs after the harvest is complete." Klein averred he uses scare guns "throughout portions of the growing season up through harvest" to protect his crops from blackbirds, and the precise dates of use depend on "the weather and the progress of the crops." Klein further averred that he has "more knowledge and expertise [regarding the use of scare guns] than anyone else in the Trempealeau County area." He asserted the date restrictions in the Town's scare gun ordinance were "entirely arbitrary[,]" and did not take into account early planting or the fact that blackbirds attempt to feed on corn until migrating in the late fall. He also averred that "[n]ormal and late planting will always run past the Town's cut off of October 1."

¶7 Klein further averred that he has inspected corn crops on land adjacent to his farm that is not protected by scare guns, and one adjacent field had "damage to the ears in almost 95 percent of the ears. These ears were on average just about 50 percent eaten and/or damaged[.]" In contrast, in Klein's adjacent field, "almost none of the corn had been damaged by birds[.]" Klein therefore averred that scare guns "are not only an effective general agricultural practice to

protect corn and crops from predation by blackbirds; they are the only effective means available to me on my farm in its specific location." He specifically averred that measures such as "bird resistant" seeds, visual scare devices, and crop spraying would not effectively protect his crops. He asserted, "We do not use [scare guns] willingly[,] but as a matter of survival."

¶8 Klein also averred that his father began using scare guns on the property in about 1962, and they have been used continuously during the growing season from 1962 to the present. Klein asserted he has been operating about thirty scare guns on the property since the late 1980s, and he did not receive any complaints about them until June 2011, when his neighbors, Roland and Patricia Kriesel, moved to a new residence seventy-five to eighty-five feet from Klein's property line. Klein averred the scare gun nearest the Kriesels' new residence has been in its current location since about 1979. Klein also averred that "many other farmers in the area" have used scare guns over the years, including the Kriesels. He conceded that no other farmers in the Town were currently using scare guns, but he asserted "no other farm in the Town … has fields in such close proximity to large number[s] of roosting blackbirds." He also theorized that other farmers may "have reasons to accept losses, including the inability to effectively operate the scare guns."

¶9 In response to Klein's second motion to dismiss, the Town submitted an affidavit of town board member Dennis Bortle. Bortle averred he was "very involved" in researching and drafting the Town's scare gun ordinance. He further averred that, since the fall of 2011, "numerous" Town residents had expressed concerns to him regarding noise caused by Klein's scare guns. Due to these complaints, Bortle visited areas near Klein's property and observed that the scare guns nearest the Kriesels' residence were discharging approximately every

twenty-six seconds, and scare guns on other portions of Klein's property were discharging approximately every ninety seconds. Bortle averred that Klein's scare guns can be heard "for a considerable distance beyond [Klein's] property line[.]" He further averred the town board received a petition signed by over sixty area residents asking the board to ban the use of scare guns.

¶10 Bortle also averred he has lived on a farm his entire life, has personally farmed for eighteen years, and used scare guns for ten or twelve years. He asserted he researched the effectiveness of scare guns by reviewing "numerous studies and reports." Based on this research, as well as his personal experience and information from other farmers, Bortle averred that blackbirds "generally only eat corn between the tassel stage and the time the corn dents, or hardens." Bortle asserted that, in most years, corn enters the tassel stage between July 15 and 31 and dents between September 1 and 15. He asserted this knowledge was the basis for the July 1 to October 1 time frame set forth in the Town's scare gun ordinance. He also noted that Klein applied for and received a hardship exemption allowing him to use scare guns before July 1 in the year 2014.

¶11 Bortle next averred, based on his research and experience, that blackbirds typically feed on corn and other crops between sunrise and sunset. He stated this was the basis for the Town's decision to allow scare gun operation only between the hours of 6 a.m. and 8 p.m. Bortle further stated the location and angle requirements in the scare gun ordinance were based on his own experience with scare guns, input from other farmers who had used scare guns, and input from town residents familiar with the noise produced by scare guns.

¶12 Finally, Bortle averred that the use of scare guns by "unscrupulous users" is not in the best interest of town residents because it "negatively affects

peace and tranquility, sleep, property values, distracts drivers, and negatively impacts visitors to the wildlife reserve." Bortle stated he is aware "of several farmers who operate farm lands similarly situated to [Klein] … without the need for scare guns[,]" and some of those farmers "spoke in favor of an ordinance." Bortle also averred that the dispute between Klein and the Kriesels "highlighted the benefits of having an effective Township[-]wide plan for dealing with scare guns to minimize future problems while protecting farmers' ability to protect their crops."

¶13 The circuit court denied Klein's second motion to dismiss in a July 18, 2014 oral ruling. A trial on the merits was held on August 25, 2014, and a judgment of dismissal/acquittal was entered the following day.[3] Klein now appeals, arguing the circuit court erred by denying his pretrial motions to dismiss because the Town's scare gun ordinance is invalid for four reasons: (1) it violates Klein's vested right to use scare guns; (2) it violates Trempealeau County's comprehensive zoning ordinance; (3) it conflicts with and is preempted by the "Right to Farm Law," WIS. STAT. § 823.08; and (4) it is arbitrary.

DISCUSSION

I. Vested right

¶14 On appeal, Klein first argues he has a vested right to use scare guns on his property as part of his farming operation. In support of this argument,

[3] Although the trial transcript is not in the appellate record, the Town asserts on appeal that the citation against Klein was dismissed because the circuit court found the Town failed to establish that Klein was the operator of the scare guns. Klein does not dispute this assertion, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Klein relies on ***Des Jardin v. Town of Greenfield***, 262 Wis. 43, 47-48, 53 N.W.2d 784 (1952), in which our supreme court, quoting another authority with approval, stated:

> "Generally speaking, a nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by statute or ordinance, where it is a lawful business or use of property and is not a public nuisance or harmful in any way to the public health, safety, morals or welfare. In other words, a zoning ordinance is invalid and unreasonable where it attempts to exclude and prohibit existing and established uses or businesses that are not nuisances. If when a zoning ordinance was adopted, premises were used for a nonconforming use, one is within his rights in continuing that use. Accordingly, zoning regulations cannot be made retroactive and neither can prior nonconforming uses be removed nor existing conditions be affected thereby."

See also ***Town of Delafield v. Sharpley***, 212 Wis. 2d 332, 337-38, 568 N.W.2d 779 (Ct. App. 1997). Based on ***Des Jardin***, Klein argues the Town may restrict his use of scare guns only if that use constitutes a public nuisance or is harmful to public health, safety, or welfare. Klein observes the circuit court failed to make any determination that his use of scare guns met these criteria.

¶15 Klein's vested rights argument fails for two reasons. First, the principle of vested rights set forth in ***Des Jardin*** applies to zoning ordinances. In ***Zwiefelhofer v. Town of Cooks Valley***, 2012 WI 7, ¶¶36-42, 338 Wis. 2d 488, 809 N.W.2d 362, our supreme court identified six characteristics typically present in zoning ordinances: (1) the division of a geographic area into multiple zones or districts; (2) the allowance and disallowance of certain uses by landowners within established districts or zones; (3) an aim to control where a use takes place, as opposed to how that use takes place; (4) the classification of uses in general terms and the attempt to comprehensively address all possible uses in a geographic area;

(5) a fixed, forward-looking determination about what uses will be permitted, as opposed to case-by-case, ad hoc determinations; and (6) permission for existing uses to continue despite their failure to conform to the ordinance. The Town's scare gun ordinance does not meet any of these criteria and is therefore not a zoning ordinance.[4] Rather, the ordinance is a regulatory ordinance enacted pursuant to the Town's nonzoning police power. *See* ***id.***, ¶5.

¶16 Second, the principle of vested rights set forth in ***Des Jardin*** applies to nonconforming *uses* of property. *See* ***Des Jardin***, 262 Wis. at 47. Although Klein argues his use of scare guns constitutes a nonconforming use, he is mistaken. Wisconsin law recognizes the distinction between the use of property and the manner in which a land owner decides to exercise that right. *See* ***Zwiefelhofer***, 338 Wis. 2d 488, ¶39; ***Racine Cty. v. Cape***, 2002 WI App 19, ¶15, 250 Wis. 2d 44, 639 N.W.2d 782 (2001). Here, both before and after enactment of the Town's scare gun ordinance, Klein used his property to farm. He does not use the property to fire scare guns. Rather, his use of scare guns is one of several practices employed in furtherance of his agricultural use of the land. While it is undisputed that Klein has a vested right to farm his property, Klein provides no authority for the proposition that he also has a vested right to employ a particular farming practice, such as the use of scare guns.

¶17 Nevertheless, Klein contends that, "without 'scare guns[,]' he cannot farm." He therefore asserts his "use of scare guns as an agricultural practice is indistinguishable from his agricultural use of his land." However, as the Town

[4] Interpretation of an ordinance presents a question of law for our independent review. *See* ***Zwiefelhofer v. Town of Cooks Valley***, 2012 WI 7, ¶20, 338 Wis. 2d 488, 809 N.W.2d 362.

points out, the circuit court made a factual finding that Klein's use of scare guns was not indistinguishable from his agricultural use, stating that the ordinance did not prevent the agricultural use of Klein's land. This finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2). There was evidence in the record from which the circuit court could reasonably conclude scare guns were not integral to the agricultural use of Klein's land—in particular, Bortle's averment that he is aware of several farmers who are able to farm land similarly situated to Klein's property "without the need for scare guns."

¶18 In the section of his brief-in-chief in which he advances his vested rights argument, Klein also asserts that the scare gun ordinance "operates like a taking of property because [Klein] will be unable to farm and his unprotected crops will literally be taken from him." We disagree.[5] "Under the Wisconsin Constitution, two types of governmental conduct can constitute a taking: (1) 'an actual physical occupation' of private property or (2) a restriction that deprives an owner 'of all, or substantially all, of the beneficial use of his property.'" ***E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.***, 2010 WI 58, ¶22, 326 Wis. 2d 82, 785 N.W.2d 409 (quoting ***Howell Plaza, Inc. v. State Highway Comm'n***, 66 Wis. 2d 720, 726, 226 N.W.2d 185 (1975)). Klein asserts the latter type—referred to as a regulatory taking—occurred here. *See* ***id.***

¶19 However, the scare gun ordinance does not deprive Klein of all or substantially all of the beneficial use of his property. In the circuit court, Klein averred that, in a neighboring field not protected by scare guns, almost ninety-five

[5] Whether government conduct constitutes a taking of private property without just compensation is a question of law that we review independently. ***E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.***, 2010 WI 58, ¶20, 326 Wis. 2d 82, 785 N.W.2d 409.

percent of the ears of corn were damaged by blackbirds, and on average the ears were approximately fifty-percent eaten. Based on this information, Klein averred the crop in that field would be "reduced by 50 percent or more." However, even accepting these facts as true, a reduction in yield by fifty percent "or more" does not constitute a deprivation of substantially all of the beneficial use of Klein's property. Moreover, contrary to Klein's suggestion, the ordinance does not prohibit him from using scare guns altogether. It merely regulates their use. Klein cites no evidence to show that the same level of damage he observed on a field completely unprotected by scare guns would occur on his own property if he used scare guns in compliance with the ordinance. Accordingly, we reject Klein's argument that the ordinance amounts to a regulatory taking of his property.[6]

II. Trempealeau County's comprehensive zoning ordinance

¶20 Klein next argues Trempealeau County's comprehensive zoning ordinance unambiguously prohibits the Town from requiring him to obtain a permit in order to use scare guns on his property.[7] Klein relies on § 4.03 of the

[6] In the section of his brief-in-chief discussing his vested rights argument, Klein also advances arguments based on Trempealeau County's comprehensive zoning ordinance and WIS. STAT. § 823.08. However, these arguments add little to Klein's vested rights argument and largely duplicate arguments addressed in subsequent sections of this opinion. Accordingly, we do not separately address them here.

We also decline to separately address an argument advanced in a later section of Klein's brief that the evidence shows his use of scare guns is not a nuisance. In that section, Klein argues that, because he has a vested right to use scare guns, the Town cannot prohibit that practice unless it constitutes a nuisance. However, we have already determined Klein does not have a vested right to use scare guns on his property. Thus, even assuming Klein's use does not constitute a nuisance, that fact is insufficient to invalidate the ordinance. Instead, as we explain in greater detail below, the ordinance, which was enacted under the Town's nonzoning police power, is valid if it bears any rational and reasonable relationship to a police power purpose. *See infra*, ¶¶35-36.

[7] Again, interpretation of an ordinance presents a question of law that we review independently. *See* ***Zwiefelhofer***, 338 Wis. 2d 488, ¶20.

comprehensive zoning ordinance, which states, in relevant part, "General agricultural practices shall be allowed in all agricultural districts without issuance of a land use permit[.]" Trempealeau Cty., Wis., Comprehensive Zoning Ordinance § 4.03(1)(a). It is undisputed that Klein's property is subject to the comprehensive zoning ordinance and is located in an agricultural district. Although the comprehensive zoning ordinance does not define the term "general agricultural practices," Klein argues his use of scare guns indisputably falls within that term. Klein also argues § 4.03's reference to "general agricultural practices" demonstrates an intent to protect agricultural practices "along with the underlying agricultural use." Thus, Klein argues any permit requirement for his use of scare guns is prohibited by the comprehensive zoning ordinance, which is binding on the Town.

¶21 However, Klein's argument that the Town's scare gun ordinance violates the comprehensive zoning ordinance rests on the faulty premise that the permit required by the scare gun ordinance is a land use permit. The comprehensive zoning ordinance defines a "land use permit" as "[a] permit, issued by the Zoning Administrator, stating that a use or a structure … may be established, expanded or enlarged subject to any conditions placed on the permit and the provisions of this Ordinance." ***Id.***, § 18.02. The term "use," in turn, is defined as "[t]he purpose or activity for which a parcel of land, or structure(s) thereon, is designed, arranged, intended, occupied, or maintained." ***Id.***

¶22 Applying these definitions, the permit required by the scare gun ordinance is not a "land use permit" because it does not attempt to license a "use." In other words, Klein's property is not "designed, arranged, intended, occupied, or maintained" to fire scare guns. *See* ***id.*** Rather, as explained above, firing scare guns is merely one type of agricultural activity Klein employs as part of the

overall agricultural use of his land. Accordingly, because the permit required by the scare gun ordinance is not a "land use permit," as the comprehensive zoning ordinance defines that term, the permit requirement in the scare gun ordinance does not violate the comprehensive zoning ordinance.

¶23 In addition, we observe that § 4.03(1)(c) of the comprehensive zoning ordinance lists "barnyards, feedlots, and uses involving agricultural structures" as examples of "general agricultural practices." ***Id.***, § 4.03(1)(c). These examples all pertain to locations or structures found on agricultural land and are different in character from the use of scare guns. This further supports our conclusion that the permit requirement in the scare gun ordinance does not conflict with the county's comprehensive zoning ordinance.

III. WISCONSIN STAT. § 823.08

¶24 Klein next argues the scare gun ordinance is invalid because it conflicts with and is preempted by the "Right to Farm Law," WIS. STAT. § 823.08. Section 823.08 is found in WIS. STAT. ch. 823, which deals with nuisance actions. It begins with the following statement of legislative purpose:

> The legislature finds that development in rural areas and changes in agricultural technology, practices and scale of operation have increasingly tended to create conflicts between agricultural and other uses of land. The legislature believes that, to the extent possible consistent with good public policy, the law should not hamper agricultural production or the use of modern agricultural technology. The legislature therefore deems it in the best interest of the state to establish limits on the remedies available in those conflicts which reach the judicial system. The legislature further asserts its belief that local units of government, through the exercise of their zoning power, can best prevent such conflicts from arising in the future, and the legislature urges local units of government to use their zoning power accordingly.

Sec. 823.08(1). The statute then provides that an "agricultural use" or "agricultural practice"[8] may not be found to be a nuisance if all of the following apply: (1) the use or practice "is conducted on, or on a public right-of-way adjacent to, land that was in agricultural use without substantial interruption before the plaintiff began the use of property that the plaintiff alleges was interfered with by the agricultural use or agricultural practice[;]" and (2) the use or practice "does not present a substantial threat to public health or safety." Sec. 823.08(3)(a). The statute also limits the remedies available if an agricultural use or practice is found to be a nuisance. *See* § 823.08(3)(b).

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[8] The term "agricultural use" is defined as:

> (a) Any of the following activities conducted for the purpose of producing an income or livelihood:
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> 1. Crop or forage production.
>
> 2. Keeping livestock.
>
> 3. Beekeeping.
>
> 4. Nursery, sod, or Christmas tree production.
>
> 4m. Floriculture.
>
> 5. Aquaculture.
>
> 6. Fur farming.
>
> 7. Forest management.
>
> 8. Enrolling land in a federal agricultural commodity payment program or a federal or state agricultural land conservation payment program.
>
> (b) Any other use that the department, by rule, identifies as an agricultural use.

WIS. STAT. §§ 91.01(2), 823.08(2)(b). An "agricultural practice" is defined as "any activity associated with an agricultural use." Sec. 823.08(2)(a).

¶25 Klein and the Town agree that WIS. STAT. § 823.08 protects both agricultural uses and practices. They also agree that the statute sets forth a heightened standard for determining that an agricultural use or practice is a nuisance. Based on these propositions, Klein argues the statute gives farmers a "vested interest" in continuing their established agricultural uses and practices. Klein therefore asserts that, in order to regulate an established agricultural use or practice, a local government must first find that the use or practice constitutes a nuisance under the higher standard set forth in § 823.08(3)(a)—that is, that it presents a substantial threat to public health or safety. Klein contends the Town did not, and could not, make such a finding in this case. He therefore argues the scare gun ordinance impermissibly conflicts with § 823.08.

¶26 Klein's analysis is flawed. The language of WIS. STAT. § 823.08 is clear and unambiguous.[9] The statute merely limits the situations in which an agricultural use or practice may be found to be a nuisance and limits the remedies available in nuisance actions involving agricultural uses or practices. Nothing in the statute suggests that it applies in any context other than nuisance litigation. Moreover, the statute appears in WIS. STAT. ch. 823, which deals exclusively with nuisance actions.[10] We therefore reject Klein's argument that § 823.08 prevents

[9] Statutory interpretation presents a question of law for our independent review. ***Domino v. Walworth Cty.***, 118 Wis. 2d 488, 493, 347 N.W.2d 917 (Ct. App. 1984). When interpreting a statute, our objective "is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Our analysis begins with the plain language of the statute. ***Id.***, ¶45. If the statute's meaning can be discerned from its plain language, we need not resort to extrinsic sources of interpretation, such as legislative history. ***Id.***, ¶46.

[10] *See* ***Kalal***, 271 Wis. 2d 633, ¶46 ("[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes[.]").

local governments from regulating agricultural uses and practices absent a finding that those uses or practices meet the heightened nuisance standard set forth in the statute.

¶27 Klein also argues WIS. STAT. § 823.08 preempts the Town's scare gun ordinance.[11] Again, we disagree. Four factors guide our determination of whether a political subdivision's actions are preempted by state legislation:

> (1) whether the legislature has expressly withdrawn the power of political subdivisions to act; or (2) whether the political subdivision's actions logically conflict with the state legislation; or (3) whether the political subdivision's actions defeat the purpose of the state legislation; or (4) whether the political subdivision's actions are contrary to the spirit of the state legislation.

Adams v. State Livestock Facilities Siting Review Bd., 2012 WI 85, ¶32, 342 Wis. 2d 444, 820 N.W.2d 404. None of these factors are met in the instant case.

¶28 First, by enacting WIS. STAT. § 823.08, the legislature did not expressly withdraw the power of local governments to regulate agricultural practices. By its plain language, § 823.08 clearly and unambiguously applies only to nuisance actions. Nothing in the statute indicates that the higher standard it sets forth for nuisance litigation applies to or prevents local regulation of agricultural activity. Klein argues that, because the legislative purpose statement in § 823.08(1) urges local governments to use their zoning authority to address conflicts between agriculture and other land uses, the statute prohibits local governments from using their nonzoning police power to regulate agricultural practices. However, that § 823.08(1) specifically mentions zoning does not

[11] This presents a question of law that we review independently. *See* ***Lake Beulah Mgmt. Dist. v. Village of E. Troy***, 2011 WI 55, ¶11, 335 Wis. 2d 92, 799 N.W.2d 787.

amount to an express withdrawal of local governments' authority to regulate agricultural practices using their nonzoning police power.

¶29 Second, the Town's scare gun ordinance does not logically conflict with WIS. STAT. § 823.08. The ordinance and statute operate in completely different spheres: the ordinance regulates a particular type of agricultural practice, pursuant to the Town's police power, while the statute protects farmers from nuisance actions under certain specified conditions.

¶30 Third, the scare gun ordinance does not defeat the purpose of WIS. STAT. § 823.08, which is to protect farmers from nuisance actions so as not to hamper agricultural production. *See* § 823.08(1), (3). Again, the scare gun ordinance merely regulates farmers' use of scare guns. Despite the ordinance, farmers are still protected from nuisance actions by the provisions set forth in § 823.08.

¶31 Fourth and finally, the Town's ordinance is not inconsistent with the spirit of WIS. STAT. § 823.08. The statute reflects an intent to protect farmers from nuisance actions, but it also recognizes that conflicts between agricultural uses and other land uses will occur, and it urges local governments to take action to address those conflicts. Here, the Town enacted reasonable restrictions on scare gun use, pursuant to its nonzoning police power, after receiving multiple citizen complaints. This was fully consistent with both the letter and the spirit of § 823.08.

¶32 For the foregoing reasons, we reject Klein's argument that WIS. STAT. § 823.08 preempts the Town's scare gun ordinance.

IV. Arbitrariness

¶33 Lastly, Klein argues the scare gun ordinance is invalid because it is arbitrary. This argument fails for several reasons.

¶34 First, Klein does not cite any authority describing what makes an ordinance arbitrary. We could reject Klein's arbitrariness argument on this basis alone. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider arguments that are unsupported by legal authority or are otherwise undeveloped).

¶35 Second, we agree with the Town that the scare gun ordinance is a valid exercise of the Town's nonzoning police power. The Town has adopted village powers, pursuant to WIS. STAT. §§ 60.10(2)(c) and 60.22(3). Under its exercise of village powers, the Town has authority to enact ordinances "for the health, safety, welfare and convenience of the public[.]" WIS. STAT. § 61.34(1); *see also* ***Rusk v. City of Milwaukee***, 2007 WI App 7, ¶9, 298 Wis. 2d 407, 727 N.W.2d 358 (2006) (Police power "covers all matters having a reasonable relation to the protection of the public health, safety or welfare." (quoted source omitted)). An ordinance is a valid exercise of police power if the means chosen by the legislative body bear a reasonable and rational relationship to a police power purpose. *See* ***State v. Jackman***, 60 Wis. 2d 700, 704-05, 211 N.W.2d 480 (1973). Moreover, an ordinance is presumed to be valid, and the burden is on the challenger to prove otherwise. ***Town of Clearfield v. Cushman***, 150 Wis. 2d 10, 20, 440 N.W.2d 777 (1989).

¶36 Here, the scare gun ordinance is reasonably related to public health, safety, welfare, and convenience. Bortle averred in his affidavit that the use of scare guns "negatively affects peace and tranquility, sleep, property values,

distracts drivers, and negatively impacts visitors to the wildlife reserve." He also averred that he received multiple complaints regarding the noise caused by Klein's scare guns, and that the town board received a petition signed by over sixty residents asking it to prohibit scare gun use. Bortle further averred, based on personal observation, that the noise produced by Klein's scare guns could be heard well beyond Klein's property lines. Based on this evidence, the circuit court could reasonably conclude that the ordinance bore a rational relationship to the police power purposes of protecting public health, safety, welfare, and convenience.

¶37 Third, the particular facets of the ordinance that Klein criticizes do not render it arbitrary. Klein observes the ordinance states that failure to comply with permit terms shall result in permit revocation. While potentially harsh, this provision is not arbitrary; rather, it provides a powerful means of encouraging compliance with permit terms. Klein also complains that the ordinance does not set forth any standards for granting permits or exemptions. However, Klein is not appealing the denial of a permit or exemption, and, as a result, this issue is not before us. Klein further criticizes the ordinance because the "[h]arm of noise is not addressed." To the contrary, the ordinance addresses the harm of noise caused by scare guns by restricting their use to certain dates and times and limiting where they may be located and aimed.

¶38 Klein also asserts the time and date limitations in the ordinance were established arbitrarily. He contends the Town was required to consult expert witnesses when setting these limitations. However, Klein cites no authority for the proposition that a municipality is required to consult with expert witnesses before exercising its police power. Moreover, evidence in the record shows that the Town had a reasonable basis for the limitations it chose. Bortle averred that he has personal experience both farming and using scare guns. He also averred that

he reviewed numerous studies and reports regarding the effectiveness of scare guns. In addition, Bortle's affidavit shows that the Town received input from other area farmers. Based on this information, Bortle averred that blackbirds generally only eat corn between the tassel stage, which begins between July 15 and 31, and the time the corn dents or hardens, which occurs between September 1 and 15. Bortle further averred that blackbirds typically feed on corn and other crops between sunrise and sunset. Based on this information, the Town could reasonably decide to allow scare gun use only from July 1 to October 1, between the hours of 6 a.m. and 8 p.m. Neither Klein's disagreement with these limitations nor the fact that he may be negatively impacted by them renders the ordinance arbitrary.

¶39 Fourth, the Town's respondent's brief sets forth a developed argument that the scare gun ordinance is not arbitrary, incorporating the points discussed above in paragraphs 35-38. Klein fails to respond to the Town's argument in his reply brief, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.