COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP495 **Cir. Ct. No. 2015CV1041**

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

GREEN VALLEY INVESTMENTS, LLC,

PLAINTIFF-APPELLANT,

V.

COUNTY OF WINNEBAGO,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 REILLY, P.J. In 2006, Green Valley Investments, LLC (Green Valley) opened Stars Cabaret (Stars), an adult cabaret offering nude entertainers,

in knowing violation of the 2006 Winnebago County Town/County Zoning Ordinance (2006 ordinance) then in effect.[1] After years of litigation in federal court, the matter comes to us on the sole question of whether the unconstitutional provisions of the 2006 ordinance are severable from the remainder of the ordinance. We conclude the unconstitutional provisions are severable, and we affirm.

Background

¶2 At the time that Green Valley opened Stars, WINNEBAGO COUNTY, WIS., ZONING ORDINANCE § 17.13(6) (2006)[2] (hereinafter WINNEBAGO ZONING ORDINANCE) regulated adult entertainment establishments and included the following conditions:

1. An adult entertainment establishment may only be located in a B-3 General (Highway) Business District (B-3 district). Sec. 17.13(6)(d)1.

2. No alcohol may be served in any adult entertainment establishments. Sec. 17.13(6)(d)3.

3. Adult entertainment establishments must be set back "at least 1500 feet from the establishment of any other adult use" and "2000 feet [from] any

[1] Green Valley does not dispute that at the time Stars opened, the property did not meet the requirements of the 2006 ordinance as it never applied for a conditional use permit, sold alcohol, and violated the setback provisions. Green Valley applied for a liquor license through the Town of Neenah, calling its business "All Stars Sports Club." The Town of Neenah has renewed Stars' liquor license each year since 2006.

[2] The County has the authority to enact zoning ordinances under WIS. STAT. § 59.69 (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

land zoned residential or institutional or … residential Planned Unit Development or farm dwelling." Sec. 17.13(6)(d)2.

4. An entity wishing to open an adult entertainment establishment must apply for a conditional use permit from the County and if approved the County would create an "adult entertainment overlay district" (AEO district) within which the adult establishment could lawfully locate.[3] Sec. 17.13(6)(d)1., (h).

Green Valley knew that its opening and operation of Stars violated the setback and alcohol restrictions of the 2006 ordinance. Green Valley did not apply for a conditional use permit per condition no. 4 above.

¶3 Condition no. 4, the "permitting process," was found by the federal district court[4] to be an unconstitutional prior restraint on speech; however, it sided with the County that the unconstitutional permitting process could be severed from WINNEBAGO ZONING ORDINANCE § 17.13(6). ***Green Valley Invs., LLC v. County of Winnebago***, No. 13-C-402, slip op. at *7-12 (E.D. Wis. May 10, 2014). The district court granted summary judgment in favor of the County and dismissed the action, concluding that severing the unconstitutional permitting process from the

[3] No AEO districts were initially created; instead, the ordinance contemplated that the AEO districts "shall only be established by Conditional Use Permit" and would be created when an application for a conditional use permit was granted. WINNEBAGO ZONING ORDINANCE § 17.13(6)(d)1.

[4] Green Valley filed three federal actions from 2006 to 2013, arguing that the County's zoning ordinance was unconstitutional. The first case ended in a stipulated dismissal before a decision on the merits after the 2006 ordinance was amended. The second lawsuit challenged the amended zoning provisions. ***Green Valley Inv. LLC v. County of Winnebago***, 790 F. Supp. 2d 947 (E.D. Wis. 2011). The third lawsuit was a second attack on the 2006 ordinance. ***Green Valley Invs., LLC v. County of Winnebago***, No. 13-C-402, slip op. (E.D. Wis. May 10, 2014).

ordinance left a "a constitutionally permissible ordinance regulating alcohol sales and/or setback requirements." ***Id.*** at *20. The issue was eventually brought before the Seventh Circuit Court of Appeals, which affirmed the district court on the unconstitutionality of the permitting process but found that the question of whether the unconstitutional provisions could be severed from § 17.13(6) was not a federal question and one best answered by a Wisconsin court. ***Green Valley Invs., LLC v. Winnebago Cty.***, 794 F.3d 864, 868-71 (7th Cir. 2015).[5] The matter is now before us on the severance question.

¶4 Green Valley argues the 2006 ordinance is unconstitutional in its entirety and, therefore, Stars has the right to continue its operation as it has a legal nonconforming status under the County's zoning code.[6] The County concedes that the permitting process of the 2006 ordinance is unconstitutional, but it argues that the provisions of the ordinance pertaining to the sale of alcohol and setback provisions are severable such that the remaining ordinance is enforceable. Both

[5] The Seventh Circuit was careful to note that the zoning issue in this case did not fall outside the court's supplemental jurisdiction as "[t]he federal question and these state-law claims spring from a common nucleus of operative fact … and that is enough." ***Green Valley Invs., LLC v. Winnebago Cty.***, 794 F.3d 864, 869 (7th Cir. 2015). The court merely recognized both that "supplemental jurisdiction need not always be exercised" and that "[t]he ability of a court to do more than excise the unconstitutional portions of the ordinance does not appear to us to be settled in Wisconsin." ***Id.*** at 869-70.

[6] A nonconforming use is the use of property in a manner not allowed by the municipality. ***Waukesha Cty. v. Seitz***, 140 Wis. 2d 111, 114-15, 409 N.W.2d 403 (Ct. App. 1987). A nonconforming use is legal, however, when "there is an active and actual use of the land and buildings which existed prior to the commencement of the zoning ordinance [that banned the use] and which has continued in the same or a related use until the present." ***Id.*** at 115; *see also* WIS. STAT. § 59.69(10). Legal nonconforming uses are protected because of concerns that retroactive application of zoning ordinances would be unconstitutional. ***Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.***, 2009 WI App 142, ¶18, 321 Wis. 2d 671, 775 N.W.2d 283.

parties moved for summary judgment. The circuit court agreed with the County and dismissed the action.

Analysis

¶5 We review a circuit court's decision on a motion for summary judgment de novo, applying the same standard as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Severability of a local ordinance is a question of state law. *See* ***Leavitt v. Jane L.***, 518 U.S. 137, 139 (1996).

¶6 We accept as undisputed that the permitting process in the 2006 ordinance is unconstitutional and invalid. It is well established in our state jurisprudence that "whether an invalid portion of a statute or ordinance fatally infects the remainder of such law is a question of legislative intent." ***City of Madison v. Nickel***, 66 Wis. 2d 71, 78, 223 N.W.2d 865 (1974). ***Nickel*** held that "[i]f a statute consists of separable parts and the offending portions can be eliminated and still leave a living, complete law capable of being carried into effect 'consistent with the intention of the legislature which enacted it in connection with the void part,' the valid portions must stand." ***Id.*** at 79-80 (citation omitted). A presumption exists in favor of severability. ***Regan v. Time, Inc.***, 468 U.S. 641, 653 (1984); ***State v. Janssen***, 219 Wis. 2d 362, ¶37, 580 N.W.2d 260 (1998).

¶7 The County included a severability clause when it adopted the 2006 ordinance; "[i]f any section, clause, provision, or portion of this Section is adjudged unconstitutional or invalid by a court of competent jurisdiction, the

remainder of the Ordinance shall not be affected thereby." WINNEBAGO ZONING ORDINANCE § 17.01(6). While the existence of a severability clause is not controlling, we give it great weight in determining whether the valid provisions can stand separate from any invalid provision. ***Nickel***, 66 Wis. 2d at 80.

¶8 It is clear the County sought to define and regulate adult entertainment and it is also clear that with the inclusion of the severability clause the County intended to preserve the 2006 ordinance should any portion be deemed unconstitutional. The County's clear intent was to restrict the sale of alcohol in adult entertainment establishments and to create a buffer area (setbacks) from residential areas, schools, and other like establishments. Based on these clear intentions of the County, it cannot be said that the County would have intended that the entire 2006 ordinance be invalidated rather than just remove the constitutionally invalid permitting process. *See* ***City of Waukesha v. Town Bd.***, 198 Wis. 2d 592, 607, 543 N.W.2d 515 (Ct. App. 1995).

¶9 Green Valley argues that the 2006 ordinance is not functional after severance as adult establishments are not listed as a principal use in the 2006 ordinance. Green Valley argues that if a land use is not expressly listed as a principal or conditional use, it is not allowed in that district; therefore, there is no location within the zoning code that an adult entertainment establishment can be lawfully located. *See* ***Zwiefelhofer v. Town of Cooks Valley***, 2012 WI 7, ¶52, 338 Wis. 2d 488, 809 N.W.2d 362; WINNEBAGO ZONING ORDINANCE § 17.13(6)(e)-(f). We disagree.

¶10 The provisions pertaining to adult entertainment fall under the purview of WINNEBAGO ZONING ORDINANCE § 17.13 addressing areas zoned B-3 districts. The ordinance provides that the principal uses permitted in B-3 districts

include "[a]ll principal uses permitted in the B-1 'Local Service District' and in the B-2 'Community Business District,'" along with other enumerated uses. Sec. 17.13(2). Within WINNEBAGO ZONING ORDINANCE § 17.12, among the principal uses described in the B-2 community business district are "Night Clubs" and "Places of Entertainment," and § 17.13(2) further extends the principal uses to "similar stores and shops offering retail goods and services." Secs. 17.12(2)(x), (cc), 17.13(2). We conclude that adult cabarets are "similar" to "Night Clubs" and "Places of Entertainment" and reading the ordinance to allow adult cabarets as a principal use in B-3 districts is a reasonable construction.[7] *See* ***Hooper v. California***, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). As a principal use within the B-3 district, an adult cabaret must comply with all valid provisions of § 17.13(6)(d).[8]

¶11 Green Valley makes two additional arguments: (1) that the County has not designated any district in which adult entertainment could be located, citing to ***Town of Wayne v. Bishop***, 210 Wis. 2d 218, 565 N.W.2d 201 (Ct. App. 1997), and (2) that ***North Ave. Novelties, Inc. v. City of Chicago***, 88 F.3d 441 (7th Cir. 1996), requires the County to present evidence of "how many sites were available" and "how many sites had to be available" in order for the court to find that it had provided a "'reasonable opportunity' to disseminate the speech at

[7] Adult Establishments is defined to include "Adult Cabaret." *See* WINNEBAGO ZONING ORDINANCE § 17.13(6)(b)9.

[8] As we conclude that an adult cabaret is a principal use under WINNEBAGO ZONING ORDINANCE § 17.13, we need not reach Green Valley's arguments that severance requires impermissible rewriting of the ordinance, rather than removing the unconstitutional provisions of the statute.

issue." *See* ***North Ave. Novelties***, 88 F.3d at 445. We distinguish Green Valley's argument that ***Town of Wayne*** supports its position given our above findings that an adult cabaret is a principal use within a B-3 district and B-3 districts do exist on the county zoning map. *See* ***Town of Wayne***, 210 Wis. 2d at 224.

¶12 Secondly, the County's 2006 ordinance is typical of many zoning ordinances seeking to regulate adult establishments by controlling their locations without outright prohibiting sexually explicit expression. As the court explained in ***North Ave. Novelties***, "[s]uch restrictions are viewed as content-neutral 'time, place, and manner regulations,' and are constitutional so long as they are 'designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication.'" ***North Ave. Novelties***, 88 F.3d at 444 (citing ***City of Renton v. Playtime Theatres, Inc.***, 475 U.S. 41, 50 (1986)). Green Valley argues that we must decide whether the setback provisions in WINNEBAGO ZONING ORDINANCE § 17.13(6)(d)2. unreasonably limit avenues of communication.[9]

¶13 In ***North Ave. Novelties***, the City of Chicago amended its zoning ordinance to limit adult uses to commercial and manufacturing districts and included setback provisions similar to those at issue in this case. ***North Ave. Novelties***, 88 F.3d at 443. North Avenue Novelties opened an adult bookstore in

[9] Green Valley does not suggest in its brief that the alcohol prohibition is unconstitutional, and the district court found that the County intended to regulate alcohol in adult establishments and deemed it enforceable when the permitting process is severed. *See, e.g.*, ***Ben's Bar, Inc. v. Village of Somerset***, 316 F.3d 702, 726 (7th Cir. 2003) (collecting cases and holding that a prohibition of alcohol at adult entertainment establishments did not violate the First Amendment). WINNEBAGO ZONING ORDINANCE § 12.13(6)(d)3., prohibiting the sale of intoxicating beverages completely, would only apply to adult entertainment establishments in a B-3 district, so there is no need to qualify the alcohol prohibition further.

violation of both those provisions. ***Id.*** The Seventh Circuit Court of Appeals noted that the parties used experts to provide evidence of available locations and what percentage of land was available for adult use. ***Id.*** at 444-45. The court found, however, that these comparisons pertaining to the "amount of acreage, standing alone, is largely irrelevant. The constitution does not mandate that any minimum percentage of land be made available for certain types of speech." ***Id.*** at 445; *see also* ***Hickerson v. City of New York***, 146 F.3d 99, 107 (2d Cir. 1998) ("[W]e are aware of no federal case … that requires municipalities to identify the exact locations to which adult establishments may relocate, as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are 'physically and legally available' to accommodate the adult establishments."). What is required, according to the court, is that "zoning schemes that regulate the location of speech provide a 'reasonable opportunity' to disseminate the speech at issue." ***North Ave. Novelties***, 88 F.3d at 445.

¶14 In this case, Winnebago County identified sixteen parcels that met the setback requirements of the 2006 ordinance—three that were already zoned B-3 district and near a highway and the remaining parcels that could have been rezoned. The evidence submitted also demonstrates that when the ordinance was enacted in 1990, there were "numerous" parcels on which an adult entertainment establishment could have been located. Further, there were already five adult entertainment establishments operating in Winnebago County in 2006. No evidence was offered by Green Valley that anyone had sought to open an adult establishment and was prevented from doing so. The record is also devoid of any evidence that the populace in Winnebago County is having difficulty satisfying their need for this type of speech as a result of the 2006 ordinance. *See* ***id.*** at 445.

Accordingly, we conclude that the evidence presented is sufficient to support a finding that the setback provisions of the 2006 ordinance allowed a reasonable opportunity to disseminate speech pertaining to adult entertainment.

¶15 As we conclude that the 2006 ordinance was not unconstitutional in its entirety, Green Valley's argument that it had a "right to ignore an unconstitutional law" and "treat it as non-existent" is a nonstarter. Green Valley had and has no protected interest or any vested right to begin or continue its nonconforming use. In order to acquire a vested interest, "the business owner must reasonably rely on the then-existing ordinance when making expenditures and incurring liabilities." ***Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.***, 2009 WI App 142, ¶2, 321 Wis. 2d 671, 775 N.W.2d 283. In ***Cross Plains***, we determined that where "the owners knew the existing law was soon to change," reasonable reliance was not present. ***Id.***, ¶39. Green Valley went one step further than the party in ***Cross Plains***; Green Valley knew it was opening Stars in violation of the 2006 ordinance. As we conclude that there was no reasonable reliance by Green Valley that the entire ordinance was invalid, Green Valley had no protection as a nonconforming use.

Conclusion

¶16 We affirm as WINNEBAGO ZONING ORDINANCE § 17.13(6), with the permitting process severed, is a valid restraint on the location of adult entertainment establishments in Winnebago County. Green Valley knowingly opened Stars in violation of the valid zoning provisions under § 17.13(6) in 2006, and Green Valley has no vested right to continue its operation of Stars.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.