COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2629 **Cir. Ct. No. 00-CV-476**

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

TOWN OF DELAVAN, A MUNICIPAL CORPORATION,

PLAINTIFF-RESPONDENT,

V.

CANDICE H. SURIANO AND RYAN ROBERSON, D/B/A EXOTICA V,

DEFENDANTS,

GREATER GENEVA GROUP, INC., A WISCONSIN CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

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

¶1 NETTESHEIM, P.J. Greater Geneva Group, Inc. (Geneva Group), appeals from a summary judgment in favor of the Town of Delavan. The order for judgment permanently enjoins Geneva Group from operating an adult entertainment establishment, Exotica V, at its present location in the Town of Delavan. The injunction was issued because Exotica V was operating within 750 feet of a park in violation of the Walworth County Shoreland Zoning Ordinances.

¶2 We reach two holdings that dispose of this appeal. First, we hold that the law of exhaustion of administrative remedies did not preclude the Town's injunction action. Second, we hold that Geneva Group's use of the property was not a valid nonconforming use. Accordingly, we affirm the grant of summary judgment to the Town.[1]

FACTS AND PROCEDURAL HISTORY

¶3 The procedural history of this case is crucial to our resolution of the issues on appeal. We therefore set forth those proceedings in detail.

¶4 Exotica V is owned by the Geneva Group and operates on premises leased from Candice H. Suriano. The premises are located within a B-2 zoning district under the Walworth County Shoreland Zoning Ordinance. Exotica V was opened in that location in 1998 and primarily sells or rents sexually explicit, adult-oriented items.

¶5 At the time Exotica V opened, Walworth County Shoreland Zoning Ordinance § 3.7 (1998) listed the principal uses permitted in the B-1 Local

[1] We also affirm the circuit court's order denying Geneva Group's motion for summary judgment.

Business District and the B-2 General Business District. These listings included, among other things, "Variety Stores" and "Gift Stores." Sec. 3.7(A). In addition, § 2.4 of the ordinance stated, "Uses Not Specified in this Ordinance may be permitted by the Board of Adjustment after the Committee has made a review and written recommendation and provided that such uses are similar in character to the permitted uses in the district."

¶6 In mid-November 1998, the Walworth county zoning manager informed the Geneva Group that the proposed use of the property as a "novelty shop" was not permitted in a B-2 zoning district. However, in early December, the zoning manager notified the Geneva Group that this decision was reversed and the proposed use would be permitted.

¶7 The Town appealed the zoning manager's decision to the Walworth County Board of Adjustment arguing that the zoning manager's initial decision was correct. At a meeting on March 11, 1999, the board denied the Town's appeal, finding that the definition of a "gift store" and a "novelty shop" were congruous.

¶8 In April 1999, the Town commenced certiorari proceedings in the circuit court seeking review of the board's decision. Geneva Group was not a party to this proceeding. In April 2000, the circuit court reversed the board's decision, finding that the board did not act according to law in determining that Exotica V was a gift store. The court remanded the case for further proceedings

consistent with its decision. In June 2000, the board conducted a further hearing and concluded that Exotica V was a retail establishment under the ordinance.[2]

¶9 The Town did not seek further certiorari review in response to this new determination by the board. Instead, on July 13, 2000, the Town filed the instant action seeking injunctive relief against Geneva Group. The Town contended that a "retail establishment" was "not a specified use within the Walworth County Shoreland Zoning Ordinance" and, therefore, Exotica V was operating in violation of the ordinances.[3]

¶10 While the Town's action was pending in the circuit court, the Geneva Group sought formal approval from the board for operation of a retail establishment as an unspecified use under § 2.4 of the ordinance.[4] However, during this hearing, the case took on a new look when the zoning manager addressed, for the first time, the provisions of the 2000 Walworth County Shoreland Zoning Ordinances. These ordinances contained an amendment to § 3.7 governing permitted uses in a B-2 zoning district. The 2000 version included a provision permitting "Adult Entertainment Use" in a B-2 zoning district

> provided that there is a minimum building separation of 750 feet from the nearest residential structure … churches, schools, public parks, public playgrounds, public beaches, daycare centers and Park Zoning Districts … existing at the

[2] The appellate record does not include a transcript of this proceeding.

[3] Later, on July 17, 2000, the Town filed a motion for preliminary injunctive relief. Following a hearing, the circuit court denied the request. This ruling is not before us on appeal.

[4] Neither the parties' briefs nor the appellate record expressly reveals an application by the Geneva Group for an unspecified use permit. However, the transcript of the board hearing on September 13, 2000, includes the statements of the Town's attorney who explained that Geneva Group had made application for such a use permit based upon the board's determination on remand that Exotica V was a retail establishment.

> time of application for a zoning permit or at the time of establishing an adult entertainment use within existing buildings which are properly zoned and do not require a zoning permit.

Walworth County Shoreland Zoning Ordinance § 3.7 (2000).

¶11 On September 21, 2000, the board issued its written decision, concluding that Exotica V qualified as an adult entertainment establishment under the amended zoning ordinance. As a result, the board did not address whether Exotica V qualified as an unspecified use.[5] In its findings, the board said, "The Board found that while working with the old ordinance (1998) and reviewing other uses listed (as the use was similar to a variety store), restricted hours and age restrictions, it was the Board's belief that Exotic V belongs as a principal use in the B-2, General Business District."

¶12 Based on this new determination by the board, the Town filed an amended complaint in this action. The Town did not dispute the board's new determination that Exotica V qualified as an adult entertainment establishment under the amended zoning ordinance. Instead, armed with this determination, the Town sought an injunction because Exotica V was operating within 750 feet of the nearest public park in violation of the amended ordinance.

¶13 The parties filed competing motions for summary judgment. Geneva Group argued that the Town was foreclosed from prosecuting this direct

[5] Therefore, we disagree with the Town's statement in its motion for summary judgment that the board "found that EXOTICA V was an unspecified use." While the proceeding before the board may have been commenced on the basis of Geneva Group's request for approval as an unspecified use, the board's written decision unequivocally states, "Exotica V should be classified as an adult entertainment establishment that is a permitted use as a retail business in the B-2, General Business District."

action for an injunction because it had failed to exhaust its administrative remedies. Specifically, Geneva Group pointed to the Town's failure to seek further certiorari review of the board's September 21, 2000 decision within the thirty-day time limit.[6] The Town responded that it was not seeking review of the board's September 21 decision; rather, it was seeking an injunction based on the board's finding that Exotica V was an adult entertainment establishment and, as such, was in violation of the 750-foot setback requirement of the ordinance.[7]

¶14 The circuit court held a motion hearing on September 5, 2001. The court found that Exotica V was operating within 750 feet of a park in violation of the zoning ordinance. The court also held that Exotica V was not a valid nonconforming use since it had never been approved as an unspecified use under the amended ordinance. Based on these findings, the court granted the Town's motion for summary judgment permanently enjoining Geneva Group from operating Exotica V.[8] Geneva Group appeals.[9]

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[6] WISCONSIN STAT. § 59.694(10) (1999-2000) provides in relevant part: "A person aggrieved by any decision of the board of adjustment … may, within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari." All references to the Wisconsin Statutes are to the 1999-2000 version.

[7] The Town also argued that Exotica V was in violation of the ordinance as an unclassified, unspecified use since it opened.

[8] In granting summary judgment to the Town, the circuit court denied Geneva Group's motion for summary judgment.

[9] Geneva Group subsequently filed a motion for a stay of the court's order pending appeal which was denied by the circuit court. After the Geneva Group filed this appeal, it requested a stay from this court. We denied that request in an order dated November 5, 2001. However, because of the potential First Amendment aspects, we expedited the case on our calendar.

STANDARD OF REVIEW

¶15 This court reviews decisions on summary judgment de novo. When reviewing a summary judgment, we follow the same methodology as the circuit court. That methodology has been described many times, and we need not repeat it here in detail. ***Vultaggio v. Gen. Motors Corp.***, 145 Wis. 2d 874, 881, 429 N.W.2d 93 (Ct. App. 1988). Suffice it to say that we review decisions on summary judgment de novo. ***Id***. However, whether and what manner of injunctive relief is warranted by a situation is committed to the circuit court's discretion. ***Forest County v. Goode***, 219 Wis. 2d 655, 662-63, 579 N.W.2d 715 (1998).

ANALYSIS

The Proceedings Before the Board and the Circuit Court

¶16 Although we have already set out the procedural history of this case, we begin our analysis with an explanation of how the issues evolved during that history. We do so because this process largely governs our decision on the appellate issues.

¶17 This case started out as a routine certiorari review of the board's initial determination that Exotica V qualified as a gift or novelty store. It continued in that vein when the circuit court reversed the board's determination and remanded the matter to the board. Thereafter, however, the case began to take on a different dimension. On remand, the board determined that Exotica V qualified as a retail establishment under the ordinance. However, the ordinance did not list a "retail establishment" among the permitted uses. Thus, Geneva

Group was required to seek permission to operate as an unspecified use in the zoning district.

¶18 However, the Town did not seek further certiorari review of this new determination by the board. Instead, the Town responded with this direct action, challenging the board's determination and seeking an injunction. If that were the extent of the record before us, we would agree with the Geneva Group that the Town's injunction action was barred under the doctrine of exhaustion of administrative remedies. The exhaustion of administrative remedies is a doctrine of judicial restraint and provides that "judicial relief will be denied until the parties have exhausted their administrative remedies." ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977). Since the Town was aggrieved by the board's determination, it should have sought review of that administrative ruling via certiorari, not via this direct action for an injunction.

¶19 *But this case was not ultimately litigated on the basis of the Town's disagreement with the board's determination that Exotica V was a retail establishment*. Instead, while the circuit court action was pending, the parties conducted further proceedings before the board on the Geneva Group's application for an unspecified use permit. During this process, the case took on yet another dimension. For the first time, the parties addressed the provisions of the *amended* zoning ordinance that recognized an adult entertainment establishment as a permitted use, not an unspecified use. And as noted, the board ultimately determined that Exotica V qualified as an adult entertainment establishment under this amended ordinance. As a result, Geneva Group's application for approval of its operation as an unspecified use became a moot point.

¶20 Armed with the board's determination that Exotica V qualified as an adult entertainment establishment, the Town returned to the circuit court with an amended complaint seeking an injunction on an entirely different theory. The Town alleged that since Exotica V was a permitted adult entertainment establishment, the operation was in violation of the 750-foot setback provisions of the amended ordinance.

¶21 So what started out as a conventional certiorari review of the board's determination under the prior zoning ordinance "morphed" into a direct action for an injunction based upon the board's interpretation under the amended zoning ordinance. With this history in place, we now turn to the substantive issues on appeal.

Exhaustion of Administrative Remedies

¶22 The first issue is whether the Town was precluded from bringing this action for injunctive relief without first requesting certiorari review of the board's September 21 decision. Pursuant to WIS. STAT. § 59.694(10), "[a] person aggrieved by any decision of the board of adjustment … may, within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari…. The court may reverse or affirm, wholly or partly, the decision brought up for review."

¶23 Geneva Group contends that once the Town became engaged in the administrative proceedings that resulted in the board's September 21 decision, it was required to exhaust its administrative remedies by challenging that decision through a timely filed certiorari proceeding. As we have noted, the exhaustion of administrative remedies is a doctrine of judicial restraint and provides that

"judicial relief will be denied until the parties have exhausted their administrative remedies." ***Nodell,*** 78 Wis. 2d at 424.

¶24 The Town responds that it was not aggrieved by the board's decision and therefore had no motivation to seek further certiorari review. Rather, armed with the board's determination that Exotica V was an adult entertainment establishment, the Town contends that it was entitled to bring this direct action for injunctive relief because Exotica V was operating contrary to the setback requirements set out in the amended ordinance. Therefore, the Town contends that it was entitled to injunctive relief and that the circuit court properly granted such relief pursuant to WIS. STAT. § 59.69(11) and § 2.14 of the Walworth County Shoreland Zoning Ordinances.

¶25 At the center of this dispute is the board's September 21 decision. In that decision, the Board states that "The [board], during the meeting on September 14, 2000, voted that Exotica V should be classified as an adult entertainment establishment that is a permitted use as a retail business in the B-2, General Business District." In its findings, the board states: "The Board found that while working with the old ordinance (1998) and reviewing other uses listed (as the use was similar to a variety store), restricted hours and age restrictions, it was the Board's belief that Exotica V belongs as a principal use in the B-2, General Business District."

¶26 WISCONSIN STAT. § 59.69(11) governs the procedure for the enforcement of county zoning ordinances. It provides in relevant part: "The ordinances shall be enforced by appropriate forfeitures. Compliance with such ordinances may also be enforced by injunctional order at the suit of the county or an owner of real estate within the district affected by the regulation." ***Id***.

Similarly, § 2.14 of the 2000 ordinance provides, "In case of any violation, the County Board of Supervisors, the Zoning Administrator, the Committee, any municipality, or any owner of real estate within the district affected who would be specifically damaged by such violation may institute appropriate action or proceeding to enjoin a violation of this Ordinance."

¶27 Here the board found that Exotica V was properly classified as an adult entertainment establishment under the 2000 zoning ordinances. That determination provided the Town with the opportunity to invoke the 750-foot setback requirement as the basis for its injunction claim in its amended complaint. Therefore, the Town was not aggrieved by the board's determination, and it had no motivation or need to seek certiorari review of the board's determination. In short, the Town had no administrative remedy to exhaust. Therefore, the Town was entitled to seek injunctive relief from the circuit court via this direct action.

Prior Nonconforming Use

¶28 Geneva Group next argues that the board's September 21 decision constitutes a finding that Exotica V was a prior nonconforming use. We disagree. The board's decision clearly states that the proper classification for Exotica V is as an adult entertainment establishment, a permitted use in the zoning district. While the board's findings allude to the prior history that Exotica V had previously been classified as a principal use under the 1998 ordinances, the board never made any finding that Exotica V was a *prior nonconforming use*. Nor did the board make a finding that the 2000 zoning restrictions applicable to an adult entertainment establishment did not apply to Exotica V.

¶29 Alternatively, Geneva Group argues that Exotica V was legally opened in a B-2 zoning district and, as such, it was entitled to continue that

operation as a valid nonconforming use under the amended zoning ordinance. It cites to WIS. STAT. § 59.69(10), "[a]n ordinance enacted under this section may not prohibit the continuance of the lawful use of any building or premises for any trade or industry for which such building or premises is used at the time that the ordinances take effect …." Similarly, § 7.1 of the 2000 ordinance provides with some exceptions, "The lawful non-conforming use of a structure … existing at the time of the adoption or amendment of this Ordinance may be continued although the use does not conform with the provisions of this Ordinance."

¶30 The circuit court rejected Geneva Group's argument, ruling that Exotica V was not a legal nonconforming use because it had never qualified as a valid unspecified use under the prior ordinance. We agree. A legal nonconforming use is a use that existed and was lawful when the restriction became effective and which has continued to exist since that time. ***City of Lake Geneva v. Smuda***, 75 Wis. 2d 532, 536-37, 249 N.W.2d 783 (1977). The prior ordinance preceded Exotica V's arrival on the scene. And while Exotica V originally had the board's approval to operate as a gift store, that determination was overturned by the circuit court. On remand, the board determined that Exotica V was a retail establishment, a designation that required Geneva Group to obtain approval as an unspecified use. Although Geneva Group sought such approval, the board did not address that request since it ultimately determined that Exotica V was an adult entertainment establishment, a permitted use under the amended zoning ordinance.

¶31 The bottom line as to this issue is threefold: (1) Exotica V did not qualify as a gift shop under the original ordinance; (2) Exotica V was operating as an adult entertainment establishment in violation of the 750-foot setback requirement under the amended ordinance; and (3) Exotica V has yet to establish

its claimed nonconforming use status since it has failed to obtain approval as an unspecified use as a retail establishment. Therefore, it cannot qualify as a legal nonconforming use under the amended ordinance.

CONCLUSION

¶32 We conclude that the Town's amended complaint seeking an injunction was not based upon a challenge to the board's September 21 determination that Exotica V was a permitted use under the amended ordinance as an adult entertainment establishment. Instead, the Town used that determination in conjunction with the 750-foot setback requirement as the basis for its injunction request. Therefore the Town was not bound by the doctrine of exhaustion of administrative remedies. Based on the summary judgment record, we further conclude that Geneva Group did not qualify as a legal nonconforming use. We affirm the grant of summary judgment to the Town.[10]

[10] Geneva Group also argues that the circuit court erred when it determined that Exotica V did not qualify as a gift shop under the original zoning ordinance. The Town answers that we should not address this argument because the court's ruling was made in the certiorari action, not in the injunction action that is before us. In its reply brief, Geneva Group responds that it was not a party to the certiorari (that action was brought by the Town against the board) and therefore it is not bound by that ruling.

Regardless of whether Geneva Group is bound by the court's ruling in the certiorari action, we note that Geneva Group never raised this argument in the injunction proceeding that is before us. If Geneva Group wanted the court to change its mind on this question, it was obligated to make that request in this action. It did not do so. That undoubtedly explains why the circuit court's decision does not speak to this issue. We do not address issues that are raised for the first time on appeal. ***C.A.K. v. State***, 154 Wis. 2d 612, 624, 453 N.W.2d 897 (1990). Besides failing to raise the issue in the circuit court, Geneva Group had another avenue by which to challenge the circuit court's certiorari ruling: it could have intervened in that action.

(continued)

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

Geneva Group further argues that the circuit court's application of the unspecified use provisions of the prior zoning ordinance represents an unconstitutional prior restraint upon free speech. However, the ordinance was not a licensing ordinance. *See* ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215, 226 (1990). Nor did the ordinance require special zoning use approval for adult uses. *See* ***Entm't Concepts, Inc. III v. Maciejewski***, 631 F.2d 497, 503-05 (7th Cir. 1980). In fact, the ordinance is silent as to such activity or uses. The only criteria for obtaining approval as an unspecified use is that it be "similar in character to the permitted uses." The circuit court simply observed that Geneva Group had not obtained approval as an unspecified use under the prior ordinance in support of its claim as a valid nonconforming use. That statement, which accurately reflects the history of this case, does not represent an unconstitutional prior restraint on free speech.