COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2520 **Cir. Ct. No. 2009CV3541**

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

DAVID NELSON AND SHIRLEY NELSON,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF SUMMIT, N/K/A VILLAGE OF SUMMIT, AND WAUKESHA COUNTY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed*.

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

¶1 PER CURIAM. David and Shirley Nelson appeal from an order granting summary judgment in favor of the Town of Summit, n/k/a Village of

Summit (for ease, "Summit"), and Waukesha County. The Nelsons[1] argue that they should not have to undertake a futile administrative appeal or other formal challenge to a variance denial. We agree with Summit and the County that the Nelsons' claims are not ripe until they at least demonstrate futility by pursuing a final decision from the regulatory authority. We affirm.

¶2 In 2003, David's and Shirley's daughter, Jolene, purchased a house and lot on Upper Nemahbin Lake in Summit. The property is zoned under the Waukesha County Shoreland and Floodland Protection Ordinance ("the Ordinance") as an Existing Floodplain Development ("EFD") Overlay District. When Jolene bought the property, it was mapped as being located in a flood fringe area of the floodplain.

¶3 The Waukesha County Board of Adjustment had granted an area variance ("the 2003 variance") to the prior owners of the property to build a new house. The variance went unused. In 2006, Jolene's parents took title to the property, planning to renovate and enlarge the approximately seventy-year-old house and then to live there with Jolene. The Waukesha County Department of Parks and Land Use Planning and Zoning Division ("the Division") advised the Nelsons that they could build a new house if they built it consistent with the plans approved in the 2003 variance.

¶4 In June 2008, Waukesha county experienced unprecedented rainfall and flooding. The Nelsons' house, which sat lower than neighboring properties,

[1] Shirley Nelson died in 2009. "The Nelsons" means either David and Shirley or David and their daughter, Jolene Cecil, as the context requires. "The Nelsons' house" means the house in which Jolene resided.

was totally destroyed. Jolene contacted the Division's Senior Land Use Specialist, Amy Barrows, to see if the property could be rebuilt using the former variance and if Federal Emergency Management Agency (FEMA) grant money might be available for rebuilding.

¶5 On September 3, 2008, Barrows wrote to Jolene advising her that FEMA had updated the County's Flood Insurance Rate Maps, which the County would adopt by November 19, 2008; that the elevation of the Nemahbin Lake floodplain had increased; and that the new Rate Maps showed Jolene's entire lot as now being in a floodway. The "Barrows letter" explained that a floodway is "an area within the floodplain required to carry the regional flood discharge," that the Ordinance prohibits repairing or reconstructing a damaged structure or building a new structure in a floodway and that the 2003 variance no longer was valid because of the updated site conditions. The letter also advised Jolene, however, that area municipalities and other affected parties were considering a joint effort to restudy the floodplain mapping and, if FEMA accepted the remapping proposals and the Nelson property once again was in the flood fringe, she could apply to the Board of Adjustment for a new variance.[2]

¶6 According to Jolene's deposition testimony, she telephoned Barrows upon receipt of the letter and Barrows told her that "it wouldn't matter if I … tried to disagree, because the floodway was going in effect, and that is the way the county was going to handle it…. And they were not issuing me a permit unless

[2] David and Shirley lived in Arizona. Shirley was seriously ill. On the heels of the Barrows letter, David appointed Jolene power of attorney to take whatever actions she deemed necessary "to effectuate the flood water issues … relative to [the Nelsons'] property."

we could get the floodway revamped." Jolene acknowledged having heard that remapping might change the restrictions on her property.

¶7 Shortly thereafter, Jolene attended a meeting about the flood mapping run by Barrows and some county board members. Jolene testified that the board members essentially agreed with Barrows' earlier-stated position and that the board members would not even discuss giving her a permit because the floodway was not yet adopted. Jolene testified that she left the meeting with the impression that the Board of Adjustment would not review the matter because, although not a member, Barrows represented the County and already had said the denial was in the County's best interest.

¶8 The Nelsons took no formal administrative action with the County, nor did they seek permission from Summit to rebuild. Instead, the Nelsons sued Summit and the County, arguing that not permitting them to rebuild the home or, essentially, to use the property for other than open space constitutes a total, permanent, uncompensated taking, *see* WIS. CONST. art. 1, § 13, entitling them to relief under WIS. STAT. § 32.10 (2009-10).[3] Summit and the County moved for summary judgment, primarily arguing that the matter was not ripe, as the Barrows' determination was not a final decision.

¶9 The circuit court agreed. It granted summary judgment in favor of Summit and the County, ruling that the controversy was "not sufficiently developed to be pursued in the circuit court, explicitly retaining to [the Nelsons]

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

the right to bring it back without any adverse consequence to their claims[,] assuming they can at a future time show such ripeness." The Nelsons appeal.

¶10 We review a grant of summary judgment de novo, using the same methodology employed by the circuit court under WIS. STAT. § 802.08. ***Smith v. Katz***, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. ***Streff v. Town of Delafield***, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

¶11 We reject the Nelsons' first argument that summary judgment was wrongly granted because seeking review would be futile and the circuit court observed that the issue of futility essentially is a question of fact. The question of futility may doom a later summary judgment motion, but ripeness is the threshold issue here.

¶12 A regulatory takings claim requires a plaintiff to prove that: (1) the government restriction or regulation is excessive and therefore has, in effect, "taken" his or her property; and (2) any proffered compensation is unjust. ***Hoepker v. City of Madison Plan Comm'n***, 209 Wis. 2d 633, 651, 563 N.W.2d 145 (1997); *see also* ***MacDonald, Sommer & Frates v. Yolo County***, 477 U.S. 340, 348 (1986). As to the first element, a takings claim is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." ***Hoepker***, 209 Wis. 2d at 651 (citing ***Williamson County Regional Planning Comm'n v. Hamilton Bank***, 473 U.S. 172, 186 (1985)). "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." ***MacDonald, Sommer & Frates***, 477 U.S. at 348. As to the

second element, if the government provides an adequate procedure for seeking just compensation, a takings claim is not ripe until the property owner has used the procedure and been denied just compensation. ***Williamson County Regional Planning Comm'n***, 473 U.S. at 195. Both the "final decision" and "exhaustion" requirements must be met. *See* ***Hoepker***, 209 Wis. 2d at 652-53.

¶13 The Nelsons assert that this court has "specifically held" that the final decision requirement does not apply if the attempt to "pursue the matter through the final decision process ... would be futile," citing ***Streff***, 190 Wis. 2d at 355. The ***Streff*** quote was not our holding. Rather, it was a paraphrasing of a partial holding from ***Unity Ventures v. County of Lake***, 841 F.2d 770, 775-76 (7th Cir. 1988), which—stated more completely—makes clear that futility is not established without at least one meaningful application. *See* ***id.*** The ***Unity Ventures*** court concluded that the plaintiffs' claim was not ripe because they did not obtain a final decision on their application; "indeed, they have failed even to present a formal application to either the Village … or [the] County." ***Id.*** at 776.

¶14 Here, too, the Nelsons never made a formal application to Summit or the County. Jolene met only with a County representative to inquire about using the 2003 variance. The Nelsons subsequently did not appeal to the Board of Adjustment either to review Barrows' determination or to dispute the EFD District boundaries shown on the official zoning map, where they would have been given "a reasonable opportunity to present arguments and technical evidence to the Board." *See* WAUKESHA COUNTY, WIS., SHORELAND AND FLOODLAND PROTECTION ORDINANCE §§ 38(c)(1)(A), 38(c)(1) (B) and 38(c)(1)(B)(ii) (2010). The Nelsons did not contact the DNR or FEMA. Without any final decision as to the application of regulations to the Nelsons' property, it cannot be determined whether there was a taking.

¶15 Likewise, the Nelsons have not availed themselves of the available procedures and been denied just compensation. As noted above, various options existed for them to at least have a forum to present their case. The engineering study and possible remapping still were underway. The Nelsons argue that they should not be forced to undertake a futile course. They offer no authority, however, that they need only assert, rather than demonstrate, futility.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.