COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 13, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2788-FT

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

ROBERT PULS AND MARY PULS,

Plaintiffs-Appellants,

v.

RICHARD MEYER AND MOLLY MEYER,

Defendants-Respondents,

v.

HARLAN AND NANCY CHRISTIANSON, WILLIAM AND KATHY KRAUSE AND DONALD AND GLORIA VAN ROO,

Defendants Third-Party Plaintiffs-Respondents,

TOWN OF BERGEN, A MUNICIPAL CORPORATION,

Third-Party Defendant.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Robert and Mary Puls appeal a summary judgment dismissing their action for money damages and equitable relief based upon alleged violations of the Town of Bergen zoning ordinance.[1] The issues raised on appeal are whether (1) this court has jurisdiction and (2) the ordinance permits sheds, mobile homes and trailers to be used for camping on property zoned RS-1, single family residential.

Because the order for partial summary judgment is nonfinal, we interpret the Puls' notice as a petition for leave to appeal and grant leave, thus obtaining jurisdiction. We conclude that the zoning ordinance does not permit camper trailers and mobile homes to be kept on the RS-1 zoned lots. We also conclude that two issues of fact are presented: (1) whether the Meyers' trailer is an accessory use and (2) whether the Van Roos use their shed as a dwelling. We therefore reverse the partial summary judgment dismissing the Puls' claims concerning zoning violations and remand for further proceedings.

This matter involves lots in the Lakehurst subdivision of the Town of Bergen in a district zoned RS-1, single family residential. The Puls' complaint states that they are homeowners and Paula and Molly Meyer, Harlan and Nancy Christianson, William and Kathy Krause, and Donald and Gloria Van Roo, the defendants, violated deed restrictions and zoning ordinances in a variety of ways and sought injunctive relief enforcing deed restrictions and town zoning ordinance, together with compensatory and punitive damages. The Puls complain that the Meyers, the Christiansons and the Krauses keep camper trailers or mobile homes on their lots. They also complain that the Van Roos use a 200-square-foot shed for residential purposes.

The defendants moved for a partial summary judgment declaring that their activities are not barred by the Town's zoning ordinance. The Christiansons and Krauses filed affidavits that they each have a mobile home "designed to be transported by a motor vehicle on a public highway" on their lots "resting on a concrete slab ... and has septic, water and electrical connections." Gloria Van Roo filed an affidavit that they do not use their shed for residential purposes and only stayed overnight in it occasionally. The Van Roos stated that they never had a permanent water system but would run a

[1] This is an expedited appeal under RULE 809.17, STATS.

garden hose to the shed for water. The defendants maintain that they obtained permission from the Eau Pleine Homeowner's Association each year that they camped and that the Van Roos obtained the necessary permits to build their shed. The trial court entered a partial summary judgment that the zoning ordinance "does not, on its face or interpretation, prohibit intermittent recreational or mobile home use of the properties such as that enjoyed by defendants ...." It entered a later order dismissing the Town as a party. The Puls appeal the court's ruling dismissing their zoning violation claims. The record suggests that the Puls' claims arising out of the alleged violations of deed restrictions remain pending.

1. Jurisdictional issue

An order or judgment, to be appealable as of right, must dispose of the entire matter in litigation as to one or more of the parties. Section 808.03(1), STATS. An appeal may be final as to one party, but nonfinal as to others. ***Culbert v. Young***, 140 Wis.2d 821, 825, 412 N.W.2d 551, 553 (Ct. App. 1987). A nonfinal order may be reviewed by a permissive appeal, the granting of which is within the discretion of the court of appeals.[2] Section 808.03(2), STATS.

The defendants contend that the Puls' notice of appeal is defective because it appeals the September 8, 1994, order dismissing the Town of Bergen, not the August 9, 1994, order for partial summary judgment dismissing the Puls' claims against the defendants for zoning violations.[3] They argue that

[2] Extensions of time to file a petition for leave to appeal nonfinal orders are within the court's discretion. Section 809.82(2), STATS.

[3] The notice of appeal states that the Puls appeal:

> the Order of Dismissal re: Town of Bergen entered on September 8, 1994 in the Circuit Court for Marathon County, the Honorable Raymond F. Thums presiding, Case No. 91-CV-621 in favor of the Defendants and Third Party Plaintiffs and against the Plaintiffs, wherein the Court dismissed and removed the Town of Bergen as a party to the action and thereby dismissed all causes of action relating to violations of the Town of Bergen Zoning Ordinance.

because the Puls' claims were against the defendants, not the Town, the Puls appealed the wrong order and the notice of appeal is jurisdictionally defective.

The defendants' jurisdictional challenge is misdirected. We conclude that reference to the September 8 order does not render the notice defective. There is no doubt what was appealed. ***Rhyner v. Sauk County,*** 118 Wis.2d 324, 326, 348 N.W.2d 588, 589 (Ct. App. 1984). The notice adequately informs the defendants that the Puls desired to challenge the ruling adverse to them with respect to zoning.

However, the record indicates that there remain pending claims by the Puls against the defendants with respect to restrictive covenants.[4] Because there remain pending claims between the parties, the order granting partial summary judgment is nonfinal. *See* ***Culbert,*** 140 Wis.2d at 825, 412 N.W.2d at 553. Neither party addresses the finality issues. Nonetheless, because the Puls have shown a substantial likelihood of success on the merits and because the disposition of this appeal will clarify further proceedings, we construe the Puls' notice as a petition for leave to appeal and exercise our discretion to grant leave. *See* § 808.03, STATS. We have jurisdiction over this appeal.

2. Summary judgment

The issue on appeal requires the interpretation of the Town's zoning ordinance. When interpreting a municipal ordinance, we give effect to the legislative intent reflected in its language. ***County of Columbia v. Bylewski,*** 94 Wis.2d 153, 168, 288 N.W.2d 129, 137 (1980). "The intent of a given section must be derived from the ordinance as a whole." ***Id.***

[4] The Puls' claims were made against the defendants, not the Town of Bergen. The Town was made a third-party defendant to litigate the validity of the Town's camping ordinance. The validity of the camping ordinance is not an issue on appeal. The notice of appeal and the parties' briefs demonstrate that the issue on appeal is the trial court's interpretation of the zoning ordinance.

Moreover, an ordinance "must be confined to such subjects or applications as are obviously within its terms and purposes, but it does not require such an unreasonably technical construction that words cannot be given their fair and sensible meaning in accord with the obvious intent of the legislative body."

Id. (quoting 6 E. MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS, § 20.49 at 133 (3d ed. 1969)). The interpretation of an ordinance, like that of a statute, is appropriate for summary judgment determination. *See* ***Kania v. Airborne Freight Corp.,*** 99 Wis.2d 746, 763, 300 N.W.2d 63, 70 (1981).

The Town's 1975 zoning ordinance plainly states that only those uses specifically authorized are permitted. Article III, § 9 (1) provides that "no building or land shall be used" except as stated in the ordinance for that district. However, "accessory buildings and uses customarily incident to the permitted uses in that district shall be permitted subject to such requirements as may be designated for that district in which they are located." Article III, § 11.

The zoning ordinance divides the Town into 10 districts, including residential, conservancy, agricultural, recreational, commercial and industrial. Article V of the ordinance provides:

Section 2. RS-1
SINGLE FAMILY (RESIDENCE DISTRICT

SECTION 3. PERMITTED USES:
....

(4) Single family dwellings designed for and occupied exclusively by one family, but not including a house trailer or mobile home.

....

(7) Accessory buildings, including private garages and buildings clearly incidental to the residential use of the

> property, provided, however, that no accessory building may be used as a separate dwelling unit.

Article VI, entitled "RS-2 SINGLE FAMILY RESIDENCE DISTRICT" permits any use permitted in the RS-1 district and

> (2) Mobile homes, as detached single family dwellings, provided the mobile home and the lot upon which it is located have a common ownership and ... permanent foundation ....

There is no claim of ambiguity made in this case. The ordinance permits only those uses specifically authorized and uses "customarily incident" to permitted uses. Here, the plain language of the Town's ordinance states that in areas zoned RS-1, single family dwellings are permitted, but not house trailers or mobile homes. There is no dispute that the Christiansons and the Krauses have placed mobile homes on their lots, which are zoned RS-1. The mobile homes are not a permitted use under the ordinance in RS-1 zoned lots, but are permitted on RS-2 zoned lots.

The Christiansons and the Krauses argue that because they "camp" instead of "dwell" in the mobile home, they are not in violation of the zoning ordinance. We disagree. The intent of the ordinance is plain and unambiguous from the ordinary meaning of its language. Single family dwellings, not including mobile homes or trailers, are permitted. The ordinance lists no exceptions based upon the type of activity that takes place in the mobile home or trailer.

The defendants contend that because no occupancy permit is required for camping, and camping in mobile homes is not expressly prohibited, they do not violate the zoning ordinance. We are not persuaded. The plain language of the ordinance expressly permits single family dwellings, not including mobile homes or trailers on RS-1 zoned lots. Its intent to exclude mobile homes and trailers as nonpermanent dwellings is plain from its terms as well as from the ordinance as a whole.

The defendants also argue that the Eau Pleine Homeowner's Association implicitly approved camping by charging extra association fees to persons with trailers or mobile homes on their lots. They contend that long established practices illustrate that the ordinance permits mobile home camping. We disagree. The failure to enforce zoning laws at an earlier point in time does not prevent the municipality from later seeking enforcement. ***Milwaukee v. Leavitt,*** 31 Wis.2d 72, 76-77, 142 N.W.2d 169, 171-72 (1966).

The Christiansons and the Krauses also argue that our interpretation of the ordinance requires the conclusion that a child could not set up a lemonade stand or play a game of softball because these activities are not "authorized" under the zoning ordinance. These facts are not before us and therefore we need not give a hypothetical opinion. ***State v. Courtney,*** 74 Wis.2d 705, 713, 247 N.W.2d 714, 719 (1976).

In a three-sentence paragraph, the Krauses and the Christiansons challenge the constitutionality of the Town zoning ordinance, contending that they have the right to be free of unreasonable and illegal restraints on the use of their property. The ordinance is presumed valid, and the challengers bear the burden of establishing its unconstitutionality beyond a reasonable doubt. ***In re Estate of Peterson,*** 66 Wis.2d 535, 538, 225 N.W.2d 644, 645 (1975). We observe that zoning requirements regarding mobile homes that are different for those for single family dwellings have withstood constitutional challenges based upon equal protection. ***Edelbeck v. Theresa,*** 57 Wis.2d 172, 180-81, 203 N.W.2d 694, 698 (1973). In any event, their argument on appeal is not sufficiently developed to permit review. ***State v. Gulrud,*** 140 Wis.2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987).

The plain language of the ordinance also prohibits sheds to be used as dwelling units. Here, the Van Roos contend that they do not use their shed as a dwelling unit, but have stayed in it occasionally. Because conflicting inferences may be drawn from their affidavit as to the extent of their use of the shed, a factual issue is presented not suitable for summary judgment determination.

The Meyers contend that they have a single family dwelling on their lot that conforms with the zoning ordinance. They claim the storage of their camper trailer on a contiguous lot falls within the meaning of "accessory

use under" art. III § 11. Whether their camper storage is "accessory" or "customarily incident" to a permitted use also presents factual issues not sufficiently developed by the record to permit summary judgment.

Therefore, we reverse the judgment dismissing the Puls' claims based upon the alleged violations of the zoning ordinance, direct the trial court to enter summary judgment that the Krauses and Christiansons violated the ordinance by camping in mobile homes on their RS-1 single family residential lots, and remand the matter to the trial court for factual determinations whether the Meyers and Van Roos violate the ordinance, as well as for further proceedings concerning the remaining causes of action, damages and other relief.

By the Court. – Order reversed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.