COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3429

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

TOWN OF FULTON,

PLAINTIFF-RESPONDENT,

v.

JAQUELINE L. SCHIFFER,

DEFENDANT,

JOHN L. HODGES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Modified and, as modified, affirmed.*

DEININGER, J.[1] John Hodges appeals a trial court judgment declaring the use of his property for the storage of semi-trailer boxes and

[1] This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS.

abandoned or wrecked automobiles to be in violation of various Town of Fulton ordinances. Hodges raises two issues on appeal. He first contends that the trial court erred in concluding that his use of the property did not constitute a valid, nonconforming use. Second, Hodges argues that the trial court erroneously determined his property to be a public nuisance. We conclude that the Town acted properly when it declared the storage of semi-trailer boxes and inoperable automobiles on property, without a proper junkyard permit, to be a public nuisance. And, because Hodges' use of the property constitutes a public nuisance, that use cannot be grandfathered as a nonconforming use. Accordingly, we affirm the trial court's judgment.

BACKGROUND

John Hodges owns two adjacent lots totaling approximately four acres on West Pomeroy Road in the Town of Fulton. Hodges began living on this property with his parents in 1961. In 1978, Hodges purchased the property from his parents, living in the house located there until it burned down in 1984. Thereafter, he resided in a camper located on the property until 1990. Since approximately 1978, Hodges has sporadically engaged in various businesses on the property, from white-washing barns to storing, selling and working on semi-trailer boxes ("trailer boxes") and junked automobiles. Hodges described his use of the property at trial as follows:

> [B]asically I used it to keep everything that I owned on, and continued whitewashing barns and my semi truck business, and buying and selling and fixing cars and fixing other people's cars. Or whoever needed a helping hand, I'd help them. A lot of it happened right there. People bring stuff to me and I'd fix it. Good fixer.

After the house on the Pomeroy property was destroyed by fire, the Town constable received complaints from residents about the open basement and

debris located on the property. In approximately 1990, the constable cited Hodges for the open basement hazard. He also cited Hodges, under either the Town's 1980 nuisance ordinance or a junked vehicle ordinance, for having vehicles that were junk and in disrepair and for the area being in general disrepair. Between 1990 and 1995, the constable repeatedly checked on Hodges' property but did not issue further citations.

In 1993, the Town amended its zoning ordinance to require people using trailer boxes on their property to obtain conditional use permits. In January 1995, the Town police chief issued Hodges a citation for violating the zoning district regulations due to the presence of trailer boxes on his property without a conditional use permit. A jury trial was held in November 1995, and Hodges was found guilty of violating the zoning ordinance. Thereafter, he moved some, but not all, of the trailer boxes off the Pomeroy property.

Hodges appeared at a January 11, 1996 Town of Fulton Planning and Zoning Committee meeting to discuss the trailer boxes which remained on his property. Hodges requested a conditional use permit for the trailer boxes and was told, due to some apparent confusion regarding the classification of his property and the requirements of the ordinance, that no such permit existed. Hodges also inquired about the possibility of erecting a pole building on his property to house the miscellaneous items, but was informed that the zoning ordinance required that a residence must first be constructed. Hodges was also told that the planning and zoning committee may not have the authority to issue a conditional use permit because Hodges remained in violation of a court order to remove the trailer boxes.

On February 8, 1996, Hodges went before the planning and zoning committee, asking once again that he be granted a conditional use permit to locate

six remaining trailer boxes on his property. The committee informed Hodges that it could not act on his request until he first complied with the court order to remove the boxes. Hodges filed a motion in circuit court to vacate the court order. Shortly thereafter, because of a procedural error in the 1995 action, the court entered an order deleting the requirement that Hodges remove the trailer boxes.

The Town filed a complaint against Hodges in May 1996, alleging that Hodges had trailer boxes on his property without the requisite conditional use permit in violation of the Town's amended zoning ordinance. In the alternative, the Town alleged that the location of trailer boxes on Hodges' land violated the Town's original 1980 zoning ordinance. In September 1996, the Town enacted an ordinance which required anyone operating a junkyard to obtain a permit. At the same time, the Town also amended its code of ordinances to expand the definition of "public nuisances" to include: (1) property on which wrecked or abandoned motor vehicles and trailer boxes were kept without a junkyard permit from the Town; and (2) property on which one or more trailer boxes were kept. In March 1997, the Town amended its complaint to include allegations that Hodges was in violation of these new provisions.

At trial, the Town established that there were currently eight trailer boxes on Hodges' property, some of which had been there since the 1980's. Hodges did not dispute that he did not have a conditional use permit for any of the trailer boxes on his property. In addition to the trailer boxes, Hodges' property was also the site of numerous semi-trailer axles, tires, doors and other semi-trailer parts, steel barrels, fifteen to eighteen motor vehicles (all of which needed some work in order to be operational), a bus and other debris. Hodges admitted that at no time had he applied for or obtained a junkyard permit for the property.

The trial court determined that Hodges was operating a junkyard on his property without a valid permit in violation of the Town of Fulton Code of Ordinances, as amended in September 1996. The court also concluded that the presence of trailer boxes on the property without a conditional use permit violated the amended zoning ordinance "as of the date of the filing of this [c]omplaint," as well as provisions of the Town's original 1980 zoning ordinance. The court also determined that the mere presence of the trailer boxes on the property constituted a public nuisance under the amended code of ordinances. Finally, the trial court found that the trailer boxes were "structures," as defined within the Town's amended zoning ordinance, and that Hodges had failed to show that the trailer boxes qualified as pre-existing nonconforming structures in their current location on his property. The court ordered Hodges to pay a $300 forfeiture and to remove all of the motor vehicles and trailer boxes from the premises.

ANALYSIS

On appeal, Hodges contends that: (1) his use of the property constituted a nonconforming use which existed prior to the enactment of any Town zoning ordinances, and therefore his use must be grandfathered; and (2) the trial court erroneously declared Hodges' property a public nuisance due to the arbitrariness of the ordinance in declaring the presence of semi-trailer boxes on property to be a public nuisance, and because the trial court made inadequate factual findings with regard to whether semi-trailer boxes constituted a threat to the public health, safety and morals.

We have recently held that a nonconforming use may be ordered terminated when that use also constitutes a public nuisance, or is harmful to the public health, safety or welfare. ***Town of Delafield v. Sharpley,*** 212 Wis.2d 332,

337, 568 N.W.2d 779, 781 (Ct. App. 1997). Thus, we first address the public nuisance issue because a determination in the Town's favor precludes the need to fully address Hodges' nonconforming use arguments. ***Id***. at 342, 568 N.W.2d at 783.

Whether Hodges' property constitutes a public nuisance involves the application of the trial court's factual findings to the standards by which nuisances are defined. This presents a mixed question of fact and law which we review de novo. *See* ***Nottelson v. DILHR,*** 94 Wis.2d 106, 115-16, 287 N.W.2d 763, 768 (1980). A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. *See* § 805.17(2), STATS. The "clearly erroneous" standard is essentially the same standard as one which considers whether a finding is "contrary to the great weight and clear preponderance of the evidence." *See* ***Figliuzzi v. Carcajou Shooting Club,*** 184 Wis.2d 572, 589 n.7, 516 N.W.2d 410, 417 (1994). The application of zoning and nuisance ordinances to the facts as found, however, is a question of law that we review de novo. ***County of Sauk v. Trager,*** 113 Wis.2d 48, 55, 334 N.W.2d 272, 275 (Ct. App. 1983).

Generally, a municipality is not entitled to obtain equitable relief to enforce its ordinances in the absence of a specific enabling statute, unless a violation is shown to constitute a nuisance per se or threatens to destroy property rights. ***County of Columbia v. Bylewski,*** 94 Wis.2d 153, 162-63, 288 N.W.2d 129, 134 (1980). The supreme court has long held, however, that municipalities may, in the exercise of a valid police power, protect the public health and safety through ordinances that operate within legislative limits. *See* ***Highway 100 Auto Wreckers, Inc., v. City of West Allis,*** 6 Wis.2d 637, 643, 96 N.W.2d 85, 88 (1959) ("The police power of the state, exercised by municipalities under authority of the legislature, extends to the public safety, health, morals and general welfare.").

Through the enactment of various statutes, including §§ 59.55(5), 84.31 and 175.25, STATS., the legislature has invested municipalities and counties with the power to enact ordinances which regulate and license the wrecking, storing and selling of junked motor vehicles. The legislature has thus shown its intent to grant the authority for the regulation of junkyards to local governments. A more general grant of authority is contained in § 66.052, STATS., which provides, in part as follows:

> **66.052 Offensive Industry. (1)** Any common council or village board may direct the location, management and construction of, and license, regulate or prohibit any industry, thing or place where any nauseous, offensive or unwholesome business is carried on . . . . Any town board shall have the same powers as provided in this section for cities and villages . . . . *Any business that is conducted in violation of any city, village or town ordinance that is authorized to be enacted under this section is a public nuisance.*

(Emphasis supplied.) *See* ***Highway 100 Auto Wreckers, Inc.,*** 6 Wis.2d at 641-42, 96 N.W.2d at 87 (holding that a municipality's power to regulate and license automobile salvage dealers derives, in part, from § 66.052). We conclude, therefore, that the Town acted within its statutory authority when it required an individual operating a junkyard on his or her premises to obtain the proper permit from the Town.

Chapter 11, section 3.a. of the Town of Fulton Code of Ordinances provides:

> No person shall cause, allow or permit any person to create any public nuisance areas on the premises owned, leased or controlled by that person in the Town of Fulton. The following are specifically declared by the Town Board of the Town of Fulton to be public safety nuisances. This declaration should not be construed to exclude other public nuisances affecting public safety in the Town of Fulton.
>
> a. an abandoned or wrecked motor vehicle area where motor vehicles, tractors, house trailers, railroad cars

> and semi-trailer boxes are allowed to remain *without a proper junkyard permit issued by the Town Board of the Town of Fulton.*

(Emphasis added.) Chapter 7, sections 3.a.8 and 3.g. of the Town code set forth the requirements for obtaining a junkyard permit.

Hodges does not contest the trial court's factual finding that his property was a junkyard. Nor does Hodges contend that he ever attempted to obtain a junkyard permit for his property, even after receiving notice of his non-compliance with the ordinance. Thus, Hodges maintained his property in "continuous violation" of the Town code of ordinances. The legislature has decreed that repeated or continuous violations of ordinances enacted pursuant to § 66.052, STATS., amount to a public nuisance which a municipality may enjoin:

> Repeated or continuous violations of a city, village or town resolution or ordinance enacted pursuant to s. 66.052(1) is declared a public nuisance and an action may be maintained by any such municipality to abate or remove such nuisance and enjoin such violation.

Section 823.07, STATS; *see also* ***State v. H. Samuels Co.,*** 60 Wis.2d 631, 639, 211 N.W.2d 417, 421 (1973); ***Sharpley,*** 212 Wis.2d at 342 n.4, 568 N.W.2d at 782 (repeated violations of an ordinance is tantamount to a public nuisance).

We conclude the trial court's finding that Hodges' property was a junkyard is not clearly erroneous, and that the Town acted within its authority when it enacted the junkyard regulation provisions of the Town code. Accordingly, we also conclude that by maintaining a junkyard on his property without a proper permit, Hodges violated Chapter 7, sections 3.a.8 and 3.g. (junkyard permit requirement) and Chapter 11, section 3.a. (junkyard without permit constitutes a public nuisance) of the Town of Fulton Code of Ordinances. And, since a public nuisance is not afforded the protected status of being a

nonconforming use, we also affirm the trial court's conclusion that Hodges violated section 4.3 (A-3) of the 1980 zoning ordinance, as well as the 1993 amended version. *See* ***Sharpley,*** 212 Wis.2d at 337, 568 N.W.2d at 781.

We note that the trial court also found Hodges to have violated Chapter 11, section 4 of the Town of Fulton Code of Ordinances, which prohibits storage of non-registered motor vehicles. The Town, however, concedes on appeal that the procedure set forth for providing notice to the property owner in section 4 was not followed, and we thus order that the judgment be modified to delete the finding that Chapter 11, section 4 was violated. Additionally, the trial court concluded that Hodges was also in violation of Chapter 11, section 3.j. of the code of ordinances, which provides:

> No person shall cause, allow or permit any person to create any public nuisance areas on the premises owned, leased or controlled by that person in the Town of Fulton. The following are specifically declared by the Town Board of the Town of Fulton to be public safety nuisances. This declaration should not be construed to exclude other public nuisances affecting public safety in the Town of Fulton.
>
> ....
>
> j. one (1) or more semi-trailer boxes, whether with wheels off or on, not used regularly for hauling cargo over the road unless the premises is zoned to allow such.

Because we conclude that Hodges' property constituted a public nuisance due to the existence of a junkyard without a permit, we do not address whether the presence of trailer boxes, in and of itself, constitutes a public nuisance.[2]

Finally, even if we were to address the nonconforming use issue, it is doubtful that we would conclude Hodges' use of the property qualified as one. Hodges contends that the trial court's determination with regard to the nonconforming use of his property was improperly based on the fact that Hodges supported himself by pursuing a variety of activities on his property, instead of a singular one. We disagree with Hodges' interpretation of the trial court's findings and conclusions.

In its oral decision, the trial court discussed the numerous businesses Hodges had operated on his land, and the difficulty such occasional uses presented in attempting to ascertain whether a constant nonconforming use was established:

> But, again, here we have a situation of one could never completely, in the court's mind, no matter what the factual scenario would be, depending on what we call the business or the use, find it never been completely abandoned as long as one piece of junk or equipment remained on the property.

A property owner bears the burden of proving by a preponderance of the evidence that a nonconforming use existed at the time the zoning ordinance was passed.

[2] A municipality's act in declaring a certain use of property to be a public nuisance does not foreclose all discussion on the matter. *See* ***Yates v. Milwaukee,*** 77 U.S. (10 Wall.) 497, 505 (1870); ***City of Milwaukee v. Milbrew,*** 240 Wis. 527, 532-34, 3 N.W.2d 386, 390 (1942); *see also* 56 AM. JUR. 2D *Municipal Corporations* § 444, 494-96 (1971) ("[G]eneral authority to define and abate nuisances does not empower a municipality to declare that to be a nuisance which is not a nuisance in fact, or which is not a nuisance per se and does not come within the common-law or a statutory definition of nuisance.").

Waukesha County v. Seitz, 140 Wis.2d 111, 115, 409 N.W.2d 403, 465 (Ct. App. 1987). The property owner must establish more than a mere sporadic use of the property for a multitude of endeavors:

> If the specific use was not so active and actual and was but casual and occasional, or if such a use was merely accessory or incidental to the principal use, then it cannot be said that the property owner had acquired a "vested interest" in the continuance of such a use and the status of non-conforming use will be denied.

Walworth County v. Hartwell, 62 Wis.2d 57, 61, 214 N.W.2d 288, 290 (1974); *see also* ***Seitz,*** 140 Wis.2d at 115, 409 N.W.2d at 405; ***City of Lake Geneva v. Smuda,*** 75 Wis.2d 532, 537-38, 249 N.W.2d 783, 787 (1977); ***Sohns v. Jensen,*** 11 Wis.2d 449, 457-58, 105 N.W.2d 818, 822-23 (1960).

For the reasons stated above, we affirm the trial court's judgment imposing forfeitures and directing Hodges to remove all trailer boxes and motor vehicles from his property.

By the Court.—Judgment modified and, as modified, affirmed.

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