COURT OF APPEALS
DECISION
DATED AND FILED

AUGUST 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-0237

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

TOWN OF JACKSON,

PLAINTIFF-RESPONDENT,

v.

JAMES A. O'HEARN, D/B/A NATIVE AMERICAN BISON COUNTRY LTD.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed.*

ANDERSON, J. James A. O'Hearn appeals from a judgment of conviction finding that his operating a meat shop from his farm violated the TOWN OF JACKSON, WIS. ZONING ORDINANCE § 3.03(a) (hereinafter ORDINANCE). O'Hearn contends that the ordinance: (1) clearly permits his activities; (2) has been selectively enforced against him; and (3) violates his equal protection rights by making an unreasonable distinction against the retail sale of

meat. We conclude that the evidence supports the trial court's finding that the meat shop violated the zoning ordinance which required that the land be used for agricultural purposes only. We affirm the judgment.

O'Hearn owns property in the Town of Jackson (hereinafter Town). This property is located within the A-1 Agricultural/Rural Residential District as defined by the Town. On his property O'Hearn raises American bison.

On July 20, 1994, O'Hearn applied for a building permit from the Town to construct a pole barn to store hay to feed his bison. Another permit was subsequently requested to construct facilities for clean storage. However, instead of using the barn for storage, O'Hearn installed a counter, countertop and a showcase freezer in the barn. He then opened a retail store for the sale of bison meat.

The Town has a practice of enforcing its zoning code when it receives a complaint. After citizen complaints were received about O'Hearn's property, the Town conducted an investigation. The investigation revealed that O'Hearn was using the pole barn on his property for the retail sale of meats.

On March 3, 1995, a citation was issued to O'Hearn for violating the Town's zoning laws. The Town interpreted its ordinance as not permitting the retail sale of meats in the A-1 zone.

After the Town's inspection of O'Hearn's property, a second citation was issued alleging the change of use of a building without approval of such change in occupancy or use without a certificate of occupancy being issued therefor, contrary to TOWN OF JACKSON, WIS. BUILDING CODE § 30.11(3).

Beginning October 13, 1994, through March 3, 1995, the Town issued several municipal citations to O'Hearn for violations of the zoning ordinances involving his property. The parties stipulated to allow the trial court to decide the case by the briefs and record on file with the court.

The zoning ordinance at issue in this case provides in relevant part:

> A-1 AGRICULTURAL/RURAL RESIDENTIAL DISTRICT
>
> The A-1 agricultural district is intended to provide for, maintain, preserve and enhance agricultural lands historically utilized for crop production ....
>
> (A) Permitted Uses
>
> ....
>
> (9) Keeping and raising of domestic stock for *agribusiness*, breeding, recreation or show.

ORDINANCE § 3.03 (emphasis added).

On appeal, O'Hearn argues that ORDINANCE § 3.03 "clearly permit[s] the marketing of farm products" within the zone. He contends that because the term "agribusiness" is not defined in the ordinance, the statutory definition of a similar word, "farming," found in § 102.04, STATS., can be used as its substitute. Thus, O'Hearn infers that the terms "agribusiness" and "farming" are synonymous. "Farming" is in part defined as "distributing directly to consumers or marketing … commodities" which were produced on the farm. Section 102.04(3). Relying on the statutory definition for "farming" as a substitute for the ordinance's term "agribusiness," O'Hearn asserts that operating a retail meat store on his land is permissible.

We disagree. When a legislature uses similar but different terms in an ordinance, the reviewing court presumes the legislature intended the particular word choice. *See* ***Graziano v. Town of Long Lake,*** 191 Wis.2d 812, 822, 530 N.W.2d 55, 59 (Ct. App. 1995). Here, O'Hearn relies on a term and its definition from another lawmaking body, not even terms within the same piece of legislation. Accordingly, we are not convinced that the term "agribusiness" in the ordinance should be construed as synonymous with "farming" as defined in a completely separate statute (§ 102.04, STATS.) by a different legislative body.

Although we do not agree with O'Hearn's construction of the ordinance, we must consider whether the ordinance is plain on its face or ambiguous. The rules for construction of statutes and ordinances are the same. *See* ***Sauk County v. Trager,*** 113 Wis.2d 48, 55, 334 N.W.2d 272, 275 (Ct. App. 1983), *aff'd,* 118 Wis.2d 204, 346 N.W.2d 756 (1984). A word or term which can reasonably be understood in more than one sense or can convey more than one meaning is ambiguous. *See* ***Wisconsin Bankers Ass'n v. Mutual Sav. & Loan Ass'n,*** 96 Wis.2d 438, 450, 291 N.W.2d 869, 875 (1980). An ordinance is ambiguous when it is capable of two or more reasonable interpretations. *See* ***Wagner Mobil, Inc. v. City of Madison,*** 190 Wis.2d 585, 592, 527 N.W.2d 301, 303 (1995). If it is not ambiguous, then we are not permitted to use interpretation and construction techniques because the words of the ordinance must be given their obvious and ordinary meaning. *See* ***Town of Seymour v. City of Eau Claire,*** 112 Wis.2d 313, 319, 332 N.W.2d 821, 823-24 (Ct. App. 1983).

With these principles in mind, we conclude that the ORDINANCE is clear and unambiguous. ORDINANCE § 3.03(9) permits the "[k]eeping and raising of domestic stock for agribusiness, breeding, recreation or show ...." Again, O'Hearn argues that his retail store is permitted on his property because the

marketing and retail sale of farm products is part of the definition for "agribusiness." We disagree. Section 3.03(9) clearly permits the "[k]eeping and raising of domestic stock." The term "agribusiness" simply provides the context in which domestic stock may be kept or raised, not a permitted land use itself. The ordinance clearly authorizes only the "[k]eeping and raising of domestic stock" and not "agribusiness" as a separate land use as O'Hearn contends.

O'Hearn also argues that the Town enforced the ordinance against him while ignoring other violators. The Equal Protection Clause of the Fourteenth Amendment is violated when an ordinance is administered "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights." ***Village of Menomonee Falls v. Michelson,*** 104 Wis.2d 137, 145, 311 N.W.2d 658, 662 (Ct. App. 1981) (quoted source omitted). However, evidence that a municipality has enforced an ordinance in one instance and not in another does not in itself establish a violation of the Equal Protection Clause. *See* ***id.*** Rather, there must be a showing that the ordinance's enforcement was intentionally, systematically and arbitrarily discriminatory. *See* ***id.***

The Town primarily enforces its ordinances by conducting an investigation when it receives a complaint about a possible violation. The investigation of O'Hearn's property was made after citizen complaints were received. When complaints were made, investigations were also made of other zone residents. These investigations were all conducted in the same manner, including a grace period to apply for a conditional use permit before a citation was issued. Unlike O'Hearn, the other zone residents either ceased their illegal activities or applied for a conditional use permit. As a result, no one received a citation except O'Hearn.

In this case, O'Hearn shows no evidence of intentional, systematic and arbitrary discrimination. On the contrary, the Town used the same enforcement methods against all of the zone residents. A law is only unconstitutionally enforced if the enforcement in question "is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others." ***Id.*** at 146, 311 N.W.2d at 663 (quoted source omitted). We find no evidence of an intent to discriminate against O'Hearn.

In March 1996, the Town amended the ordinance to allow the sale of certain items, but not the sale of meat. O'Hearn asserts that the ordinance violates the Equal Protection Clause by making an unreasonable distinction between the retail sale of meat and other farm products. Equal protection in the context of zoning laws means that those in similar circumstances, among whom no reasonable basis for distinction exists, must be treated equally. *See* ***Browndale Int'l Ltd. v. Board of Adjustment,*** 60 Wis.2d 182, 203-04, 208 N.W.2d 121, 132-33 (1973). In general, substantive due process protects against arbitrary, wrongful governmental actions regardless of the fairness of the procedures used to implement them. *See* ***Jones v. Dane County,*** 195 Wis.2d 892, 912, 537 N.W.2d 74, 79 (Ct. App. 1995). Legislative enactments are presumed constitutional and the court will sustain the ordinance if there is any reasonable basis for the act. *See* ***Dane County v. McManus,*** 55 Wis.2d 413, 423, 198 N.W.2d 667, 672 (1972). We agree with the circuit court that there is a "distinction with a difference" surrounding the sale of meat and other farm-produced items. The purpose of the agricultural zone is "to provide for, maintain, preserve and enhance *agricultural lands historically utilized for crop production*." ORDINANCE § 3.03 (emphasis added). Therefore, regulating the nature of any commercial use of the property—

including the types of products that may be sold—is reasonable. We affirm the trial court.

By the Court.—Judgment affirmed.

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