COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3114

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

WINNEBAGO COUNTY,

PLAINTIFF-RESPONDENT,

V.

RODNEY G. WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

BROWN, J. Rodney G. Wilson appeals pro se from a judgment of the trial court finding him in violation of Winnebago County's zoning ordinance for conducting a landscaping business on the premises; enjoining him from continuing this business; ordering that he remove all equipment and material associated with the business; and assessing forfeitures, costs and reasonable attorney's fees. On appeal, he argues that he has been denied equal protection

because other businesses within his zoning district have been allowed to exist while his has not; that all he does is store equipment on the property but does not actually operate his business on the property; and that even if the trial court is correct that he does regularly use the property for his business, it is allowed under the zoning ordinance. We decline to address his equal protection argument because it was raised for the first time, and obliquely at that, during his reconsideration motion in the trial court and was therefore untimely brought. We agree with the trial court on the remaining issues and we affirm.

Wilson purchased property known as 2536 Oakridge Road, Neenah, Wisconsin, on April 4, 1990. On April 17, 1998, Winnebago County filed a complaint against Wilson alleging, in pertinent part, that the property was zoned A-2 (General Agricultural); that because it consisted of 2.275 acres, the zoning ordinance allowed only a residence upon the property; that Wilson was using the premises to operate a business; that he received mail for the business at that location and had employees at that location; that he advertised his business as "Wilson's Lawn and Landscaping"; and that the operation of the business at that location violated the ordinance.

Wilson responded to the complaint by, inter alia, admitting that the premises were in an A-2 zoning district, but claiming that although landscaping equipment was stored at the property, the actual landscaping business was conducted off-site. He claimed that he had a lawful right to use the metal storage building for storage of equipment in connection with his off-site landscaping business. He observed that the storage building was on the premises long before the ordinance and was therefore a legal nonconforming structure. He asserted that he had a right to use the building for storage of items, just as the building had always been used, even though this storage was incidental to his off-site business.

The County moved for judgment on the pleadings and filed an affidavit and accompanying materials in support of its moving papers. Wilson responded, agreed that the facts before the court were stipulated and in a brief to the trial court defined the sole issue in the case as whether he was operating a business in the building or simply storing equipment in the building incidental to his business. At a hearing on the motion, Wilson continued to argue that the building was manifestly designed and used for storage of equipment because of its size and that he had a right to use the building for storage of equipment incidental to his business.

The trial court seized upon the sole issue before it: was the nightly placement of landscaping equipment in the storage shed actually "storage" or was it part of "running the business" on the premises? The court held:

> If he wants to stipulate that once he puts a piece of equipment into that building or a truck or whatever other vehicle and that he will leave it there for at least 30 days at a time, then I suppose you can say maybe he's storing it; but if he's operating it on a daily basis, scheduling things out of his house, and going in and out of this property with various equipment and trucks, it sounds to me like he's running a business there.
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> Part of his business is keeping his trucks and equipment somewhere and taking them to a job and then bringing them back. Now, I don't interpret that kind of activity as storage. That's parking overnight, but that's not storage ….
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> ….
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> I think, with the stipulated facts, I would conclude that this is operating a business there, because I don't know how else a landscaping business is done .... [A]s far as the actual functioning of the business, it is conducted in that he has to go there to get to his various jobs and, when he's done, he takes stuff back there, and that's how you conduct a landscaping business. This isn't just simple storage which I would define as just sitting there, it's not being used in this manner ….

The trial court then granted judgment on the pleadings.

Thereafter, Wilson appeared on his own behalf, without an attorney, in what would accurately be described as a reconsideration motion. Again, Wilson argued that he was not "running a business" from his property. He told the court that people in the township, and the town board in particular, did not feel that he was running a business from his property. Also, he argued, for the first time, that since other businesses have been allowed to operate close by, he should be able to as well. Wilson admitted that this was a "different issue" but argued it anyway. The trial court held that nothing Wilson had presented changed its mind on whether Wilson was operating a business on the property. The trial court did not speak to the claim that the County had allowed other nearby businesses to operate, but not his. Wilson then commenced this appeal.

On appeal, Wilson makes what we perceive to be three arguments. First, he argues that the trial court erred in holding that he was operating a business on the property. Second, he claims that even if he is running a landscaping and nursery business on the property, it is a valid use. Third, he asserts that he has been denied equal protection under the law because other businesses have been allowed to operate and he has not.

As to the first issue, we cannot improve upon the logic and rationale employed by the trial court and adopt it as our own.

As to the second issue, for the first time Wilson argues that the landscaping use is, in his words, "non-conforming." In support, he argues that persons residing in an A-2 district may use the property for certain kinds of businesses which are outlined in the ordinances. Those business uses include floriculture, forestry, greenhouse, orchards, plant nurseries, truck farming and barns. He suggests that the word "barns" brings him within the purview of

permitted uses. We think what he means to argue is not that his use is nonconforming, but that it is in fact in conformance with a permitted use. He also argues that the limitation to residential use only of a parcel of land of less than five acres is not found in the ordinance and is therefore inapplicable. These are all new arguments never raised before the trial court. We refuse to entertain an argument raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980). This is especially so when Wilson admitted through counsel at the first hearing before the trial court that he resided on a parcel zoned A-2 that was subject to the restriction of use for a residence only because the property was under five acres. Judicial economy is preserved by requiring arguments to be presented at the time scheduled for litigation. Any perceived injustice in this rule is justified by these public policy concerns as well as the knowledge that Wilson could easily have made this argument at the start.

As to the third issue, we cite the following law: A motion for reconsideration "assumes that the question has previously been considered. If a party has not ... presented arguments in the litigation, the court has not considered that party's arguments in the first instance." ***O'Neill v. Buchanan***, 186 Wis.2d 229, 234, 519 N.W.2d 750, 752 (Ct. App. 1994). Absent a showing of a ground for relief under § 806.07, STATS., the party has waived the opportunity to present his argument. *See* ***O'Neill***, 186 Wis.2d at 235, 519 N.W.2d at 752. Wilson's equal protection argument, first brought in the reconsideration motion—and not labeled as an equal protection argument until this appeal—is untimely. We will not consider it.

By the Court.—Judgment affirmed.

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