COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2009

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1067 **Cir. Ct. No. 2001CV1652**

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

STATE OF WISCONSIN EX REL. DAVID J. GEHL AND DSG EVERGREEN F.L.P.,

PLAINTIFFS-APPELLANTS,

V.

TOWN BOARD OF TOWN OF PERRY, PAT DOWNING, LARRY PRICE, DAN KELLER, MARY L. PRICE, DANE COUNTY, JAMES E. GREGORIUS, BRIAN STANDING, JEAN SIELING AND JOHN DOE,

DEFENDANTS-RESPONDENTS,

BENJAMIN SOUTHWICK,

DEFENDANT.

APPEAL from orders of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 HIGGINBOTHAM, P.J. David Gehl and DSG Evergreen (collectively, "Gehl") appeal circuit court orders granting summary judgment to the Town Board of the Town of Perry and Board members in their individual capacity (collectively, "the Town") and to Dane County and specified county officials (collectively, "Dane County") and dismissing Gehl's complaint in its entirety. This is a fifth appeal in a line of actions brought by Gehl in his challenge to the Town of Perry's efforts to condemn part of Gehl's property for the establishment of an Historic Preservation District and in his efforts to build a residence, a driveway and an agricultural accessory building on a tract of agricultural land in the Town of Perry. Gehl raises a number of issues on this appeal. For the reasons that follow, we reject his arguments and affirm in all respects.

BACKGROUND

¶2 The history of this case is long and complex. We first provide only the most fundamental historical facts to assist in understanding the background of this case. We then provide an extensive discussion of the procedural history of this case to place our discussion of the arguments in their proper context. The historical and procedural facts are taken from the summary judgment materials, circuit court orders and prior decisions of this court, and are materially undisputed.

Historical Facts

¶3 Gehl owns and farmed approximately 225 acres of land in the Town of Perry through a family limited partnership named DSG Evergreen. In 2000, he purchased an adjacent 22-acre parcel. Since approximately November 2000, Gehl has been attempting to construct a farmhouse, an agricultural accessory building and a driveway on the 22-acre parcel. However, the Town Board of the Town of

Perry has prevented Gehl from doing so by denying his applications for various building and driveway permits and through actions to condemn portions of his property for inclusion in a historic preservation district established by the Town. Dane County has also rejected a request by Gehl to change the zoning on his property so that he can put up his buildings.

Procedural History

¶4 The pertinent procedural facts are as follows. On November 9, 2000, Gehl filed an application for a permit to construct an agricultural accessory building on the 22-acre parcel. The Perry Town Board denied the application in December 2000.

¶5 On March 29, 2001, Gehl filed a site plan application and applications for building and driveway permits to construct a farmhouse on the 22-acre parcel. The Town Board denied those applications on April 25, 2001.

¶6 On June 20, 2001, Gehl filed a complaint and petition in circuit court against the Town Board and Board members in their individual capacity, seeking mandamus and certiorari relief in connection with these denials. Gehl also brought an unlawful takings claim under Wisconsin's Constitution and a conspiracy claim under 42 U.S.C. § 1983 against the Board members. These claims constitute the second, third, and fourth causes of action, respectively, in Gehl's original civil complaint.[1]

[1] In the first cause of action, Gehl alleges the Town violated Wisconsin's open meetings law. The circuit court agreed, and the Town did not appeal the court's decision.

¶7 In an oral decision rendered on July 10, 2002, the circuit court granted certiorari relief with respect to the Town Board's denial of Gehl's application for a driveway permit, but denied mandamus and certiorari relief with respect to the building permit, concluding that the decision of where a building may be located is within the Town's discretion and that the Town's denial of the building permit application was a valid exercise of its police powers. The court also concluded that the building ordinance did not constitute zoning. The court did not address the takings claim or the conspiracy claim at that time.

¶8 On June 12, 2001, the Town enacted a historic preservation zoning ordinance, authorizing the Town Board to designate certain properties or structures as historic and to take certain actions to protect such designated places. On August 7, 2001, Gehl filed a second application for an agricultural accessory building permit to be located on the 22-acre parcel. On December 11, 2001, the Town designated the Hauge log church, which was built by Norwegian settlers in about 1850, as a historic building. The church is located near Gehl's 22-acre parcel and the Town placed approximately one-half of Gehl's parcel within the newly created Perry Hauge Log Church National Historic District.

¶9 Following the establishment of the historic district, the Town asked Gehl to identify the proposed location of his agricultural accessory building. Gehl took the position that he was not required to disclose the location under the building ordinance in effect at the time he filed his application, and he did not provide the requested information. He still has not provided this information. Consequently, the Town has not acted on the August 7, 2001 application for a permit to build the agricultural accessory building.

¶10 On October 17, 2001, Gehl filed an amended complaint, in part seeking judicial review of the August 7, 2001 denial of his application for a permit to build the agricultural accessory building. This claim is part of the sixth cause of action. In its July 10, 2002 oral ruling the court denied certiorari relief because the claim was not ripe because the Town had not acted on Gehl's agricultural accessory permit application. As we noted earlier, Gehl had not disclosed to the Town the site of his agricultural accessory building, a requirement the Town maintains is necessary under its building ordinance before it can approve a building permit application. Gehl did not appeal the court's decision.

¶11 In June 2004, Gehl filed a petition in circuit court seeking mandamus relief compelling the Town "to approve" and "to issue" a building permit for an agricultural accessory building. The court entered a written order on June 22, 2005, denying the petition. We affirmed the court's order, concluding that under the plain language of the Town's building ordinance, "the approval of an application for a building permit is a discretionary action of the town board, not a ministerial act for which mandamus would lie." ***Gehl v. Town of Perry***, No. 2005AP1971, unpublished slip op. ¶8 (WI App June 15, 2006).

¶12 On May 2, 2001, Gehl filed a farm plan application with Dane County to obtain a zoning permit to construct his farmhouse. On May 24, 2001, the County Zoning Administrator approved the application and the Town appealed the decision to the County Board of Adjustment. On August 23, 2001, the Board of Adjustment reversed the Zoning Administrator on several grounds, two of which were that the substantial income test applied by the Zoning Arbitrator was arbitrary and capricious and that Gehl's proposed building site was not eligible for residential construction under the Town's land use plan. The Board of Adjustment remanded Gehl's application to the Zoning Administrator with directions to

develop a new substantial income test. Gehl sought certiorari review of this decision, which was assigned to a different branch of the circuit court, Judge Daniel Moeser, presiding.[2] On July 17, 2002, the court denied the requested relief. Gehl did not appeal this decision.

¶13 In March 2002, the County Zoning Administrator issued a new substantial income test for the review of farm plan applications, increasing the threshold amount for what constitutes "substantial income" and adding a requirement that the application be provided to the appropriate town board for an advisory opinion regarding consistency with the town's land use plan. On October 3, 2002, the Zoning Administrator applied the new policy to Gehl's May 2001 farm land plan application and denied it. Gehl did not appeal that decision to the County Board of Adjustment.

¶14 On January 10, 2005, Gehl filed a third amended summons and complaint, adding two claims directed at Dane County and certain county officials.[3] Both claims stem from the Dane County Board of Adjustment's reversal and remand of the Zoning Administrator's May 24, 2001 approval of Gehl's farm land plan application and the October 3, 2002 denial of Gehl's farm land plan application. Specifically, the eleventh cause of action alleges the Zoning

[2] *See* ***Gehl v. Dane County Board of Adjustment***, Dane County Circuit Court Case No. 2001CV2487.

[3] The third amended summons and complaint also made two claims, the thirteenth and fourteenth causes of action, challenging the Town of Perry's efforts to condemn part of Gehl's property. The circuit court granted summary judgment to the Town on the thirteenth cause of action and, in a separate order in July 2005, dismissed the fourteenth cause of action. Gehl subsequently moved to file a fourth amended complaint, essentially amending the fourteenth cause of action. The circuit court denied that motion on January 27, 2006. Gehl does not appeal any of these decisions.

Administrator denied Gehl's constitutional right to equal protection by applying the old farm land policy to other applicants similarly situated to Gehl, and by applying the new farm land policy only to Gehl. The twelfth cause of action is essentially a rehash of the eleventh cause of action with the added twist of an alleged conspiracy among the named county officials for the purpose of depriving Gehl his equal protection rights.

¶15 On September 5, 2006, Dane County moved for summary judgment on the claims made against it. On September 7, 2006, the Town Board filed motions to dismiss and for summary judgment on behalf of itself and the individual Town Board members, seeking dismissal of the remainder of Gehl's claims against them. The circuit court granted both motions and entered orders dismissing Gehl's complaint in its entirety. Gehl appeals these orders.

STANDARD OF REVIEW

¶16 We review a circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[4] We draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781 (citation omitted).

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

DISCUSSION

¶17 Gehl advances eight arguments. The first five relate to the court's order granting summary judgment to the Town; issue six relates to the court's denial of Gehl's motion for a temporary injunction in his effort to stop the Town from proceeding with condemnation of his property; issue seven relates to Gehl's assertion that the Board members were ethically barred from voting to commence condemnation proceedings; and the eighth issue concerns Gehl's request for a continuance to complete discovery so that he can more fully respond to the motions for summary judgment.[5] We consider each argument in turn.

1. Validity of the Town's Building Ordinance

¶18 Gehl contends the Town improperly exercised zoning powers when it denied his applications for building and driveway permits to construct a farmhouse and agricultural accessory building on the 22-acre parcel he purchased from a neighboring farmer. He advances three arguments: (1) the Town lacks the authority to enact its building ordinance because the ordinance constitutes zoning and the town lacks the statutory authority to enact a zoning ordinance; (2) the building ordinance is arbitrary and capricious because it fails to provide any definite standards or uniform rules governing the Town's site approval process;

[5] Gehl does not make arguments challenging the summary judgment order with respect to his fourth, twelfth, thirteenth or fourteenth causes of action, discussed earlier, as well as his fifth cause of action, which alleges a conspiracy by the defendants to violate Gehl's rights under the Fifth and Fourteenth Amendments to the United States Constitution, and his eighth cause of action, alleging denial of his rights of procedural and substantive due process, and equal protection. We conclude Gehl has abandoned his appeal on these claims and therefore do not address them. *See* ***Reiman Assocs. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

and (3) the building ordinance expressly exempts agricultural accessory buildings from the site approval process. We consider and reject each argument in turn.

a. The Town's Authority to Enact the Building Ordinance

¶19 Gehl contends the Town lacks specific statutory authority for regulating the location of buildings. Specifically, he asserts that regulating the location of buildings is defined in WIS. STAT. § 59.69(4)(g)[6] as an exercise of zoning powers and is expressly granted only to counties. He also asserts that the statute is a matter of statewide concern and consequently preempts the Town's more general police powers to regulate for the health, safety and welfare of its citizens. In short, Gehl contends that the only source of authority for regulating the location of buildings is § 59.69(4)(g), and that under the statute only counties can regulate the location of buildings through zoning ordinances while towns cannot.

¶20 This argument suffers from several fatal flaws. WISCONSIN STAT. § 59.69(4)(g) applies only to counties and contains no language limiting the Town's authority to regulate the location of buildings under a different statute. Stated differently, simply because § 59.69(4)(g) confers authority on counties to regulate the location of buildings does not mean no other statute confers such authority on towns as well.

¶21 Indeed, towns that have adopted village powers are authorized by WIS. STAT. § 61.34(1)[7] to regulate the location of buildings as a valid exercise of

[6] WISCONSIN STAT. § 59.69(4)(g) grants county boards the authority to regulate "[t]he location, height, bulk, number of stories and size of buildings and other structures."

[7] WISCONSIN STAT. § 61.34(1) states:

(continued)

its police powers. The Town of Perry adopted village powers pursuant to WIS. STAT. § § 60.10(2)(c)[8] and 60.22(3).[9] Section 61.34(1) grants power to villages and towns that adopt village powers, to enact regulations that promote the "good order of the village … and for the health, safety, welfare and convenience of the public." It is under this grant of authority that the Town enacted its ordinance regulating the siting of buildings within the Town. It is well established that a town, in the proper exercise of its police powers, may enact building regulations. ***Village of Wind Point v. Halverson***, 38 Wis. 2d 1, 9, 155 N.W.2d 654 (1968).

¶22 In addition, Gehl appears to argue that the only type of ordinance regulating the siting of buildings is a zoning ordinance, which of course is not true. *See* ***Halverson***, 38 Wis. 2d at 9. Furthermore, his argument fails to consider the definition of zoning under Wisconsin case law and he fails to explain why the Town's building ordinance falls under his definition of zoning. In any event, we

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> Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public service, and shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

[8] WISCONSIN STAT. § 60.10(2)(c) states, "Authorize the town board to exercise powers of a village board under s. 60.22(3). A resolution adopted under this paragraph is general and continuing."

[9] WISCONSIN STAT. § 60.22(3) states: "If authorized under s. 60.10(2)(c), may exercise powers relating to villages and conferred on village boards under ch. 61, except those powers which conflict with statutes relating to towns and town boards."

are satisfied, based on well-established case law, that the Town's building ordinance is not a zoning ordinance.

¶23 Zoning has been defined as the regulation of the use of land by the establishment of zones or districts. *See* ***Town of Clearfield v. Cushman***, 150 Wis. 2d 10, 19-20, 440 N.W.2d 777 (1989); ***Heitman v. City of Mauston Common Council***, 226 Wis. 2d 542, 550, 595 N.W.2d 450 (Ct. App. 1999). The Town of Perry Building Ordinance does not regulate the use of land by the establishment of zones or districts. The ordinance authorizes the Town to regulate, among other things, the siting of residential and agricultural accessory buildings on a person's property. We therefore conclude that the Town's ordinance does not constitute zoning.

¶24 Gehl maintains that the circuit court improperly relied on ***Cushman*** in concluding that the enactment of the building ordinance was a proper exercise of the Town's police power. Gehl appears to read ***Cushman*** as establishing a rule that an ordinance regulating building locations is invalid unless "alternative statutory authority" exists authorizing such regulations. Gehl misreads ***Cushman***.

¶25 The pertinent issue before the court in ***Cushman*** was whether the Town of Clearfield had specific statutory authority to enact the challenged provisions of its land division and building ordinance requiring a building permit, a well, and septic system for mobile homes. ***Id***. at 19-20. The supreme court rejected Cushman's argument that the ordinance was a zoning ordinance, concluding that the Town therefore did not need the Juneau County Board to approve its ordinance. ***Id.*** The court also agreed with the Town's assertion that it was authorized by other statutes to enact such regulation. ***Id.*** ***Cushman*** did not address the issue Gehl suggests that it did. Rather, ***Cushman***, on this issue, stands

for the proposition that more than one statute may authorize a Town's enactment of building regulations.

¶26 Applying ***Cushman***, the circuit court here correctly concluded that WIS. STAT. § 61.34(1) specifically authorizes the Town of Perry to enact its building ordinance. There was, and still is, no need to consider whether any "alternative" statutory authority exists for the Town's power to regulate the location of buildings.

¶27 Gehl argues that the Town's building ordinance violates WIS. ADMIN. CODE § COMM 20.02(2)(a) of Wisconsin's Uniform Dwelling Code. This argument is not fully developed, thus we do not consider it. *See* ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).

¶28 In sum, we conclude that the Town's building ordinance is not a zoning ordinance and that the Town properly enacted the ordinance pursuant to its general police powers conferred by WIS. STAT. § 61.34(1).

b. Whether the Town's Building Ordinance Violates Due Process

¶29 Gehl contends the Town's building ordinance fails to provide substantive and procedural due process to property owners under what he refers to as the "zoning enabling acts." Specifically, he maintains that there is no procedure in the ordinance for review of a Town Board's decision to grant or deny a building permit and the ordinance is arbitrary because it provides no objective standards for determining the proper location for a building. We reject this argument. This argument rests entirely on the assumption that the provision in the Town's

building ordinance regulating building locations is a zoning ordinance, an argument we have rejected. We therefore do not consider it any further.

¶30 Finally, Gehl relies on ***Town of Hobart v. Collier***, 3 Wis. 2d 182, 189-90, 87 N.W.2d 868 (1958), for the proposition that the ordinance is violative of his procedural and substantive due process rights. ***Town of Hobart*** involved a zoning ordinance and therefore is not applicable to this case.

c. The Town Building Ordinance Exempts Agricultural Buildings from the Site Approval Process

¶31 Gehl is asking this court to review the circuit court's decision affirming the Town's decision issued on December 12, 2000, denying his November 20, 2000 agricultural-accessory building permit application. We have already reviewed this decision in ***Gehl v. Town of Perry***, No. 2005AP1971, unpublished slip op. ¶¶4-5 (WI App June 15, 2006), concluding that the denial of the building permit was discretionary and not subject to a writ of mandamus.

¶32 In ***Gehl***, No. 2005AP1971, Gehl contended that he was entitled to a writ of mandamus requiring the Town to act on his building permit applications. He argued then, as he does now, that the Town improperly denied his application for a building permit to construct his accessory building based on its location in light of the fact that PERRY, WIS., BUILDING ORDINANCE § 1.07(1) (2000), expressly exempts agricultural accessory building permit applicants from having to obtain site plan approval prior to submitting an application. We rejected this argument and said the following:

> The town's building code provides that the town clerk shall issue a building permit "only if all of [a list of specified] conditions are satisfied *as determined by the discretion of the Town Board*." The conditions for the board to consider include compliance with the goals, standards and policies of the town's Land Use Plan;

> compliance with applicable local and state building codes; adequate sanitation during the construction process; avoidance of any public nuisance; and appropriate measures to prevent trespassing, littering, discharging of waste or nuisances on adjacent land. Contrary to Gehl's assertions, we find nothing in the ordinance that limits the application of § 1.06 to only those proposed structures for which a site plan must be submitted. We are satisfied that, under the plain language of the ordinance, the approval of an application for a building permit is a discretionary action of the town board, not a ministerial act for which mandamus would lie.

Gehl, No. 2005AP1971, slip op. ¶8 (citations and footnote omitted). Because we have previously addressed and rejected the argument Gehl raises on this topic in this appeal, we do not consider it any further.

2. Motion in Limine Regarding the Exclusion of Evidence of the Discussion Concerning the Nine Acre Donation

¶33 Gehl challenges the circuit court's decision granting the Town's motion in limine seeking to exclude evidence of a conversation between the Town's attorney, Mark Sewell, and Gehl's attorney, Harvey Temkin, concerning a proposal from the Town that Gehl donate nine acres of his land to the Town.[10] The proposal was made in the context of settlement negotiations between Gehl and the Town.[11] Gehl argues that, by way of the proposal, the Town was conditioning approval of his permit applications on Gehl donating the property to it, which, he

[10] Actually, Gehl appeals a decision by the circuit court denying his motion for the court to reconsider an earlier decision granting the Town's motion in limine excluding this evidence. Neither party argues the proper legal standard of review of a grant or denial of a motion to reconsider. We therefore review the court's decision granting the Town's motion in limine under the discretionary standard of review related to admitting or excluding evidence.

[11] At first glance, it appears that Gehl challenges the circuit court's conclusion that the Sewell-Temkin conversation on October 9, 2001, occurred in the context of settlement negotiations. However, in his reply brief on appeal, Gehl seems to concede this point.

asserts, constitutes an unconstitutional taking of his property without just compensation. The Town contends that the court properly granted its motion because the suggestion to donate the nine acres was made in the context of settlement negotiations and is therefore inadmissible under WIS. STAT. § 904.08. We agree with the Town.

¶34 Whether to admit or exclude evidence is a matter of trial court discretion, which we will not disturb in the absence of an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will affirm the circuit court's ruling if the court examined the relevant facts, applied the appropriate legal standard and reached a reasonable conclusion through a rational process. ***Morden v. Continental AG***, 2000 WI 51, ¶81, 235 Wis. 2d 325, 611 N.W.2d 659.

¶35 WISCONSIN STAT. § 904.08[12] prohibits the admission of evidence of offers to compromise or settle if offered to "prove liability for or invalidity of" a claim. "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." WIS. STAT. § 904.08. The statute, however, provides an

[12] WISCONSIN STAT. § 904.08 reads as follows:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

exception that permits, but does not require, the admission of settlement evidence. *See* ***Morden***, 235 Wis. 2d 325, ¶82. The statute provides: "This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution." Sec. 904.08.

¶36 We begin our analysis by briefly reviewing the facts surrounding the Town's suggestion to Gehl that he donate nine acres to the Town. We consider these facts in the light most favorable to Gehl.

¶37 The following facts are taken from an affidavit submitted by Temkin. In his affidavit, Temkin averred that he and Gehl met prior to a Town Board meeting that was held on October 9, 2001, at which time Gehl intended to present an alternative site for his buildings, which are the subject of this litigation. Temkin subsequently staked out the new location. The Town Board met on October 9 at Gehl's property; Temkin and Gehl attended the meeting. Temkin showed the Board members the staked-out site, after which the Board went into closed session with its attorney, Mark Sewell. At the conclusion of the closed session, Sewell talked with Temkin and "said that the only way the Town Board would begin discussing agreeing on a site would be if the Gehls first agreed to donate 9 acres of land." Temkin told Sewell he would consult with Gehl and get back with Sewell. Temkin contacted Sewell the following day; Temkin averred that he and Sewell were "resigned … to the fact that the case would not settle unless the Gehls gave up 9 acres of land."

¶38 The Town moved to exclude this evidence under WIS. STAT. § 904.08 as protected settlement negotiations. Gehl objected, arguing that this

evidence was critical to the inverse condemnation and taking claim made in the seventh cause of action. In granting the Town's motion, the circuit court considered the context and nature of the communications between Sewell and Temkin and the settlement proposals exchanged between them leading up to this conversation. Based on this evidence, the court concluded that the Town's suggestion that Gehl donate nine acres of his land to the Town was made in the context of settlement negotiations. The court eventually granted the Town's motion for summary judgment, dismissing Gehl's seventh cause of action.

¶39 Gehl contends that the circuit court erroneously excluded this evidence because it is being "offered for another purpose," which, he asserts, WIS. STAT. § 904.08 permits.[13] Specifically, Gehl maintains that evidence of the conversation between Sewell and Temkin supports his claim that the Town was attempting to essentially strong-arm him into donating nine acres of his property in exchange for issuing permits. His concerns served as the bases for the inverse condemnation and taking claims made in the seventh cause of action.

¶40 In response, the Town points out that Gehl ignores the second sentence of WIS. STAT. § 904.08, which precludes admitting evidence of "conduct or statements made in compromise negotiations." The Town also refers to the Judicial Council Committee's Note to the statute, which cautions against admitting statements made during settlement negotiations that do not fit into one of the enumerated exceptions. The Town explains that Gehl's stated purpose for

[13] In a separate argument, Gehl argues that the circuit court failed to analyze Sewell's statements to Temkin to determine their admissibility "for another purpose" under WIS. STAT. § 904.08. Because we conclude that Gehl's intent in seeking admission of this conversation is not a recognized exception under the rule for its admission, we do not consider this argument.

admitting the conversation between Sewell and Temkin is to demonstrate an unlawful regulatory taking of his property, and that proving a separate wrong is not one of the exceptions for admissibility under the statute. We agree with the Town.

¶41 It is undisputed that Gehl hoped to use the conversation between Sewell and Temkin as proof that the Town is attempting to engage in an unlawful taking, a reason not included among the enumerated purposes for admitting settlement evidence under WIS. STAT. § 904.08. As the Town points out, the Judicial Council Committee Note to § 904.08 cites cases that "admonish trial courts to be cautious in determining admissibility." S. CT. ORDER, 59 Wis. 2d R1, R90 (eff. January 1, 1974). To that end, the Wisconsin Supreme Court in ***Morden*** concluded that the statute should not be expansively construed to include exceptions not enumerated in the statute. ***Morden***, 235 Wis. 2d 325, ¶85. We refuse to expand the exceptions in WIS. STAT. § 904.08 to include alleged wrongful conduct.

3. Alleged Misrepresentations Made by the Town to Dane County

¶42 Gehl contends that the circuit court erred in dismissing his ninth cause of action. The ninth cause of action is another takings claim based upon allegations that the County was involved in the cutting of trees on Gehl's property, a conspiracy by the Town to deny his permit applications for the purpose of suppressing the value of his property, and the Town's threatened use of condemnation. Pertinent here, Gehl alleges that the Town, in its efforts to prevent county officials from granting Gehl a zoning permit, misrepresented to the county its policy regarding density unit requirements and its intentions to acquire Gehl's property through condemnation. Although the court did not specifically address

this claim, the circuit court ruled that Gehl offered no evidence to support his claim of wrongdoing and that, "[t]o the extent the record does contain information about the conduct of the Town defendants, I have already concluded that their actions were proper."

¶43 Gehl's claim stems from a letter sent in September 2001 by the Town's attorney, Mark Sewell, to Gehl's attorney, Harvey Temkin. The subject of the letter was an offer to settle the pending litigation. In that letter, the Town offered to transfer a density unit from Gehl's 204-acre parcel to the westerly half of the adjacent 22-acre parcel, the intended site for Gehl's new farm house. By doing so, this would pave the way for the approval of Gehl's farm plan by Dane County. This in turn would allow Gehl to construct his farmhouse and accessory building. In exchange, Gehl would donate nine acres of the easterly half of the 22-acre parcel to the Town. This deal fell through.

¶44 Meanwhile, on September 11, 2002, Sewell issued an opinion letter to the Town Board offering his view on how the Town should respond to an advisory request from the Dane County Zoning Administrator regarding approval of Gehl's farm land plan application. The Board approved the letter and subsequently sent it to the Zoning Administrator. In that letter, Sewell opined that the Town Land Use Plan prohibited the transfer of density units from one parcel to another noncontiguous parcel owned by the same person. In Sewell's opinion, the most reasonable interpretation of the Town's density unit policy as expressed in the ordinance was that its purpose is to prohibit the transfer of density units from one parcel to another parcel. Sewell also informed the Board that he was informed by the Town clerk that as of August 22, 1979, the 204 acre parcel had no remaining density units. This information was ultimately conveyed to the Zoning Administrator.

¶45 On October 3, 2002, James Gregorius, the Dane County Zoning Administrator, applying the new substantial income requirements to Gehl's May 2001 farm plan application, denied it based in part on the Town's representation to him that no density units were available for the 22-acre parcel. Gehl did not appeal that decision to the Dane County Board of Adjustment. Instead, Gehl filed a new farm plan application in October 2003, which was denied by a different zoning administrator in June 2004. Gehl appealed that decision to the Board of Adjustment, the Dane County Circuit Court, Judge Fiedler presiding, and this court, all of whom affirmed the Zoning Administrator's decision. The Wisconsin Supreme Court denied Gehl's petition for review.[14]

¶46 In a collateral attack on the denial of his May 2001 farm plan application, Gehl contends that the Town's representation to Dane County that Gehl's property had no remaining density units was inconsistent with the Town's September 2001 offer to settle by transferring one density unity from the 204-acre parcel to the 22-acre parcel. Gehl maintains that if no density units could be transferred, as Sewell stated in his opinion letter to the Town Board, then the Town made an illegal offer to settle in the September 2001 letter. On the other hand, Gehl continues, if the density units could be transferred, then the Town intentionally misled the County in 2002 regarding Gehl's noncompliance with its density unit policy.

¶47 We conclude that this issue is moot. An issue is moot if a determination is sought that cannot have a practical effect on an existing

[14] ***Gehl v. Conrad***, 2007 WI 59, 299 Wis. 2d 327, 731 N.W.2d 637, No. 2005AP2589, (Feb. 12, 2007).

controversy. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. A reviewing court will generally decline to decide moot issues. ***Id***.

¶48 Gehl did not appeal the Zoning Administrator's October 3, 2002 decision denying his farm land plan application. Therefore, all issues related to the use of density units in the consideration of that application are moot.

¶49 Even if the issue were not moot, there is no evidence that the Town misrepresented to the County that Gehl's 22-acre parcel had no remaining density units or that the Town intentionally misled the County in 2002 regarding Gehl's noncompliance with its density unit policy. That is, the evidence supports the Town's position that the 22-acre parcel had no remaining density, and thus the Town's communication to the Zoning Administrator regarding Gehl's noncompliance with its density policy was accurate. The September 27, 2001 letter from Sewell to Temkin referred to allowing the transfer of density units from the 204-acre parcel to the 22-acre parcel. As the Town points out, this supports the Town's representation to the County that the 22-acre parcel had no available density units. In addition, as the Town also points out, Gehl did not accept the Town's offer to transfer the density unit and therefore the Town's communication to the County regarding the unavailability of density units for the 22-acre parcel was accurate.

¶50 Gehl argues that the Town's motion for summary judgment did not address "the adequacy" of ¶¶32-34 of his ninth cause of action. He also argues that the Town failed to raise a defense to these allegations, either by argument or by introducing admissible evidence on the issues. Paragraph 32 is the conspiracy claim we just discussed. Paragraphs 33 and 34 relate to Gehl's claim that the

Town was intentionally delaying issuing permits to Gehl to suppress the value of his property.

¶51 With respect to the conspiracy claim, we have considered and rejected Gehl's arguments. As for the claims contained in ¶¶33-34, we conclude Gehl has waived any argument by failing to bring them to the circuit court's attention first and by failing to develop any argument on appeal relating to these claims.

4. The Zoning Administrator's Treatment of Gehl's Zoning Application in Comparison to Applications from Other Property Owners

¶52 Gehl contends the circuit court erred by rejecting his claim that Gregorius, the Dane County Zoning Administrator, violated his right to equal protection by treating farm land plans submitted by others similarly situated differently than his farm land plan. Gehl maintains that Gregorius "discriminated" against him in two ways: by sending his farm plan to the Town for review prior to County approval and not sending farm plans submitted by other applicants to their respective towns for review prior to County approval; and by applying the old substantial income policy to the farm plans submitted by the others and treating Gehl's farm plan application under the new substantial income policy.

¶53 Gehl fails to fully develop this argument. He offers no analysis under the proper constitutional principles and fails to explain how he is similarly situated to the other applicants. We therefore do not consider this argument. *See* ***Roehl***, 222 Wis. 2d at 149.

5. Validity of the Town of Perry's Historic Preservation Ordinance

¶54 Gehl contends that the Town's enactment of its Historic Preservation Ordinance constitutes unlawful zoning. Acknowledging that the Town relies on WIS. STAT. § 60.64[15] for its authority to enact the historic preservation ordinance, Gehl maintains that the plain language of the statute permits towns to enact such an ordinance only in the town's exercise of "zoning *and* police power." In Gehl's view, this language suggests that a town must possess both zoning *and* police powers before it can enact historic preservation regulations.

¶55 In response, the Town contends that its authority to enact the historic preservation ordinance is derived from its police powers granted by WIS. STAT. § 61.34(1). The Town also contends that the circuit court properly refused to rule on Gehl's certiorari challenge to the Town's historic preservation ordinance on ripeness grounds. As we have noted, the Town has not acted on Gehl's building permit applications because Gehl has not informed the Town of the specific proposed location for his buildings. Thus, the argument goes, because the ordinance has not been applied to Gehl, he has not been injured by application of

[15] WISCONSIN STAT. § 60.64 reads as follows:

> The town board, in the exercise of its zoning and police powers for the purpose of promoting the health, safety and general welfare of the community and of the state, may regulate any place, structure or object with a special character, historic interest, aesthetic interest or other significant value for the purpose of preserving the place, structure or object and its significant characteristics. The town board may create a landmarks commission to designate historic landmarks and establish historic districts. The board may regulate all historic land marks and all property within each historic district to preserve the historic landmarks and property within the district and the character of the district.

the ordinance. Citing ***State ex rel. Sullivan v. Drake***, 130 Wis. 152, 153, 109 N.W. 982 (1906), the Town asserts that a party must first suffer an injury for a court to grant certiorari review and because Gehl has not been injured by application of the historic preservation ordinance, certiorari review is inappropriate at this time.

¶56 A person has standing to challenge the validity of an ordinance if the person is injured by application of the ordinance. ***Cushman*** 150 Wis. 2d at 18; *see also* ***Mast v. Olsen***, 89 Wis. 2d 12, 16, 278 N.W.2d 205 (1979); ***Milwaukee, Etc. v. Milwaukee County Park Comm'n***, 477 F. Supp 1210, 1215-16 (E.D. Wis. 1979). A party lacks standing to challenge those portions of a town ordinance which are not enforced against him. ***Cushman***, 150 Wis. 2d at 18.

¶57 Here, the historic preservation ordinance has not been enforced against Gehl. On August 7, 2001, Gehl filed a second permit application with the Town to construct an agricultural accessory building. The Town did not act on the application because Gehl refused to disclose where he intended to construct his buildings. Indeed, Gehl has not even disclosed whether he intends to construct his buildings on those portions of his property placed within the historical preservation district. Gehl has taken the position that the Town's building ordinance does not require that Gehl disclose the location of the proposed building. Consequently, because the Town has not applied the historic preservation ordinance to Gehl's building permit applications, he lacks standing to challenge the ordinance.

6. The Court's Denial of Gehl's Motion for a Temporary Restraining Order

¶58 On July 8, 2002, Gehl filed a motion seeking a temporary restraining order and permanent injunction against the Town enjoining it from initiating condemnation proceedings while Gehl pursued his inverse condemnation and regulatory taking claims. The circuit court denied the motion. The court ruled that WIS. STAT. § 32.10[16] requires Gehl to dismiss his "right to take" action filed in a separate branch of the Dane County Circuit Court before the court can entertain Gehl's motion for a temporary restraining order. Gehl did not dismiss his "right to take" action and the court subsequently denied Gehl's motion. Then, by granting summary judgment to the Town, the court dismissed Gehl's inverse condemnation claim.

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[16] WISCONSIN STAT. § 32.10 reads:

> If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced. The petition shall describe the land, state the person against which the condemnation proceedings are instituted and the use to which it has been put or is designed to have been put by the person against which the proceedings are instituted. A copy of the petition shall be served upon the person who has occupied petitioner's land, or interest in land. The petition shall be filed in the office of the clerk of the circuit court and thereupon the matter shall be deemed an action at law and at issue, with petitioner as plaintiff and the occupying person as defendant. The court shall make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this subchapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same and assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied.

¶59 On appeal, Gehl contends the circuit court improperly denied his motion by construing WIS. STAT. § 32.10, the inverse condemnation statute, as requiring Gehl to withdraw his "right to take" action against the Town before granting the relief Gehl was seeking. We conclude this issue is moot.

¶60 We observe that Gehl has not appealed the circuit court's February 22, 2007 summary judgment order on the inverse condemnation claim. As a result, even assuming Gehl is correct that WIS. STAT. § 32.10 requires that the Town's condemnation proceedings be stayed pending resolution of Gehl's inverse condemnation action, the inverse condemnation claim has been dismissed; he has not appealed the dismissal; and there is nothing to gain by enjoining the Town from proceeding with its condemnation action. *See* ***Roth v. LaFarge Dist. Bd. of Canvassers***, 2004 WI 6, ¶13, 268 Wis. 2d 335, 655 N.W.2d 599 ("A case is moot if a decision in the matter will not have any practical effect upon an existing legal controversy.").

7. *Were Town Board Members Ethically Restrained From Voting to Condemn Gehl's property?*

¶61 Gehl contends the Town Board members could not ethically vote to commence condemnation proceedings against him because they were, at the time, being sued in their individual capacity in this lawsuit. He maintains that WIS. STAT. § 19.59(1)(c)1. and 2.[17] prohibit the Board members, as local public

[17] WISCONSIN STAT. § 19.59(1)(c) provides:

> 1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.
>
> 2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit,

(continued)

officials, from participating in the condemnation proceedings because each member has a self-interest in the outcome of the proceedings because Gehl is seeking damages against each board member. Therefore, according to Gehl, because each board member participated in the condemnation proceedings, "none of the statutory prerequisites to a hearing on just compensation can possibly have been met by Perry." We reject this argument.

¶62 Under WIS. STAT. § 893.80(4), governmental bodies and their officers and employees are immune from suit for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."[18] The terms "quasi-judicial or quasi-legislative" and "discretionary" are synonymous. ***Sheridan v. City of Janesville***, 164 Wis. 2d 420, 425, 474 N.W.2d 799 (Ct. App. 1991). A quasi-judicial or quasi-legislative act involves the exercise of discretion and judgment. ***Id.*** A discretionary act is one that "involves the exercise of judgment in the application of a rule to specific facts." ***Willow Creek Ranch, L.L.C. v. Town of Shelby***, 2000 WI 56, ¶25, 235 Wis. 2d 409, 611 N.W.2d 693.

> direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

[18] WISCONSIN STAT. § 893.80(4) provides as follows:

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

¶63 Here, the Town Board members are immune from liability for their discretionary acts throughout the condemnation proceedings, including voting to condemn parts of Gehl's property. These discretionary acts are quasi-legislative, and therefore immune from liability. Consequently, there is nothing in WIS. STAT. § 19.59(1)(c)1. and 2. that compelled the Board Members from abstaining to vote on the condemnation of Gehl's property.

8. The Denial of Gehl's Motion for a Continuance Under WIS. STAT. § 802.08(4)

¶64 Gehl argues that the circuit court improperly denied his motion for a continuance to conduct discovery of the Town and County so that he could more fully respond to their motions for summary judgment related to his ninth[19] and twelfth causes of action. The motion was made pursuant to WIS. STAT. § 802.08(4),[20] which permits the court, in the proper exercise of its discretion, to stay summary judgment proceedings "or … make such other order as is just" to permit the opposing party to conduct discovery upon a showing by affidavit that the party has not been able to obtain "facts essential to justify the party's opposition."

[19] In his brief-in-chief, Gehl also indicated that he requested a continuance to conduct additional discovery for the eleventh cause of action. However, we observe that Gehl's motion for a continuance spoke to discovery relating only to the ninth and twelfth causes of action. We therefore do not analyze Gehl's arguments on his motion for a continuance in relation to the eleventh cause of action.

[20] WISCONSIN STAT. § 802.08(4) reads as follows:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

¶65 Gehl argues on appeal that the court failed to consider "what is 'just' as required by WIS. STAT. § 802.08(4)," and instead improperly relied on the length of time this case had been pending as the basis for rejecting his motion for a continuance. On the latter topic, Gehl points out that the allegations to which the open records request relate were filed on September 18, 2003, and December 8, 2004. Gehl appears to suggest that these claims are not so old as to serve as a basis for the court's denial of his motion. With respect to the former topic, Gehl appears to argue that the court did not consider his need for the records he sought to obtain through an open records mandamus action filed against Dane County that he believed would support his conspiracy claim in rejecting his motion. At the time Gehl moved for a continuance, he had a pending appeal before this court in ***State ex rel. Gehl v. Connors***, No. 2006AP2455. A separate circuit court rejected Gehl's petition for writ of mandamus. On October 18, 2007, we subsequently affirmed the circuit court's decision. *See* ***State ex rel. Gehl v. Connors***, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530. Consequently, at the time of Gehl's motion for a continuance, he had not succeeded in obtaining these documents. We conclude that the circuit court properly exercised its discretion in denying Gehl's motion for a continuance.

¶66 Whether to grant a continuance to permit a party to conduct further discovery in response to a summary judgment motion is left to the discretion of the circuit court. *See* ***Mathias v. St. Catherine's Hospital, Inc.***, 212 Wis. 2d 540, 555, 569 N.W.2d 330 (Ct. App. 1997); WIS. STAT. § 802.08(4). We will sustain a discretionary act if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 772, 582 N.W.2d 98 (Ct. App. 1998).

¶67 We disagree with Gehl's assertion that the circuit court relied solely on the length of time the case had been in litigation as the ground for denying his motion for a continuance. Certainly, the court was very concerned that the case had been pending for close to six years and wanted to avoid any further delays that may be caused by waiting for the resolution of the mandamus appeals. But it also appears that the court was not persuaded by Gehl's assertion that the open records request would produce evidence helpful to his claims. We observe that Gehl's optimistic forecast of the benefit he would receive from the sought-after documents was expressed in equivocal terms, from which the court could reasonably conclude that the cost of waiting for this court to resolve the mandamus appeal was not worth the uncertain benefits Gehl would receive from the records. We note that the court expressed a willingness to consider reopening the case should Gehl succeed in his mandamus appeal and obtain "newly-discovered" evidence. We also note that the court expressed the possibility of denying the motions for summary judgment if, after reviewing the evidentiary materials, "there are gaps" in the evidence making summary judgment inappropriate.

¶68 In addition, Gehl had ample opportunity to depose Town and County officials and discover evidence relating to the ninth and twelfth causes of action prior to the filing of the summary judgment motions. Indeed, the record reflects Gehl did depose the defendant officials. Other than for efficiency purposes, Gehl offers no reason why he could not gather evidence he felt necessary to respond to the summary judgment motions. It was reasonable for the court to reject Gehl's continuance motion.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.