COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2796 **Cir. Ct. No. 01-FO-64**

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

COUNTY OF PORTAGE,

PLAINTIFF-APPELLANT,

V.

WILLIAM R. KONOPACKY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge. *Affirmed*.

¶1 DEININGER, P.J.[1] Portage County appeals an order that dismissed its complaint against William Konopacky for operating an automobile wrecking yard on his property in violation of the county zoning ordinance. We conclude the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

trial court did not err in granting summary judgment to Konopacky and therefore affirm the appealed order.

BACKGROUND

¶2 Portage County filed a summons and complaint against Konopacky seeking a forfeiture and injunctive relief. The County alleged that he was operating an automobile wrecking yard on his property in violation of the Portage County Zoning Ordinance.

¶3 Konopacky raised the affirmative defense that his use of the property to store inoperable motor vehicles predated the provision in the county zoning ordinance which the county was now seeking to enforce against him. He cited a provision of the Portage County Zoning Ordinance as permitting the continuation of nonconforming uses which predate zoning enactments. We have been unable to locate a copy of the ordinance in the record. The trial court noted in its decision and order, however, that the parties agreed that (1) Konopacky was in fact in violation of the present ordinance provisions prohibiting an automobile wrecking yard in an agricultural district without special exception approval, and (2) Konopacky's use of the property "existed prior to the adoption of the present county ordinance."[2]

[2] The County had previously cited Konopacky for violating its zoning ordinance provisions regarding automobile wrecking yards. The trial court dismissed the prior action, however, concluding that the automobile wrecking yard definition in the then existing ordinance was "unenforceably vague." The County did not appeal the decision in that case. Instead, it amended the language in question and commenced this new prosecution against Konopacky under the amended ordinance.

¶4 Konopacky moved to dismiss the complaint and the trial court treated the motion as one for summary judgment because matters outside the pleadings were submitted for review. The trial court granted summary judgment and dismissed the County's action. The County appeals.

ANALYSIS

¶5 We review the granting of a motion for summary judgment de novo, applying the same methodology and standards as the trial court. *See* ***Green Spring Farms v. Kersten,*** 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is proper when the pleadings, answers, admissions and affidavits show no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* ***Maynard v. Port Publ'ns, Inc.*** 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980). We view the facts in the light most favorable to the nonmoving party. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986). We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or if material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.,*** 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Like the trial court, we do not decide issues of fact on summary judgment; we decide only whether a material factual dispute exists. ***Id***.

¶6 The County, citing ***Des Jardin v. Town of Greenfield***, 262 Wis. 43, 53 N.W.2d 784 (1952), argues that in order for his nonconforming use defense to succeed, Konopacky must establish that his use of his property does not constitute a public nuisance. The supreme court explained in ***Des Jardin*** that:

> "Generally speaking, a nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by statute or ordinance, where it is a

> lawful business or use of property *and is not a public nuisance* or harmful in any way to the public health, safety, morals, or welfare."

Id. at 47 (quoting EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 363 (3d ed. 1977)) (emphasis added).

¶7 We note, however, that the court placed no requirement on landowners to show that their property use is not a public nuisance in order to raise a nonconforming use defense in zoning enforcement actions. We note further that the zoning authority in ***Des Jardin***, like the County in this case, was attempting to enforce a use restriction not to abate a nuisance, and it did not prevail. *See* ***id***. at 49-50. Thus, if anything, ***Des Jardin*** supports Konopacky's position and the trial court's ruling that Konopacky was entitled to continue a nonconforming use which predated the amended ordinance prohibiting automobile wrecking yards. *See* ***id***. at 50 (The landowner "is entitled to have a judgment rendered in his behalf determining that his vested interest to continue to use his trailer on his own land for dwelling-house purposes is not prohibited by the provisions of the aforesaid town ordinance … inasmuch as such ordinance is not retrospective in operation with respect to such prior vested rights ….").

¶8 The County also seeks to rely on ***Town of Delafield v. Sharpley***, 212 Wis. 2d 332, 568 N.W.2d 779 (Ct. App. 1997), but we find the case distinguishable. The town in ***Sharpley*** cited a landowner for violating its public nuisance ordinances, *not* its zoning ordinance. ***Id***. at 336. The landowner attempted to defend on the basis that his use of his property predated the ordinances in question. ***Id***. at 339. We concluded that a nonconforming use defense is not available where a municipality establishes that the use it seeks to

enjoin or abate is a public nuisance. ***Id***. at 338.[3] Contrary to the County's contention, we did not say or even suggest in ***Sharpley*** that when a municipality prosecutes a zoning violation, a landowner who wishes to defend on the basis of a pre-existing nonconforming use bears the burden of showing that the use is not a public nuisance.

¶9 We thus conclude that the holdings in ***Des Jardin*** and ***Sharpley*** stand for the proposition that the defense of pre-existing nonconforming use is available to a landowner in an action to enforce municipal zoning and use restrictions, but not in a municipal nuisance abatement action. If a municipality seeks to enjoin a use it deems to be a public nuisance, it bears the burden of pleading and proving the nuisance allegations, as the town did in ***Sharpley***. If the municipality fails to plead and prove a nuisance, a landowner may successfully defend against an alleged zoning violation by showing that the use in question predated the enactment of the restriction the municipality seeks to enforce. *See* ***Des Jardin***, 262 Wis. at 50.

¶10 The County also suggests that because Konopacky did not show his use to be for the purpose of a "trade or industry," *see* WIS. STAT. § 59.69(10)(a), the use cannot be defended on the basis that it predated the zoning enactment

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[3] Specifically, we said this:

> Here, the trial court granted summary judgment in favor of the Town finding that it was undisputed that the Sharpleys created a public nuisance by maintaining their property in the manner described. If this determination was correct, then whether the Sharpleys had a valid and legal nonconforming use of their respective properties which predated the Town's ordinances is irrelevant.

Town of Delafield v. Sharpley, 212 Wis. 2d 332, 338, 568 N.W.2d 779 (Ct. App. 1997).

sought to be enforced. We disagree. "'[A] nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by the statute or ordinance, where it is a lawful business *or use* of property ….'" ***Des Jardin***, 262 Wis. at 47 (quoting EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 363 (3d ed. 1977)) (emphasis added). The County also raises an issue as to whether Konopacky has shown his use to be "an active and actual use of land" so as to qualify it as a valid nonconforming use. *See* ***Walworth County v. Hartwell***, 62 Wis. 2d 57, 60, 214 N.W.2d 288 (1974). Konopacky responds that the "active and actual use" issue is raised for the first time on appeal. The County has not filed a reply brief, and we thus accept Konopacky's assertion and decline to address the issue. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980); ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

CONCLUSION

¶11 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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