COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP186 **Cir. Ct. No. 2014CV524**

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

ELAINE A. RAY,

PLAINTIFF-APPELLANT,

V.

TOWN OF KINNICKINNIC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Elaine Ray appeals an order granting summary judgment to the Town of Kinnickinnic on Ray's declaratory judgment claim. Ray asked the circuit court to declare certain portions of a Town ordinance invalid. The court granted summary judgment to the Town, concluding Ray's claim was

not justiciable because it was not ripe for adjudication. We agree with the court's conclusion and therefore affirm.

BACKGROUND

¶2 On March 4, 2014, the Town adopted "Subdivision Ordinance 2014-1" (the Ordinance), pursuant to WIS. STAT. § 236.45.[1] As relevant to this appeal, the Ordinance provides that "[c]onventional major subdivisions as described in the St. Croix County Land Division Ordinance are not allowed in the Town," but the Town "does allow a Modified Conventional Major Subdivision as described in Section 7.0 of this Ordinance." TOWN OF KINNICKINNIC, WIS., SUBDIVISION ORDINANCE 2014-1, § 1.0:B.4.a. (March 4, 2014).

¶3 Section 7.0 of the Ordinance, in turn, provides that, during the development of a modified conventional major subdivision, "[t]he lot placements and road design will be a cooperative effort of the subdivider and the Town." ***Id.***, § 7.0:L.4.a. Section 7.0 also introduces a concept called a "density bonus." ***Id.***, § 7.0:L.5. The "density bonus" allows a subdivider to divide a particular property into more lots than would otherwise be permitted if he or she incorporates certain conservation features into the plat. *See* ***id.***

¶4 A subdivider is awarded percentages of the total "density bonus" for incorporating specific conservation features. "Up to the first 50%" of the total density bonus must be earned by "plant[ing] or preserv[ing] landscape screening and buffer area between existing roads and development to screen views." ***Id.***,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

§ 7.0:L.5. (Table) (capitalization omitted). If that requirement is "fully satisfied," then "up to" an additional fifty percent of the total density bonus may be earned by: (1) "plant[ing] or preserv[ing] trees on lots"; (2) "establish[ing] a trail system across the development"; (3) "maintain[ing] minimum setback from Kinnickinnic River to closest lot line"; and (4) "locat[ing] farmettes between existing roads and development." ***Id.*** (capitalization omitted). In addition, the Ordinance gives the Plan Commission "latitude to recommend assigning density bonus points for preservation or [sic] unique geological, manmade or historic features." ***Id.***, § 7.0:L.5.b. An example set forth in the Ordinance explains that, in a hypothetical 100-acre subdivision, if all possible density bonus points were awarded, the permissible number of lots would increase from twenty-five to thirty-seven. ***Id.***, § 7.0:L.4.

¶5 Ray has an ownership interest in approximately 175 acres of undeveloped land in the Town that are subject to the Ordinance. Ray claims she has "subdivided land in the Town in the past and may seek to do so in the future." However, there is no evidence in the record that Ray has taken any action to date to subdivide her undeveloped 175-acre parcel.

¶6 On November 17, 2014, Ray filed the instant lawsuit against the Town, seeking a declaratory judgment "concerning the constitutionality and scope of the authority claimed in certain provisions of" the Ordinance. Ray argued the following provisions of the Ordinance were unconstitutionally vague: (1) the provision stating that lot placements and road design would be a "cooperative effort" between the subdivider and the Town; (2) the provisions allowing a subdivider to obtain a density bonus of "up to" fifty percent by incorporating certain features into a plat; (3) the provision requiring the available density bonus for screening and buffer zones to be "fully satisfied" before bonus points could be

awarded for other conservation features; and (4) the provision granting the Plan Commission "latitude" to recommend assigning density bonus points for preservation of "unique geological, manmade or historic features." In addition, Ray argued the provision regarding "cooperative effort" between the Town and subdividers violated the public purpose doctrine and exceeded the Town's statutory authority.

¶7 Both Ray and the Town moved for summary judgment. The circuit court denied Ray's motion and granted summary judgment in favor of the Town. The court concluded Ray's lawsuit was not justiciable, on two alternative grounds: (1) the facts were not ripe for adjudication; and (2) Ray had failed to exhaust her administrative remedies. Although the court recognized it did not need to do so, it also determined Ray's claims failed on their merits. Ray now appeals.

DISCUSSION

¶8 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Here, the circuit court granted summary judgment in favor of the Town in part due to its determination that Ray's declaratory judgment claim was not ripe for adjudication. "[T]he appropriate standard to review a circuit court's grant of summary judgment premised upon the legal conclusion that a declaratory judgment action is not ripe, and therefore not justiciable, is de novo review." ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶73, 309 Wis. 2d 365, 749 N.W.2d 211.

¶9 A court must be presented with a justiciable controversy before it may exercise jurisdiction over a declaratory judgment claim. ***Id.***, ¶28. In order for a controversy to be justiciable, the issue involved in the controversy must be ripe for adjudication. ***Id.***, ¶29. The ripeness required in a declaratory judgment action is different from the ripeness required in other types of lawsuits. ***Id.***, ¶43. "[A] plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself [or herself] of the [Uniform Declaratory Judgments] Act." ***Id.*** Instead, "[w]hat is required is that the facts be sufficiently developed to allow a conclusive adjudication." ***Id.*** Not all adjudicatory facts must be resolved in order for a declaratory judgment action to be ripe; however, the facts on which the court is asked to make a judgment should not be contingent or uncertain. ***Id.***

¶10 On appeal, it is undisputed that Ray has brought a facial challenge to the Ordinance, rather than an as-applied challenge. Because she has brought a facial challenge, Ray argues her claim was ripe from the moment the Ordinance was enacted. In support of this proposition, she cites the following statement from ***Olson***: "As a facial challenge, Olson's suit is ripe because it challenges the very enactment of the ordinance and its application to all Town landowners. Such challenges to ordinances are generally ripe the moment the challenged ordinance is passed." ***Id.***, ¶44 n.9.

¶11 However, ***Olson*** did not hold that *every* declaratory judgment action in which the plaintiff brings a facial challenge to an ordinance is ripe when the ordinance is enacted; it merely held that is *generally* the case. The United States Supreme Court has similarly recognized that, although in some cases "the promulgation of a regulation will itself affect parties concretely enough" to make a declaratory judgment action challenging the regulation ripe for adjudication, "that will not be so in every case." ***Reno v. Catholic Soc. Servs., Inc.***, 509 U.S. 43, 57

(1993); *see also* ***National Park Hosp. Ass'n v. Department of the Interior***, 538 U.S. 803, 807-12 (2003) (holding a facial challenge to a federal regulation was not ripe for adjudication). Even in the case of a facial challenge, a court must consider: (1) whether the issues raised are fit for judicial decision; and (2) whether withholding consideration of the issues will cause hardship to the parties. *See* ***National Park Hosp. Ass'n***, 538 U.S. at 808.

¶12 "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." ***Miller v. Brown***, 462 F.3d 312, 319 (4th Cir. 2006). Conversely, a claim is not fit for judicial decision if it rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all." ***Texas v. United States***, 523 U.S. 296, 300 (1998) (quoting ***Thomas v. Union Carbide Agric. Prods. Co.***, 473 U.S. 568, 580-81 (1985)). Even where a claim involves purely legal issues, it may be less fit for judicial resolution "when it is clear that a later as-applied challenge will present the court with a richer and more informative factual record." ***Sabre, Inc. v. Department of Transp.***, 429 F.3d 1113, 1119 (D.C. Cir. 2005) (citing ***National Park Hosp. Ass'n***, 538 U.S. at 812; ***Atlantic States Legal Found. v. Environmental Prot. Agency***, 325 F.3d 281, 284 (D.C. Cir. 2003)).

¶13 We agree with the Town that Ray's claim is not fit for judicial decision because it rests entirely on the possible occurrence of future events. The factual circumstances of this case are completely undeveloped. There is no evidence that any proposal to subdivide land has been submitted to the Town by Ray, or by anyone else, much less acted upon. Ray does not provide any information about the nature of her property, whether she actually intends to subdivide it, or when she intends to do so. Accordingly, she does not provide enough information for even an advisory opinion based on hypothetical facts.

Moreover, there is no doubt that, under the circumstances, an as-applied challenge would present the court with "a richer and more informative factual record" on which to rule. *See* ***id.***

¶14 Ray has also failed to show that withholding consideration of the issues raised by her lawsuit will cause her any hardship. The hardship prong of the ripeness inquiry is satisfied when the challenged action "creates a direct and immediate dilemma for the parties." ***Sindicato Puertorriqueno de Trabajadores v. Fortuno***, 699 F.3d 1, 9 (1st Cir. 2012) (quoting ***Verizon New Eng., Inc. v. International Bhd. of Elec. Workers, Local No. 2322***, 651 F.3d 176, 188 (1st Cir. 2011)). Here, Ray has presented no evidence to show that the Ordinance has any impact on her property, in its current state. Ray has not taken any steps to subdivide her property, and she does not indicate that she has any concrete intent to do so in the near future. Thus, there is no evidence that enactment of the Ordinance has created a "direct and immediate dilemma" for Ray. *See* ***id.***

¶15 Ray correctly notes that, in ***Loy v. Bunderson***, 107 Wis. 2d 400, 413-14, 320 N.W.2d 175 (1982), our supreme court overruled a previous statement from ***Heller v. Shapiro***, 208 Wis. 310, 313, 242 N.W. 174 (1932), that the "declaratory relief statute [only justifies] a declaration of rights upon an existing state of facts, not one upon a state of facts that may or may not arise in the future." However, the ***Loy*** court went on to explain that "[t]he vice of this statement, if interpreted literally, is that it deprives the trial judge of the discretion to examine the controversy before him to determine the imminence of the controversy or the ripening of the dispute." ***Loy***, 107 Wis. 2d at 414. The court further stated, "The imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform, create justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote,

contingent, and uncertain events that may never happen." ***Id.*** (quoted source omitted).

¶16 In this case, Ray has failed to show not only an existing state of facts that is fit for judicial decision, but also that any such facts are imminent or practically certain to occur. *See* ***id.*** Her claim is based entirely on "remote, contingent, and uncertain events that may never happen." *See* ***id.*** On the whole, we agree with the Town's assessment that

> Ray is asking the circuit court to address the constitutionality and statutory legitimacy of a town ordinance that has yet to be implemented, in a complete factual vacuum, when there is no present possibility the ordinance will cause any demonstrable harm to her or her property. If there was ever an "abstract" dispute, this is it.

Accordingly, Ray's declaratory judgment claim is not ripe for adjudication and, as a result, is not justiciable. The circuit court properly granted the Town summary judgment dismissing Ray's claim.[2]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] Because we conclude Ray's claim was properly dismissed as unripe for adjudication, we need not address the parties' arguments regarding the merits of Ray's claim. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) (we decide cases on the narrowest grounds possible).