

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 12, 2006**

Cornelia G. Clark  
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. 2005AP2710**

**Cir. Ct. No. 2002CV33**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**TOWN OF GRAFTON,**

**PLAINTIFF-APPELLANT,**

**v.**

**CITY OF CEDARBURG, JOHN A. ZARLING AND  
JOHN A. ZARLING CHARITABLE REMAINDER TRUST,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Ozaukee County:  
JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. The Town of Grafton appeals from a judgment dismissing its complaint that certain conveyances of property to the City of

Cedarburg violated the TOWN OF GRAFTON, WIS., LAND DIVISION CODE (LDC).<sup>1</sup>  
We affirm the judgment.

¶2 In January 2000, the City purchased 79.23 acres of 119.25 acres of property within the Town’s boundaries owned by John Zarling. The parties agree that the conveyance constituted a “major land division” as defined in the LDC. The Town filed this action to have the conveyance declared void for the failure to comply with the LDC requirement that a major land division be accomplished by use of a town-approved plat. It sought a daily forfeiture for each day of the violation.

¶3 In February 2002, shortly after the action was filed, the City purchased the remaining 40.02 acres of the Zarling property. The City then annexed the entire parcel of land. The Town’s separate action challenging the annexation was consolidated with this action. The parties filed cross-motions for summary judgment.

¶4 We first address the Town’s request that the conveyances and annexation be declared void. The Town concedes that a conveyance of the entire Zarling property would not have invoked any provision of the LDC. The 2002 purchase of the remaining portion of the Zarling property demonstrates that a conveyance of the entire property could now be completed and now in fact no

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<sup>1</sup> We acknowledge that our citations to the LDC do not conform to “Blue Book” format in that the year of publication is omitted. There seems to be some dispute between the parties of the applicable publication date, a dispute we need not address.

division of the land exists.<sup>2</sup> The Town’s request to void the conveyances elevates form over substance since the parties could simply redo what has now been accomplished—conveyance of the entire property without regard to the LDC.<sup>3</sup> We deem the request to void the conveyances and annexation moot. “An issue is moot when its resolution will have no practical effect on the underlying controversy. In other words, a moot question is one which circumstances have rendered purely academic. Generally, moot issues will not be considered on appeal.” *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (citation omitted).

¶5 That said, the entire appeal is not moot because the Town seeks a monetary forfeiture for every day that a violation of the LDC may have occurred. We address whether the LDC was violated by the original conveyance of only a portion of the Zarling property. The circuit court concluded that the City did not violate the Town’s LDC.

¶6 Upon review of a summary judgment decision, we apply the standards set forth in WIS. STAT. § 802.08(2) (2003-04),<sup>4</sup> in the same manner as the circuit court. *See County of Dane v. Norman*, 174 Wis. 2d 683, 686, 497 N.W.2d 714 (1993). Since there is no disagreement as to issues of fact, we must determine whether the moving parties were entitled to judgment as a matter of

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<sup>2</sup> We hesitate to say that the 2002 purchase of the remaining portion of the Zarling property effectively cured any violation of the LDC because the Town argues that the 2002 conveyance was based on an illegal land division in the first place. Thus, like a house of cards, the entire transaction must fall.

<sup>3</sup> Zarling does not ask that the conveyances be declared void.

<sup>4</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

law. *See id.* This court decides questions of law independently, without deference to the decision of the circuit court. *See id.*

¶7 The Town argues that Zarling and the City were required to comply with § 3.03 of the LDC, which requires a major land division be accomplished by use of a town plat review and approval.<sup>5</sup> The City does not directly address the application of § 3.03. Rather, it directs us to § 2.02 of the LDC titled “Compliance,” which provides:

No person, firm or corporation shall divide any land located within the limits of the Town of Grafton, Ozaukee County, Wisconsin, which results in a subdivision, minor land division or a replat as defined herein; no such subdivision, minor land division or replat shall be entitled to recording; and, no street shall be laid out or improvements made to land without compliance with all requirements of this code and all the following regulations and documents.

¶8 Notably absent from this provision is the requirement that a person making a *major* land division comply with the LDC. No amount of creative statutory construction can supply the missing link between a transaction that simply constitutes a major land division and required compliance with the LDC.<sup>6</sup> This explains the circuit court’s conclusion that the LDC was not created to regulate the type of acquisition made by the City but rather was designed to

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<sup>5</sup> Section 3.03(1)(a) of the LDC provides in part: “Town Plat Required. When a subdivider proposes to create a major land division as defined in Section 11.00 of this code, the subdivider shall subdivide by use of a Town Plat.” “Subdivider” is defined in § 11.02(ff) as: “Any person, firm or corporation, or any agent thereof, dividing or proposing to divide land resulting in a subdivision, major or minor land division or replat.”

<sup>6</sup> We reject the Town’s contention that the “Violation” provision in § 2.07 of the LDC supplies the missing link. That section provides in part: “It shall be unlawful to ... divide, convey ... in violation of this code....” A violation can only be committed by a person required to comply with the LDC.

control residential and commercial development. By omitting “major land division” from the compliance section, the LDC only regulates major land divisions that result in the creation of subdivisions or require replats. It is perhaps an unfortunate gap in the LDC but a gap nonetheless. There is no basis for the assessment of forfeitures against the City or Zarling.

¶9 Although the Town challenges the 2002 conveyance of the remaining property, it does so only based on the alleged unlawfulness of the initial conveyance. Having concluded that the initial conveyance is unassailable, we need not address whether the 2002 conveyance complied with the LDC. The LDC does not apply to transfers between adjoining property owners. *See* § 2.01(c) (the LDC does not apply to the “[s]ale or [e]xchange of parcels of land between owners of adjoining property if additional lots are not thereby created and the lots resulting are not reduced below the minimum sizes required by these regulations....”).

*By the Court.*—Judgment affirmed.

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

