COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2947 **Cir. Ct. No. 2002CV44**

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

LEON R. MCQUEEN,

PLAINTIFF-APPELLANT,

V.

TOWNSHIP OF WYOCENA AND WYOCENA TOWN BOARD,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Columbia County: PATRICK TAGGART, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Leon McQueen appeals from a judgment dismissing his claim against the Town of Wyocena and the Town Board (collectively, "the Town") under 42 U.S.C. § 1983 alleging an equal protection violation in the Town's decision to veto McQueen's rezoning petition. We affirm.

¶2 We begin by describing the relevant features of the rezoning procedure at the time the events at issue occurred. This process appears substantially similar, and perhaps identical, to the procedure still in effect. When a petition for a zoning ordinance amendment is filed with the county, it is referred to the county zoning agency for its consideration, report, and recommendations. WIS. STAT. § 59.69(5)(e)1. (1999-2000).[1] If a town affected by the proposed amendment files with the county a resolution disapproving of the petition, the county zoning agency may not recommend approval of the petition without change, but may recommend approval only with change or disapproval. Section 59.69(5)(e)3. The county board then decides whether to deny the petition or pass an ordinance making a zoning change. Section 59.69(5)(e)5. If the county board approves an ordinance, the affected town may then file a resolution disapproving of the ordinance, in which case the ordinance will not become effective. Section 59.69(5)(e)6.

¶3 McQueen's amended complaint alleged that in January 2001 the Wyocena Town Board filed a disapproval of his rezoning petitions before the county board acted, and that in December 2002 the Town Board filed a disapproval of the amending ordinance that the Columbia County Board of Supervisors passed in November 2002. McQueen claimed that the Town's actions were without legitimate governmental reason or purpose and were irrational, arbitrary, and capricious in violation of his right to equal protection under the federal constitution. McQueen also made other claims, but it appears from his trial briefs and brief on appeal that those claims were not pursued through trial and

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

are not at issue now. McQueen sought money damages and attorney fees, but not an injunction against the zoning decision itself.

¶4 In the circuit court's memorandum decision denying McQueen's claims after trial, the court stated that it was considering only the Town's December 2002 disapproval of the ordinance passed by the county board, because that was the only action by the Town that actually had the effect of denying McQueen's rezoning petition. On appeal, McQueen argues that the court erred in that decision. He argues that the Town disapprovals before action by the county board are at issue because those early disapprovals contribute to the Town's ability to determine the outcome and "have the same effect as vetoes."

¶5 This argument is without merit. As discussed above, under the process established by WIS. STAT. § 59.69(5)(e), a town disapproval before the county board acts has only the effect of controlling the recommendation made to the county board by the county zoning agency. McQueen does not provide any analysis of § 59.69 that disputes this interpretation, and he offers only vague generalities from case law that do not squarely address the issue. The circuit court correctly limited its decision to the final disapproval because that is the only disapproval that actually caused the harm for which McQueen seeks damages. The Town's prior disapprovals had no effect at all on the final outcome of McQueen's rezoning attempt, because the county board approved McQueen's ordinance in spite of the Town's expressed disapprovals.

¶6 We next discuss the legal theory of equal protection that McQueen relies on. At trial and on appeal, one legal standard McQueen proposed was one in which he initially bears the burden to demonstrate a *prima facie* case of constitutionally impermissible intent by the Town; the Town must then show that

its actions were legitimate and nondiscriminatory; and the burden then shifts back to McQueen to demonstrate that the reasons given by the Town were pretextual. The cases he cites for this standard are ***Abrams v. Walker***, 307 F.3d 650, 654 (7th Cir. 2002) and ***O'Neill v. Gourmet Systems of Minnesota, Inc.***, 213 F. Supp. 2d 1012, 1018 (W.D. Wis. 2002). Neither of these cases is an equal protection or zoning case. ***Abrams*** was a claim by a citizen against a police officer for alleged retaliation against the citizen's exercise of First Amendment rights, while ***O'Neill*** was a claim under 42 U.S.C. § 1981 concerning the right of non-white citizens to make and enforce contracts. We do not apply this standard in this case.

¶7 The parties appear to agree that to prevail on an equal protection claim, one thing McQueen must show is that he was treated differently from similarly situated persons. *See* ***Schmeling v. Phelps***, 212 Wis. 2d 898, 919-20, 569 N.W.2d 784 (Ct. App. 1997) (burden to show an equal protection violation is on plaintiff, who must demonstrate that he was the object of differential treatment for improper or unlawful reasons); *see also* ***Purze v. Village of Winthrop Harbor***, 286 F.3d 452, 455 (7th Cir. 2002) (applying "similarly situated" standard in "class of one" equal protection case).

¶8 The circuit court's decision reviewed various examples McQueen gave, which, he argued, showed that Board member Orlando Allen acted with an unconstitutional motive. One of those was that Allen incorrectly stated that the Town had not granted any similarly situated rezonings in the area of McQueen's property. The court found that McQueen "did not point to any other two[-]acre parcels that had been zoned from agricultural to residential in the area near plaintiff's property." We review circuit court findings under the "clearly erroneous" test. WIS. STAT. § 805.17(2).

¶9 On appeal, McQueen's brief asserts that the evidence shows the Town treated him differently from owners of similarly situated properties. However, he does not specifically identify what that evidence was or where in the record such evidence could be found. He does not describe the other properties or any of their features that made them similar to his own. Nor does he point to any evidence of how those properties were treated in the zoning process, or what the standards in effect at that time were. Accordingly, we conclude that McQueen has not shown that it was clearly erroneous for the court to find that he did not establish that he was treated differently from similarly situated owners. Because that finding is fatal to his equal protection claim, we need not address other issues that were briefed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).