COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2970 **Cir. Ct. No. 2003CV168**

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

FRIENDS OF RICHLAND COUNTY, THOMAS SHIELDS AND DONALD KRAMER,

PLAINTIFFS-APPELLANTS,

V.

RICHLAND COUNTY, STEVE SCHMITZ, CINDY SCHMITZ, LEE CLARK AND JUDY CLARK,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

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

¶1 DEININGER, J. Friends of Richland County is a non-profit association of Richland County residents who seek "to preserve the farmland, forest, wildlife and a[]quatic resources of Richland County." Friends and two of

its members, who are Richland County residents, property owners and taxpayers, commenced this declaratory judgment action challenging Richland County's alleged pattern and practice of illegally granting rezoning petitions for parcels in the Agriculture-Forestry District. The plaintiffs later amended their complaint to include a request that three recently granted rezoning amendments be set aside.[1] The circuit court dismissed Friends' claims on summary judgment, concluding both that Friends lacked standing to bring its claims for certiorari and declaratory relief and, further, that the claims lacked merit. We conclude Friends lacks standing and affirm the appealed judgment on that basis.

ANALYSIS

¶2 Whether a party has standing to seek declaratory relief is a question of law we decide de novo. *See* ***Village of Slinger v. City of Hartford***, 2002 WI App 187, ¶8, 256 Wis. 2d 859, 650 N.W.2d 81. "In order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy." ***Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland***, 2002 WI App 301, ¶15, 259 Wis. 2d 107, 655 N.W.2d 189.

¶3 As a "nonprofit association," Friends has standing if it satisfies the following requirement:

[1] At a hearing in June 2004, counsel for Friends informed the court that the rezoning of as many as thirteen specific parcels might be at issue. Friends filed a Second Amended Complaint in January 2005 identifying three parcels whose rezoning Friends sought to set aside by way of a writ of certiorari. Ultimately, however, Friends asked the circuit court to remand the rezoning petitions for only two parcels, which belonged to parties named Schmitz and Clark. The two sets of owners remain as parties and are respondents in this appeal. Both have informed us that they join in the County's responsive brief. We refer in this opinion to all plaintiff-appellants as "Friends" and to all defendant-respondents as "the County."

> A nonprofit association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests that the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.

WIS. STAT. § 184.07(2) (2003-04).[2] Thus, Friends' standing to seek certiorari review and declaratory relief turns on whether one or more of its members have standing to seek these legal remedies based on the allegations in Friends' complaint.[3]

¶4 The Richland County Board accomplished the challenged rezoning actions by amending the Richland County Zoning Ordinance, and the individual amendments are themselves board-enacted ordinances. WISCONSIN STAT. § 806.04(2) provides that "[a]ny person … whose rights, status or other legal relations are affected by a … municipal ordinance, … may have determined any question of construction or validity arising under the … ordinance … and obtain a declaration of rights, status or other legal relations thereunder." Although the statutory language describing who may seek declaratory relief regarding a municipal ordinance is quite broad, ("any person … whose rights … are affected by [the] ordinance"), case law confirms that relief under § 806.04 is not available

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. "Nonprofit association" is defined in WIS. STAT. § 184.01(2).

[3] The parties' arguments on appeal focus exclusively on the standing requirements for declaratory judgment actions. That is, Friends does not argue that, even if it lacks standing to seek declaratory relief under WIS. STAT. § 806.04, it has standing to seek certiorari review of the rezoning actions relating to the two specific parcels cited in its amended complaint. Because Friends makes no separate argument regarding its standing to pursue certiorari review, we, like the parties, discuss standing only as it relates to obtaining declaratory relief.

to every citizen who disagrees with the provisions of a municipal ordinance or with how officials are executing their duties under it.

¶5 A justiciable controversy must exist in order for a party to maintain a declaratory judgment action under WIS. STAT. § 806.04. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 409-410, 320 N.W.2d 175 (1982). A controversy is justiciable when the following factors are present:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> (2) The controversy must be between persons whose interests are adverse.
>
> (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest.
>
> (4) The issue involved in the controversy must be ripe for judicial determination.

Lake Country, 259 Wis. 2d 107, ¶15. The dispositive issue in this case centers on the third element of justiciability, which is often referred to as a plaintiff's "standing" to seek declaratory relief. *See* ***City of Madison v. Town of Fitchburg***, 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1983).

¶6 To meet the third requirement for justiciability, and thus to have standing to bring a declaratory judgment action, a plaintiff must "have a personal stake in the outcome and must be directly affected by the issues in controversy." ***Lake Country,*** 259 Wis. 2d 107, ¶15 (citing ***Village of Slinger***, 256 Wis. 2d 859, ¶9). We concluded in ***Lake Country*** that a plaintiff's mere status as a resident, property owner, and taxpayer of the municipality whose action was being challenged was insufficient to confer standing. Rather, we deemed it necessary for the plaintiff to have sustained, or to be likely to sustain in the future, "some

pecuniary loss or otherwise … substantial injury to his or her interests." ***Lake Country***, 259 Wis. 2d 107, ¶17.

¶7 We conclude that, as in ***Lake Country*** where the plaintiff argued that "its status as a village taxpayer and property owner confers standing," ***id.***, ¶16, Friends' assertion in its complaint that the two co-plaintiff members of the association are Richland County residents, property owners and taxpayers is not sufficient, in and of itself, to give Friends standing to seek a declaratory judgment regarding Richland County's re-zoning ordinances. Friends' Second Amended Complaint alleges the County committed numerous violations of state statutes, and of state and local planning standards, as well as transgressions against good public policy. The complaint also includes some general assertions that these alleged violations are "to the detriment of Richland County's … citizens and taxpayers"; that the County Board's actions are "not in the public interest"; and that the actions are "harmful to county land resources and its citizens and taxpayers." Nowhere, however, does Friends allege that any member of the association has suffered any direct pecuniary loss or any other substantial injury to his or her legally protectible interests. *See* ***Village of Slinger***, 256 Wis. 2d 859, ¶¶7-12 (rejecting claim of "legally protectible interest in the rezoning of adjoining property that impairs the quality of residential life" and concluding that plaintiffs lacked standing for failure to allege "some pecuniary loss" or other "substantial injury to their interests").

¶8 Friends argues, however, that its members "have been personally affected by [the County]'s rezoning[] decisions" because their "lives are inextricably tied to the Richland County landscape. Their taxes subsidize efforts to preserve farmland, and they bear the costs that result from poor zoning decisions." The only legal authority they cite in support of their claim that these

things are sufficient to confer standing is ***Weber v. Town of Lincoln***, 159 Wis. 2d 144, 463 N.W.2d 869 (Ct. App. 1990). The plaintiffs in ***Weber*** were town residents who sought a declaratory judgment invalidating the town's repeal of its zoning ordinance. ***Id***. at 146. We concluded that the residents had standing to challenge the repeal because the rights of all residents of the town were affected by the complete repeal of the zoning ordinance. ***Id***. at 147-49. In essence, the repeal of the existing zoning ordinance had the effect of "rezoning" every parcel of land in the town. We specifically noted that "the lack of a zoning ordinance affects all town residents," and that all property owners were statutorily empowered to enforce the repealed zoning ordinance, a right the town extinguished by repealing the ordinance. *See* ***id***. at 148-49.

¶9 Friends and its members do not and cannot allege a loss or injury in this action similar to that in ***Weber***. The rezoning of other parcels of land in Richland County did not disturb the existing zoning of the members' properties, and whatever statutory or other zoning enforcement rights they might enjoy as property owners were not affected by the rezoning of parcels belonging to others. Although it is true that a Richland County property owner may not now seek to have a rezoned parcel comply with restrictions or regulations that no longer apply to the parcel, we conclude that this fact does not represent a pecuniary loss or other substantial injury to a property owner's interests sufficient to confer standing under WIS. STAT. § 806.04. *See* ***Lake Country***, 259 Wis. 2d 107, ¶17.[4]

[4] Friends points in its reply brief to ***Cushman v. City of Racine***, 39 Wis. 2d 303, 159 N.W.2d 67 (1968), and ***Step Now Citizens Group v. Town of Utica***, 2003 WI App 109, 264 Wis. 2d 662, 663 N.W.2d 833, as examples of cases in which citizens other than those owning rezoned parcels were allowed to challenge the rezoning ordinances. We first note that the question of the plaintiffs' standing is not discussed in either case. Moreover, in both cases, the plaintiffs were able to point to specific and direct harm they would suffer as a result of the (continued)

¶10 Friends contends in its reply brief that its members face "a likely pecuniary loss" because "[t]he rezoning of particular properties originally zoned for exclusive agricultural use under the Farmland Preservation Act, WIS. STAT. ch. 91, may lead the Land Conservation Board to revoke its certification of [Richland County's] exclusive agricultural zoning ordinance," and "[t]he loss of this certification would cause property owners, such as the Plaintiffs, to lose tax credits" that they can currently claim under chapter 71 of Wisconsin Statutes.[5] Friends thus claims its members "face the risk of considerable financial loss as a result of the County's current practice of rezoning farmland while ignoring statutory criteria."

¶11 We acknowledge that pecuniary loss or injury need not actually have occurred in order for a plaintiff to have standing to seek declaratory relief, but it must at least appear likely that a plaintiff "will sustain some pecuniary loss" if relief is not granted. *See* ***Village of Slinger***, 256 Wis. 2d 859, ¶12. Friends' suggested future pecuniary losses that its members may someday incur due to lost tax credits is simply too remote and speculative for this court to conclude that the present plaintiffs will likely sustain some pecuniary loss on account of Richland County's allegedly improper rezoning actions. In essence, what Friends asserts is that, if Richland County continues doing what it is allegedly doing (that is,

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rezoning actions. *See* ***Cushman***, 39 Wis. 2d at 304, 310-11 (owners of "homes or lots … in close proximity to the subject parcel" demonstrated that the market value of their properties would be adversely affected); ***Step Now***, 264 Wis. 2d 662, ¶¶2, 6 (members of citizens' group were "potentially affected" by negative effects of constructing and operating an ethanol plant, including odor emission, noise, increased traffic, and increased demand for fire control and water supply services).

[5] Under WIS. STAT. ch. 71, subchapter IX, owners of farmland that is subject to agricultural use restrictions are eligible to claim credit against Wisconsin income or franchise taxes if certain requirements are met. *See* WIS. STAT. §§ 71.57-71.61.

improperly or inadvisably granting petitions to rezone parcels from agricultural to other uses), eventually the pattern may prompt the Land Conservation Board to decertify Richland County's exclusively agricultural zoning for purposes of property tax credit eligibility. Whatever may be the plausibility of these events ever coming to pass, Friends and its members cannot rely on events that "may" someday happen to claim that they are "*directly affected* by the issues in controversy." *See* ***id.***, ¶9 (emphasis added).

¶12 Friends also argues that WIS. STAT. § 59.69(14) confers standing on it and its members to challenge the rezoning ordinances at issue. The statute provides as follows:

> LIMITATION OF ACTIONS. A landowner, occupant or other person who is affected by a county zoning ordinance or amendment, who claims that the ordinance or amendment is invalid because procedures prescribed by the statutes or the ordinance were not followed, shall commence an action within [180 days]….

Section 59.69(14). Friends maintains that the statute "provides a broad basis for legal action across a wide spectrum," including the present declaratory judgment action brought on behalf of members who are allegedly "affected by a county zoning ordinance or amendment." We reject Friends' contention that WIS. STAT. § 59.69(14) grants it and its members standing to bring this action.

¶13 We agree instead with the County and the circuit court that WIS. STAT. § 59.69(14) is a statute of limitation. It specifies the time period within which an action challenging a zoning ordinance or amendment on procedural grounds must be commenced. Thus, if a plaintiff seeks by way of a declaratory judgment action under WIS. STAT. § 806.04 to undo a rezoning ordinance on the grounds that a county failed to follow procedures prescribed by statute or

ordinance, he or she must commence the action within one hundred eighty days of the adoption of the zoning ordinance amendment. *See* WIS. STAT. § 893.73(1). Simply put, nothing in § 59.69(14) evinces a legislative intent to create a separate, alternative cause of action for challenging zoning ordinances or amendments. *See, e.g.*, ***Grube v. Daun***, 210 Wis. 2d 681, 689, 563 N.W.2d 523 (1997) (noting that a statute will be deemed to create a private right of action only where "there is a clear indication of the legislature's intent to create such a right"). Thus, § 59.69(14) does not provide a means of circumventing the rules of standing for obtaining declaratory relief.

¶14 Friends' last claim of standing rests on the Wisconsin Public Trust Doctrine. Friends acknowledges that the doctrine "typically applies to the preservation of navigable waters," but argues that the doctrine should be deemed to extend to all citizen "interests in the public natural resources," including "waterways, wildlife, and agriculture and forest resources." Friends would have us conclude that, because there is a "public property interest in state natural resources[,] … [t]his … provides standing for citizens to challenge the actions of their government when detrimental to their interests in the public natural resources."

¶15 We do not quarrel with Friends' contention that the use to which land in a given watershed is put affects the quality of the waters that lie within it. We also acknowledge that among the factors a zoning authority should consider when acting on a request to rezone property lying within an exclusive agricultural district is whether the proposed use will "result in undue water or air pollution, cause unreasonable soil erosion or have an unreasonably adverse effect on rare or irreplaceable natural areas." *See* WIS. STAT. § 91.77(1)(c). Neither of these facts, however, translates into a conclusion that the Public Trust Doctrine confers on

every citizen the right to challenge in court any governmental action that arguably impacts any natural resource in Wisconsin.

¶16 Quite simply, Friends cites no instance where the Public Trust Doctrine has been applied in Wisconsin in a context beyond the direct infringement of the public's rights in navigable waters. *See, e.g.*, ***State v. Waushara County Bd. of Adjustment***, 2004 WI 56, ¶41 n.1, 271 Wis. 2d 547, 679 N.W.2d 514 (Bradley, J., dissenting) ("Although the public trust doctrine originally existed to protect commercial navigation, it has been expansively interpreted to safeguard the public's use of navigable waters for other purposes."); ***Muench v. PSC***, 261 Wis. 492, 515-l, 53 N.W.2d 514 (1952) ("The trust doctrine has become … thoroughly embodied in the jurisprudence of this state … as it applies to rights of recreational enjoyment of our public waters…."). We are thus not persuaded that the Public Trust Doctrine provides standing to every citizen to challenge any government action that affects some aspect of the environment other than the public's rights in the navigable waters of our state. *See* ***Wisconsin's Envtl. Decade, Inc. v. PSC***, 69 Wis. 2d 1, 15, 230 N.W.2d 243 (1975) ("We are unwilling to adopt a rule that any allegation of harm to the environment raises, by implication, an allegation of harm to navigable waterways.").[6]

¶17 Finally, we note that the circuit court commented in its oral ruling on the County's motion for summary judgment that "the plaintiffs raise legitimate

[6] We note that, where the Public Trust Doctrine is implicated, that is, in cases involving the infringement of public rights in navigable waters, private enforcement actions are recognized as having a statutory basis. *See* ***Gillen v. City of Neenah***, 219 Wis. 2d 806, 828-32, 580 N.W.2d 628 (1998) (concluding that, under WIS. STAT. § 30.294, a private citizen has standing to bring an action to enjoin violations of the statutes that embody the public trust doctrine). The Farmland Preservation Act, WIS. STAT. ch. 91, contains no similar provision that authorizes "any person" to bring an action to abate or enjoin a failure to preserve agricultural land.

public policy concerns with which reasonable people can agree or disagree but these are issues for the public debate." We agree with the circuit court's observation that Friends' complaints regarding the wisdom of the County Board's rezoning actions "are issues which are to be resolved by the political process." *See, e.g.*, ***Lake Country***, 259 Wis. 2d 107, ¶23 (noting that the plaintiff "is simply registering its disagreement with legislative decisions of the Village," which "is insufficient to confer standing"); ***Schmeling v. Phelps***, 212 Wis. 2d 898, 918, 569 N.W.2d 784 (Ct. App. 1997) (noting that a disagreement over the "interpretation of the county's planning policies relating to rural residential development … is a matter for the actors in the legislative process, and possibly the political and electoral processes; [but] it is not for the courts to resolve").

CONCLUSION

¶18 Because we conclude Friends lacks standing to bring this action, we affirm the appealed judgment. We note that the circuit court also ruled that, in addition to lacking standing, Friends also failed to state a claim on which relief could be granted. Because we agree with the circuit court that Friends lacks standing, we do not address the merits of its claims.

By the Court.—Judgment affirmed.

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