COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2119 **Cir. Ct. No. 2004CV695**

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

FRANKLIN F. COOK,

PLAINTIFF-APPELLANT,

V.

TOWN OF GREENFIELD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

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

¶1 HIGGINBOTHAM, P.J. Franklin F. Cook appeals a circuit court order affirming a hearing examiner's decision denying him a driveway construction permit and a special permit to exceed the maximum allowed driveway length. We conclude that Cook fails to meet his burden to prove that the

ordinance's provision limiting the length of driveways to 400 feet is not a valid exercise of the Town's police power under WIS. STAT. § 61.34. We further conclude that this provision and another provision permitting the Town to grant a special permit to exceed the maximum allowed driveway length are not zoning restrictions. Finally, we conclude that the Town's application of the relevant provisions of the ordinance to Cook was not arbitrary and represented its judgment rather than its will. We therefore affirm.

BACKGROUND

¶2 The following facts are undisputed, and, except where noted, are taken from the hearing examiner's findings. Section 1.10 of the Town of Greenfield Ordinances, regulates driveways within the town. The ordinance states that among its purposes is to:

> [r]egulate the establishment, construction, improvement, modification or reworking of a driveway to assure that the site, method of construction, and conservation practices used will promote the public health, safety, and general welfare of the community, and to enforce the goals and polices set forth in the Town of Greenfield Land Use Plan.

Section 1.01(1), Town of Greenfield Ordinances. Section 1.10(19) limits driveway length as follows:

> Driveway Length. Maximum length 400 feet. Upon application, the Town Board may, by special permit, allow a longer driveway where the landowner shows satisfactory evidence that the same is necessary because of existing natural barriers or some other special condition of the land. When the Town Board considers a special permit it may consult with the Fire Department.

¶3 Cook owns a parcel of land, located on Man Mound Road, in the Town of Greenfield in Sauk County. The parcel is divided into multiple lots that

were approved for residential development by the Town Plan Commission. Cook constructed a 1,420 foot driveway to provide the lots with access to Man Mound Road. Cook failed to seek a driveway construction permit or a special permit to exceed the maximum allowed driveway length before installing the driveway.[1]

¶4 On August 13, 2003, the Town sent Cook a letter notifying him that he had failed to seek the proper permits before constructing the driveway. Cook then submitted the appropriate permit applications. The Town Engineer reviewed the applications and sent Cook a letter detailing his concerns about Cook's application, and seeking additional information from him. In response, Cook submitted materials to supplement his application.

¶5 Documents in the record indicate that Town Chairman Terry Turnquist and Baraboo Fire Chief Kevin Stieve inspected Cook's driveway. After the inspection, the fire chief sent a memo to the town board expressing his opposition to Cook's applications. The memo asserts that the driveway's length, steep grade and winding curves would make it difficult for fire trucks to traverse the road, particularly in winter. The town chairman expressed similar concerns in a memo to the Board stating his opposition to the applications.

¶6 In May 2004, the Town Plan Commission reviewed Cook's applications. The commission report recommended denying the applications. In

[1] Cook asserts that the driveway was actually an improved road in existence since 1964, predating the driveway ordinance. However, he does not contend that the hearing examiner's finding that he started constructing the driveway in 2001 is clearly erroneous, or even attempt to explain the discrepancy between his assertion and the examiner's finding. We therefore accept the hearing examiner's finding on this point. Moreover, we reject Cook's argument that his driveway should have been grandfathered-in because it is premised on an assertion of fact (that the road existed since 1964) that is contrary to the hearing examiner's findings.

its report, the commission explained that its approval of the division of Cook's parcel into residential lots two years earlier had sought "to ensure the lots were configured to accommodate construction [of a driveway or driveways] within 400 feet of Man Mound Road to comply with the town's driveway ordinance." The commission further "expressed concern that the steepest existing and finished grade occurs at the sharpest turn of the proposed/existing driveway." The commission also "questioned the ease with which and whether fire and emergency rescue vehicles could access future homes along this proposed/existing driveway."

¶7 In June 2004, the Town Board took up Cook's permit applications and reviewed the plan commission's report. The Town Board accepted the commission's recommendation and unanimously rejected Cook's applications. Cook sought review of the Board's initial decision, and the Board confirmed its denial of the applications.

¶8 Cook appealed the Board's decision. Pursuant to WIS. STAT. § 68.11, a hearing examiner was appointed to review the Town Board's decision. Following a hearing, the examiner upheld the decision, concluding that the Town "must be allowed the authority to make the determinations having to do with, but not limited to, the design and placement of driveways." Cook filed a certiorari petition to review the examiner's decision. The circuit court affirmed. Cook appeals.

STANDARD OF REVIEW

¶9 On appeal from a circuit court order entered on certiorari, we review the record of the board or other decision maker to which certiorari is directed, not the circuit court's decision. ***Hills v. Village of Fox Point Bd. of Appeals***, 2005 WI App 106, ¶6, 281 Wis. 2d 147, 699 N.W.2d 636.

> When no additional evidence is taken, statutory certiorari review is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably make the order or determination in question based on the evidence.

Id. (citation omitted).

DISCUSSION

A. Whether the Ordinance Provision Limiting Driveway Length to 400 Feet is a Valid Exercise of Police Powers

¶10 The Town of Greenfield in Sauk County is a town government vested with the powers of a village pursuant to WIS. STAT. § 60.10(2)(c). Towns so organized have broad police powers under WIS. STAT. § 61.34, which confers the

> power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means.

¶11 Cook contends that WIS. STAT. § 61.34 does not provide the Town with the authority to enact the 400 feet length restriction contained in the Town's driveway ordinance. A municipal ordinance enjoys the presumption of validity. ***Town of Clearfield v. Cushman***, 150 Wis. 2d 10, 20, 440 N.W.2d 777 (Ct. App. 1988). A party challenging an ordinance on grounds that it is not authorized by any statute bears the burden of proving the statute's invalidity. *See* ***id.*** An ordinance is valid as an exercise of the police power if "the means chosen have a reasonable and rational relationship" to a purpose set forth under the police power. ***State v. Jackman***, 60 Wis. 2d 700, 705, 211 N.W.2d 480 (1973); *see also*

Bisenius v. Karns, 42 Wis. 2d 42, 45, 165 N.W.2d 377 (1969) (to be valid under the police power, an ordinance must be "appropriately related to a proper purpose of such police power"). Whether the Town has authority to enact this ordinance is a question of statutory interpretation that we review de novo. ***Cushman***, 150 Wis. 2d at 19.

¶12 Cook first argues that the 400 feet length limitation is invalid because it does not bear a reasonable and rational relationship[2] to a purpose under the police power provided in WIS. STAT. § 61.34. He asserts that the record contains no evidence supporting the view that driveways longer than 400 feet are less safe due to length alone. He also argues that, if the Town had intended for the ordinance to serve public safety ends, it would have drafted the ordinance differently. We reject these arguments.

¶13 Cook's suggestion that the Town must point to evidence in the record to support its purported exercise of the police power ignores the presumption in favor of the validity of an ordinance and wrongly shifts the burden of proof onto the Town to demonstrate that the driveway length restriction is a proper exercise of the police power. In any event, Cook's argument that the 400 feet length limitation is not reasonably and rationally tied to a purpose set forth in WIS. STAT. § 61.34 is largely conclusory. We also reject Cook's assertion that, if the ordinance's goal is to promote public safety, it would not include a length limitation. He submits that a more reasonable ordinance containing a length

[2] The "reasonable and rational relationship" requirement in this area of the law should not be confused with the rational basis test associated with equal protection analysis, which holds that a classification need only be "rationally related" to any legitimate government purpose to pass constitutional muster. *See* ***State v. Smart***, 2002 WI App 240, ¶5, 257 Wis. 2d 713, 652 N.W.2d 429.

limitation might read as follows: "No driveway shall be permitted which, due to its length, impairs public health or safety." While this language may better serve the public health and safety purposes of § 61.34, "[t]he question before us is not what a [municipal government] should do, but what [it] can do…. We are not to sit in judgment on the merits of … legislation." ***Bisenius***, 42 Wis. 2d at 45. The ordinance need only be reasonably and rationally tied to a purpose provided in § 61.34 to be a valid expression of the powers conferred by the statute. Here, one might surmise that, by limiting driveway length to 400 feet, public safety would be served because possible snow removal would be less time consuming and emergency vehicles would have easier access to residences. Regardless, Cook fails to meet his burden to prove the ordinance does not bear a reasonable and rational relationship to an objective of the Town's police power under § 61.34.

¶14 Moreover, we note that persuasive authority exists for the admittedly broader proposition that towns may adopt ordinances regulating driveway installation. A 1987 Attorney General Opinion asserts that towns may regulate driveway installation pursuant to WIS. STAT. § 61.34 under the reasoning of ***Village of Wind Point v. Halverson***, 38 Wis. 2d 1, 155 N.W.2d 654 (1968). *See* 76 Wis. Op. Att'y Gen. 62-63 (1987). As the attorney general noted, in ***Halverson***, the court upheld that a village building code establishing minimum setback lines as a valid exercise of the village's power to pursuant to § 61.34. The ***Halverson*** court held:

> "[A] setback ordinance may also be adopted by a city or village other than by adopting a zoning ordinance, as a building restriction or part of a building code, pursuant to the general grant of power in sec. 61.34(1), Stats. This court has liberally construed the power of a city or village to enact building regulations pursuant to the general grant of police power."

76 Wis. Op. Att'y Gen. at 62-63 (quoting ***Halverson***, 38 Wis. 2d at 9). Applying ***Halverson*** to the question of whether § 61.34 would also permit a municipality to adopt an ordinance regulating driveway installation, opined the attorney general:

> I perceive no meaningful distinction under the language of the statute between a setback ordinance and an ordinance regulating driveway installation. Both appear to be permissible if enacted 'for the government and good order of the [town or] village … [or] for the health, safety, welfare and convenience of the public ….' Sec. 61.34(1), Stats.

76 Wis. Op. Att'y Gen. at 63.

¶15 We note that, even if we were to adopt it here, the attorney general's opinion would not be dispositive of this case because it does not address the validity of the specific provision at issue, namely a 400 feet limit on driveway length. However, ***Halverson*** and the attorney general's opinion interpreting that case suggest that any challenge to a specific provision regulating driveway installation arises in a context (driveway installation) in which, as a general matter, regulations are authorized by the police powers in WIS. STAT. § 61.34. This does not mean that a specific provision relating to driveway installation will necessarily be authorized by § 61.34. But it stands to reason that if towns have the general authority under § 61.34 to adopt driveway installation ordinances, particular provisions of those ordinances are likely to be valid under § 61.34 as well.

¶16 In sum, we conclude that Cook fails to demonstrate that the provision limiting driveway length to 400 feet is not a valid exercise of the police powers in WIS. STAT. § 61.34.

B. Whether the Ordinance is Invalid Because It Is an Unauthorized Zoning Restriction

¶17 Cook contends that the ordinance is invalid because it is an unauthorized zoning regulation. It is undisputed that, pursuant to WIS. STAT. § 60.62(3), the Town is prohibited from adopting its own zoning rules.[3] Cook's argument begins with the language of the ordinance, which he asserts demonstrates that it is a zoning regulation because one of its stated purposes is "to enforce the goals and policies set forth in the Town of Greenfield Land Use Plan." Section 1.10(1), Town of Greenfield Ordinances. Cook ignores, however, that the first purpose listed in the ordinance is "to promote the public health, safety, and general welfare of the community," ***id.***, an expression of the police power purposes set forth in WIS. STAT. § 61.34. As noted above, Cook does not challenge the validity of the ordinance as a whole; he therefore does not assert the statement of legislative purpose renders the entire ordinance invalid as an impermissible zoning regulation. And he provides no authority for the unusual proposition that a specific provision of an ordinance may be rendered invalid by one part of the ordinance's legislative purpose, particularly where the specific provision is not otherwise invalid as an exercise of a town's police powers.

¶18 Cook next argues that the Town's historic application of the ordinance provision limiting driveway length to 400 feet demonstrates that the ordinance is a zoning regulation. First, Cook notes that driveway permits are processed by the Town Plan Commission, a body that, Cook argues, serves zoning

[3] WISCONSIN STAT. § 60.62(3) provides as follows: "In counties having a county zoning ordinance, no zoning ordinance or amendment of a zoning ordinance may be adopted under this section unless approved by the county board." It is undisputed that Sauk County has adopted a zoning ordinance.

purposes, citing WIS. STAT. § 62.23(2).[4] From this, Cook appears to argue that the driveway ordinance must be a zoning ordinance rather than a safety ordinance. This argument lacks merit. The function and authority of a town plan commission is not defined by § 62.23, which governs only *city* planning commissions. Moreover, Cook fails to persuade us that the fact that the Town Plan Commission may be charged with zoning-related duties demonstrates that everything that it does is zoning-related.

¶19 Second, Cook also contends that the manner by which the Town has applied the "other special conditions" exception to the driveway ordinance demonstrates that the Town is engaged in zoning. He refers to six applications approved by the Town where the "other special conditions" criteria were applied. The evidence in the record concerning the Town's application of the exception in other cases is insufficient to prove that the Town has engaged in zoning by application of the exception. Moreover, what can be gleaned from the record indicates that, if anything, the Town engaged in a case-by-case application of the driveway ordinance based upon the unique characteristics of each case. This is not zoning, which the supreme court has defined as "'governmental regulation of the uses of land and buildings according to districts or zones.'" ***Cushman***, 150 Wis. 2d at 19 (quoting 8 McQuillin, *Municipal Corporations* § 25.01 at 6 (3rd ed. 1983)).

[4] WISCONSIN STAT. § 62.23(2) provides, in relevant part, that it "shall be the function and duty of the commission to make and adopt a master plan for the physical development of the city."

¶20 In sum, we conclude that the provisions of the Town's ordinance concerning driveway length do not constitute an unauthorized zoning restriction, and are therefore not invalid on this basis.

C. Whether the Driveway Ordinance Was Properly Applied to Cook

¶21 Cook challenges the manner in which the ordinance has been applied to him. Cook contends that the Town's action on his applications (and presumably the hearing examiner's decision upholding that action) was "arbitrary, oppressive, or unreasonable and represented [the] will and not [the] judgment" of the decision makers. *See* ***Hills***, 281 Wis. 2d 147, ¶6 (citation omitted). Specifically, he maintains that the manner in which the Town denied his application deviated from its usual practice by failing to afford him the opportunity to submit a revised proposal addressing the safety concerns of Town officials, and that, by doing so, the Town acted in an arbitrary manner that represented its will and not its judgment. We disagree.

¶22 We first note that the record before us regarding the Town's treatment of other driveway permit applications is insufficient for us to conclude that its denial of Cook's application deviated from its usual practice. And if Cook was, in fact, treated differently than other applicants, we note that his situation was different because he installed the driveway before submitting the applications. Cook's "proposed" driveway was a reality, and modification of the driveway to address safety concerns would have required changing not just a blueprint, but moving earth. Regardless, neither the Town's ordinances nor any other authority requires that the Town provide an applicant the opportunity to submit a revised application addressing the concerns of Town officials. Furthermore, to the extent that Cook is complaining that his application for a special permit did not receive

the same degree of consideration as other applicants, the hearing examiner found that the Town denied Cook's special permit application because his property did not present any "natural barriers" or "other special conditions" that would make him eligible for a special permit.

¶23 In sum, we conclude that the Town's application of the relevant provisions of the ordinance to Cook was not arbitrary and represented its judgment and not its will.

¶24 Finally, Cook contends that the "true reason" for the Town's denial of his applications is that he wanted to build atop the Baraboo Bluffs, and the Town's Land Use Plan seeks to discourage development in this part of the Town. Cook thus suggests that the public safety justifications were only a pretext for the denial of his applications. However, Cook fails to point to any evidence in the record that would support this argument.[5]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[5] Cook also asserts two constitutional arguments that we decline to address on the merits. First, he argues that the relevant portions of the ordinance violate his substantive due process rights secured by the Fourteenth Amendment of the United States Constitution. Second, he argues that the ordinance on its face violates equal protection guarantees. Specifically, he contends that the ordinance's provision allowing the Town to issue an exemption when the property contains "natural barriers" or "other special conditions of land" is "completely irrelevant to the law's [public safety] purpose," and is therefore invalid on equal protection grounds. We decline to address these arguments because they are conclusory and undeveloped. *See* ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).