**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 29, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP2622** **Cir. Ct. No. 2003CV287**

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

---

**TOWN OF FOND DU LAC,**

**PLAINTIFF-RESPONDENT,**

**V.**

**HARRY SCHMITZ, JR.,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 SNYDER, J. Harry Schmitz, Jr., appeals from a summary judgment in favor of the Town of Fond du Lac that awarded the Town forfeitures in the

amount of $37,650 from Schmitz. Schmitz contends that the circuit court improperly resolved the case by summary judgment because genuine issues of material fact exist. He further contends that the forfeiture violates the Settlement Agreement between the parties. We affirm the summary judgment on the Town's building permit and site and grading permit claims, and we affirm the forfeiture award as calculated by the circuit court; however, we reverse the summary judgment on the Town's nuisance claim. We remand for further proceedings.

## FACTS AND PROCEDURAL BACKGROUND

¶2 Schmitz owns parcels described as Lot 1 and Lot 2 on Rolling Meadows Drive in Fond du Lac county. In September 2001, Schmitz applied for a permit to move an existing building onto his property. His application stated that he was applying for a construction permit. The Town issued a permit to Schmitz. On the permit, the Town checked a box to indicate it was issuing a construction permit but also specifically designated the permit as a "moving permit." The fee charged was twenty-five dollars.

¶3 In early October 2002, Schmitz began excavation of land and construction of concrete slabs on his property. The Town issued a stop work order on October 4, 2002. The Town asserted that the construction work on Schmitz's property was subject to the Town's site and grading plan ordinance, which required Schmitz to submit a plan before the activity could begin. Furthermore, the Town's zoning ordinance required Schmitz to obtain a building permit in order to construct a concrete slab on the property. Finally, the Town alleged that the accumulation of inoperable or unlicensed vehicles along with the "accumulation of defective buildings" reduced property values in the area, created a blighted condition or hazard and constituted a public nuisance.

¶4 The parties entered into an Agreement in Lieu of Enforcement Action on December 17, 2002. Under the agreement, Schmitz agreed to pay forfeitures in the amount of $1075 and to submit a site and grading plan to the Town's designated engineering representative, Scott Roltgen. He also agreed to cure any deficiencies Roltgen identified in that plan. In exchange, the Town agreed not to prosecute the ordinance violations arising from the construction of the concrete slab and the proposed placement of the building on that slab. The plans submitted by Schmitz were not acceptable to the Town.

¶5 The Town ultimately filed suit on May 19, 2003. The Town sought "forfeitures of not less than $50 nor more than $500" for the site and grading ordinance violation, "forfeitures of not less than $25 nor more than $500" for the zoning ordinance violation, "forfeitures of not less than $50 nor more than $500" for the nuisance ordinance violation, together with costs and fees. The Town also asked the court to order Schmitz to restore the property to the condition it was in prior to the described events and to refrain from any further acts or omissions giving rise to ordinance violations.

¶6 On March 8, 2004, the parties entered into a Settlement Agreement. The Settlement Agreement acknowledged that Schmitz had filed a "plot plan" pertaining to the intended placement of the existing building, but noted the Town deemed that plan insufficient. The parties agreed that Schmitz would file a site and grading plan prepared by an approved professional engineer. The site and grading plan was to include information specified in the agreement and was to be delivered to the Town no later than May 1, 2004. Schmitz also agreed to provide basic renderings showing the appearance of the subject building and all proposed future expansion after installation. Once Schmitz complied with these requirements, the Town agreed to issue all additional permits required for the

installation of the building and finishing the surface area around it. The parties also stipulated that, once the building installation was complete, it would be used for one of several approved uses such as a licensed vehicle dealership or a retail warehouse. A portion of the Settlement Agreement addressed disabled vehicles which were to be removed by an agreed upon deadline. Other provisions dealt with Schmitz's prior tenant, Wolfe-Browning, Inc., which used a mobile home on one of the parcels as a business office. Finally, the Settlement Agreement provided that Schmitz would reimburse the Town for reasonable attorney fees, adjusted for previous payments made.

¶7 On June 30, 2005, Schmitz filed a counterclaim, alleging that the Town had breached the initial December 17, 2002 agreement by pursuing an enforcement action against him. He further claimed "inverse condemnation," alleging that the Town's continued actions against Schmitz interfered with his use and enjoyment of his property. Finally, he claimed the Town conspired to deprive him of his equal protection and due process rights "by seeking arbitrary enforcement" of the Town's ordinances.

¶8 The Town filed a motion for summary judgment on February 1, 2006, asking the court to dismiss the counterclaims. The court granted summary judgment, dismissing with prejudice all counterclaims against the Town.

¶9 The Town subsequently filed a motion for partial summary judgment, which asked the court to address two issues: (1) whether Schmitz obtained the necessary permits for the construction activity that occurred on his property, and (2) whether the condition of Schmitz's property constituted a public nuisance under the Town's ordinance. In the event the court determined that Schmitz did violate the Town's ordinances, the Town asked the court to calculate

the appropriate forfeitures. Schmitz responded and submitted his own motion for partial summary judgment, asking the court to rule that the Settlement Agreement between the parties resolved the matter because Schmitz complied with the agreement.

¶10 The court held a hearing on July 16, 2007. It held that Schmitz had not complied with the Settlement Agreement and denied his motion for summary judgment. The court then granted the Town's motion for summary judgment and, in its final order filed October 24, imposed forfeitures in the amount of $37,650. Schmitz filed a motion for reconsideration and the court held a hearing on October 24, 2007.[1] The court denied the motion and entered judgment against Schmitz. Schmitz appeals.

## DISCUSSION

¶11 Schmitz presents three primary allegations of error by the circuit court. First, he contends that genuine issues of material fact should have prevented summary judgment in favor of the Town. Schmitz asserts that he had the necessary permit for the construction activity on his property and that the Town breached the Settlement Agreement of March 8, 2004, because Schmitz had complied with the terms of that agreement. Finally, he contests the forfeiture

[1] At the close of the summary judgment hearing on July 16, the parties indicated a willingness to negotiate the amount of forfeitures that would ultimately be imposed. Because the negotiations were unsuccessful, the Town submitted a proposed order for summary judgment. On September 26, Schmitz submitted his motion for reconsideration. The court deferred signing the Town's proposed summary judgment order until a motion hearing took place on October 24. Consequently, the date of the final summary judgment order and the date of the hearing on Schmitz's motion for reconsideration of that order are both October 24, 2007.

amount imposed by the court and argues that specific performance of the Settlement Agreement was the only reasonable remedy.

¶12 We review an appeal from a summary judgment de novo, applying the same standard and following the same methodology required of the circuit court under WIS. STAT. § 802.08 (2005-06).[2] In ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 334 N.W.2d 580 (Ct. App. 1983), we set out the methodology to be used in summary judgment:

> [T]he court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. If the complaint … states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a prima facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary.
>
> Summary judgment methodology prohibits the trial court from deciding an issue of fact. The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment.

***Id.*** at 116 (citations omitted).

¶13 Here, the Town's complaint alleged six ordinance violations and set forth facts supporting those allegations. Ultimately, the court granted summary judgment on three claims, two involving the construction of a concrete slab

[2] All references to the Wisconsin Statutes are to the 2005-06 version.

without the appropriate permits, and one involving the claimed public nuisance.[3] We begin with the building permit and the site and grading ordinance violations.

¶14 To support its motion for summary judgment, the Town submitted certified copies of its permit fee schedule, building inspection ordinance, site and grading plan ordinance, and relevant portions of its zoning ordinance. The permit fee schedule states that commercial construction or remodeling with an estimated building cost of less than $125,000 requires a building permit fee of $200.[4] In contrast, the fee schedule states that the permit fee for moving a building is $25. The Town issued Schmitz a $25 permit. The zoning ordinance provides in relevant part: "Building permits issued on the basis of plans and applications approved by the Building Inspector authorizes (sic) only the use, arrangement and construction set forth in such approved plans and applications. Use, arrangement or construction at variance with that authorized shall be deemed a violation of this ordinance." Town of Fond du Lac, Wis., Building Inspection Ordinance § 7D. (eff. on or before Sept. 20, 2001). Finally, the site and grading ordinance states in part: "No building shall hereafter be erected, constructed, reconstructed, moved or structurally altered, and no land shall be developed, unless a site and grading plan has been submitted in accordance with the requirements of this Ordinance and all permits required under this Ordinance have been obtained." Town of Fond du

[3] The remaining three claims arose from the construction of a parking lot without the appropriate permits and the storage and use of a mobile home on the property. The Town's brief asserts that the circuit court found Schmitz in violation of the zoning ordinance because of the parking lot and storage area associated with the moved building. The summary judgment decision confirms that the court focused on the construction of the concrete slab, and that it concluded three concurrent ordinance violations occurred.

[4] On his permit application, Schmitz indicated that the estimated building cost was $4500.

Lac, Wis., Site and Grading Plan Ordinance § 1.2 (eff. on or before Sept. 20, 2001).

¶15 The parties do not dispute the applicability of these ordinances to the work performed on Schmitz's property. The genuine issue of material fact, as Schmitz presents it, is whether the permit issued was in actuality a building permit that allowed for the construction of the concrete slab. He directs us to communication he received from Scott Roltgen, who issued the permit, stating, "Your new building will require a new commercial construction permit which will cost $200 if construction costs are under $125,000…. The Town also requires a site plan. I am enclosing the site plan requirements." That is evidence, Schmitz asserts, that the Town understood he was seeking, and it was issuing, a new construction permit. Schmitz also points to the permit application itself, which contains several designations that this was a construction permit related to a moved-in building and a concrete foundation. Schmitz also notes that the Town listed a "moving permit $25," as an approval condition on the permit application, strongly suggesting that the moving permit was in addition to the new construction permit. Finally, Schmitz asserts that he paid $225 for the combined construction and moving permit. He points to the Settlement Agreement of March 8, 2004, which states, "Schmitz has already paid the $225 fee for a building permit." Schmitz explains that the Town owed him a credit of $200 for a previous transaction and simply applied it to the building permit fee.

¶16 Whether Schmitz held the appropriate permit for the type of construction taking place is an issue material to the resolution of this case. However, the issue must be genuine as well as material. An issue is genuine if the evidence is such that reasonable jurors could return a verdict for the nonmoving party. ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991).

Although Schmitz relies on arguably ambiguous designations on the permit application, there is but one permit in the record and it is clearly designated as a "moving permit." The comments included on the permit itself state "move 35' x 35' building." On his application for that permit, Schmitz stated that he would be "moving in pre-erected building, the existing 'moved in' structure will have no adverse effect on the surrounding parcel's existing drainage patterns. None." The permit application fee section does not reference a $200 fee or corresponding credit, but only lists the $25 moving permit fee. We conclude that reasonable jurors could not conclude that the $25 building permit, which is the only permit in the record and clearly states on its face that it is a "moving permit," was instead a building permit that contemplated the construction of a concrete foundation on the property. Summary judgment on this ordinance violation was proper.

¶17 Schmitz makes much of the fact that he submitted site and grading plans to the Town and that his documents met the requirements of the site and grading ordinance. We understand him to rely in part on plans he submitted in 1997, which resulted in two permits, a construction permit and a drainage and erosion permit. He insists the March 8, 2004 Settlement Agreement did not require professionally drawn plans for Lot 2. Schmitz argues that a site and grading permit should have been forthcoming and that the Town's refusal to issue the permit was unreasonable.

¶18 The Town counters that Schmitz's plans did not comply with the requirements of the Settlement Agreement. The Town concedes that Schmitz did submit a revised set of professionally prepared "Site and Drainage Plans" on April 26, 2004. The Town asserts, however, that the plans neither depicted nor described the "planned manner of installation of the existing building which Schmitz has moved onto the Premises," as required by the Settlement Agreement.

The Town further asserts that the plans also failed to (1) show the direction of drainage flow, (2) distinguish existing drainage patterns from proposed patterns, (3) depict spot grade elevations, and (4) indicate the location of all utilities.

¶19 Schmitz contends that the Settlement Agreement did not require professionally drawn plans for Lot 2. The Town insists it did. Interpretation of a contract presents a question of law. *See* ***Farm Credit Servs. v. Wysocki***, 2001 WI 51, ¶8, 243 Wis. 2d 305, 627 N.W.2d 444. Here, section (1) of the Settlement Agreement expressly requires "a site and grading plan prepared by J.E. Arthur & Associates, Inc., or another professional engineer acceptable to the Town." Subsection (1) also states that "Schmitz has represented to the Town that Excel Engineering already has drainage pattern information relating to all improvements on Lot 2 … and information relating to the existing improvements on Lot 1. If Excel Engineering has this information, Schmitz shall not be required to provide any further information." The language of the Settlement Agreement unambiguously contemplates professionally prepared plans for both lots.

¶20 There is no genuine dispute that the plans Schmitz relied on pertaining to Lot 2 were not professionally prepared. As late as July 8, 2004, the plans were rejected as "amateurish" and lacking in detail. Schmitz has not provided any site and grading plan that wholly complies with the requirements of the Settlement Agreement. Schmitz's argument that he made a good faith effort to comply does not raise a genuine issue of material fact sufficient to prevent summary judgment. Summary judgment on the site and grading ordinance violation was appropriate.

¶21 Schmitz next argues that there are genuine issues of material fact regarding the Town's public nuisance claim. The Town's public nuisance ordinance states in relevant part:

> A public nuisance is a thing, act, occupation, condition or use of property which shall continue for such length of time as to: (a) Substantially annoy, injure or endanger the comfort, health, repose or safety of the public; (b) In any way render the public insecure in life or in the use of property; (c) Greatly offend the public morals or decency; (d) Unlawfully and substantially interfere with, obstruct or tend to obstruct or render dangerous for passage any street, alley, highway, navigable body of water or other public way or the use of public property; or (e) Any condition or use of premises or of building exteriors which is detrimental to the property of others or which causes or tends to cause substantial diminution in the value of other property in the neighborhood in which such premises are located.

Town of Fond du Lac, Wis., Ordinance Prohibiting Public Nuisances §2(1) (Mar. 12, 2001).[5] The ordinance goes on to describe specific actions or conditions affecting the public health, and includes motor vehicles in "such state of physical or mechanical ruin as to be incapable of propulsion or of being operated upon the public streets …." ***Id.***, §2(2)(h). The ordinance also covers buildings with certain defects, or that lack specific appliances, or that have deteriorated to a point that they are no longer safe. ***Id.***, §2(2)(j). It also prohibits the "unsightly accumulation of items or materials such as may tend to depreciate property values in the area, or create a blighted condition, or create a hazard …." ***Id.***, §2(4)(e). The ordinance imposes a fine of not less than fifty dollars for each nuisance offense and explains

[5] Where a public nuisance ordinance exists, we apply the language of the ordinance rather than the common law definition of "public nuisance." *See* ***Town of Rhine v. Bizzell***, 2008 WI 76, ¶¶66-68, ___ Wis. 2d ___, 751 N.W.2d 780.

that "[e]ach day that a violation continues shall be considered a separate offense." ***Id.***, §5.

¶22 The Town alleged that Schmitz had violated the public nuisance ordinance by allowing disabled, junked, or otherwise inoperable vehicles to accumulate on the property. It further alleged that there was an accumulation of defective buildings and other "unsightly" items and materials that violated various provisions of the ordinance. Specifically, the Town alleged conditions that brought property values down, created a blighted condition and presented a hazard. Whether certain conditions meet a legal standard, here the Town's ordinance definition of public nuisance, is a question "reserved for the trier of fact." *See* ***Vogel v. Grant-Lafayette Elec. Co-op.***, 201 Wis. 2d 416, 427, 548 N.W.2d 829 (1996).

¶23 In support of its motion for summary judgment on this claim, the Town submitted the affidavit of Sam Tobias, Planning and Parks Director for Fond du Lac county. Tobias averred as follows: Schmitz's property is located at the entrance of the local airport and "is visible to visitors both entering and exiting the Airport site"; the airport is used by "numerous residents and visitors to the greater Fond du Lac area"; the airport is "an important tool for economic development" and is "among the first sights" seen by visitors; the property "contains unsightly accumulations of junk, wood, bricks, abandoned vehicles or machinery"; and, the "condition of substantial portions of the Property are unsightly and, therefore, interfere with the public's comfortable enjoyment and use of the Airport."

¶24 Photographs taken and relied upon by the Town show the property cluttered with what appear to be boat hoists, wooden dock slats, a refrigerator, a

mobile home, a BMW sedan, a semi-tractor, a building with an oversized concrete block wall on one side, and general debris. The grass is overgrown, the driving areas are undefined and covered in gravel, and there appears to be some graffiti on the concrete block wall. Patti Supple, Town Clerk, averred that the property on May 25, 2007, at the time of this lawsuit, was in "substantially the same" condition as the photographs submitted by the Town.

¶25 Schmitz argues that the area of concern is set back and not visible to anyone using the public roads or the local airport. He disputes that the Town can show that the condition of his property brought other property values down, created a blighted condition or presented a hazard as required by the public nuisance ordinance. As the nonmoving party, Schmitz had the obligation to oppose summary judgment by advancing specific facts showing the presence of a genuine material dispute. *See* ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2001 WI App 148, ¶48, 246 Wis. 2d 933, 632 N.W.2d 59, *aff'd*, 2002 WI 80, 254 Wis. 2d 77, 646 N.W.2d 777; *see also* ***Baxter***, 165 Wis. 2d at 312, 477 N.W.2d 648 (nonmovant must demonstrate more than a mere existence of an alleged factual dispute).

¶26 Schmitz submitted his own photographs to counter the Town's assertions. One depicts property with a neatly mowed lawn and a paved parking lot. It shows an existing building that appears well-kept, and there are vehicles parked at the perimeter of the lot as if offered for sale. This view is from the corner of Grove Street and Rolling Meadows Drive, but does not show the same portion of the property as that depicted in the Town's photographs.

¶27 Schmitz also submitted aerial photographs of Lots 1 and 2 in their entirety; unfortunately, the quality is such that distinguishing the condition of the

property from that shown in the Town's photographs is difficult. The aerial shots do indicate that airport visitors using the main parking would not have a view of the alleged nuisance area of the property. Schmitz also submitted photographs taken at ground level showing a view of his property from various vantage points at the airport. He argues from these pictures that views of his property are limited due to natural foliage and restricted access roads at the airport.

¶28 Schmitz also emphasizes that the Town has not documented any complaints from area residents or business owners experiencing a decrease in their property values or other economic interests as a result of the condition of Schmitz's property. He challenges the opinion of Tobias as conclusory and unsupported by any evidence. Indeed, the affidavit submitted by Tobias contains opinions, but no supporting documents are provided. None of the allegations by Tobias specifically link the condition of Schmitz's property to diminished "comfort, health, repose or safety of the public," or to "substantial diminution in the value of other property in the neighborhood," or to hazardous conditions or "blight." *See* Town of Fond du Lac, Wis., Ordinance Prohibiting Public Nuisances § 2(1), 2(4)(e). The power of a municipality to define nuisances by ordinance does not empower a municipality to declare that to be a nuisance which is not in fact a nuisance. *See* ***City of Milwaukee v. Milbrew, Inc.***, 240 Wis. 527, 533, 3 N.W.2d 386 (1942).

¶29 Schmitz further disputes Supple's statement that the current condition of the property is substantially the same as it was when the Town took photographs of the clutter. Schmitz points to the affidavit of Andrew Raasch,

operator of Schmitz's tenant Aqualand L.L.C.,[6] who disputed the Town's characterization of the property and stated that the Town's photographs "falsely and intentionally misrepresent … the existing condition" of the property. Therefore, Schmitz argues, the condition of the property constituting the alleged nuisance is in dispute.

¶30 Schmitz also asserts that the Fond du Lac County Airport is a small and rural facility and that access is limited to small, private aircraft. In his affidavit, Raasch estimates that approximately twenty-five cars per week travel the airport's restricted access road, which is located along the rear boundary of Schmitz's property.[7] Thus, the argument goes, the condition of Schmitz's property is not likely to affect any individual's decision to travel to or from Fond du Lac by air. Schmitz asserts that a reasonable jury could view his photographs, hear testimony of local business owners, and conclude that no nuisance, as defined in the ordinance, exists.

¶31 The circuit court concluded that the affidavits and accompanying photographs submitted by the Town left no genuine issue of material fact about the existence of a public nuisance; specifically, the court referenced the nuisance ordinance's prohibition against wrecked or unlicensed motor vehicles together with the unsightly accumulation of junk, machinery parts, appliances and other items that may tend to depreciate property values or create a blighted condition.

[6] Wolfe-Browning, Inc. was Schmitz's tenant from January 1999 through January 2004. The business "specialized in the fabrication and sales of piers, boatlifts and utility trailers." In May 2004, Aqualand L.L.C. began operations in place of Wolfe-Browning. Aqualand engages in the construction and sale of boatlifts and piers.

[7] Tobias offered no estimate of the volume of traffic at the Fond du Lac County Airport.

¶32 In its decision granting summary judgment on the nuisance claim, the court stated in relevant part that it was making "*the following findings* and conclusions" (emphasis added):

> 8. The Town has duly adopted an Ordinance Prohibiting Public Nuisances [which] prohibits junked, wrecked or unlicensed motor vehicles, truck bodies, the accumulation of junk, machinery parts, appliances or any other unsightly accumulation of items or materials such as may tend to depreciate values in the area, or create a blighted condition.
>
> 9. Both the photographs accompanying the plaintiff's motion and the Affidavit of Sam Tobias … support a finding that the existing condition of the defendant's property violates [the ordinance]. The existing condition of the defendant's property constitutes a public nuisance because it works some substantial annoyance, inconvenience, or injury to the public generally. In this regard, the Court accepts and adopts the factual assertions contained in the Affidavit of Sam Tobias, including, without limitation, that (a) the defendant's property is among the first sights of visitors to Fond du Lac who arrive at the Fond du Lac County Airport; (b) the defendant's property contains unsightly accumulations of junk, wood, bricks, abandoned vehicles or machinery, all of which are visible to visitors ingressing or egressing the Airport; (c) the immediate proximity of the defendant's property to the Airport means that the property has a direct and substantial impact on the public use of the Airport including the use of the Airport for economic development purposes….; (d) the unsightly conditions of substantial portions of the property adversely affect the usefulness of the Airport as an economic development tool; (e) the strategic location of the defendant's property on both a County Road and adjacent to U.S. 41 makes the defendant's property highly visible to both local residents and visitors to the greater Fond du Lac community; and (f) the condition of substantial portions of the defendant's property are unsightly and, therefore, interfere with the public's comfortable enjoyment and use of the Airport.

(Emphasis added.)

¶33 Our review of the record indicates that Schmitz offered competing evidence as to the appearance of the property as a whole, the type of materials stored on the property, the description of the property as "unsightly," the visibility of the disputed area, and the disputed impact on the local community. Given the competing affidavits and documents provided by the two parties, the circuit court's "findings" are inappropriate. The court's responsibility was to determine whether genuine issues of material fact existed, not to weigh the evidence, assess credibility, draw inferences, or make findings. Summary judgment is granted only when there is no genuine issue as to any material fact, WIS. STAT. § 802.08(2), where facts are not being asserted by one party and denied by the other. Formal findings of fact by the circuit court are not part of the summary judgment methodology. Accordingly, summary judgment on the Town's nuisance claim was error.

¶34 Finally, we turn to the issue of the forfeitures imposed. The circuit court awarded the Town a total of $37,650. The court arrived at this amount by first finding that Schmitz had violated the Town's building permit inspection ordinance, the site and grading plan ordinance, and the public nuisance ordinance. The court held that, because the violations were concurrent, the lowest daily forfeiture of $25 per day would be "appropriate and equitable."[8] The court then found that Schmitz had "actual notice of the violations described above no later than June 2, 2003, the date on which the Summons and Complaint were served …." It calculated that Schmitz had notice that he was in continuing violation of the ordinances from the date of service through the date of the summary judgment

[8] The Town does not dispute this on appeal.

hearing on July 16, 2007, for a total of 1506 days. The court awarded the Town $37,650 accordingly.

¶35 It is well settled that when a municipal board, acting within its authority, sets minimum and maximum forfeitures for specific ordinance violations, the circuit court has no authority to impose less than the minimum forfeiture. *See* ***Village of Sister Bay v. Hockers***, 106 Wis. 2d 474, 479, 317 N.W.2d 505 (Ct. App. 1982). Furthermore, when an ordinance states that each day the offending condition continues it is a separate violation, the forfeiture must be imposed for each day of noncompliance. ***Id.*** The forfeiture calculation begins on the day the property owner receives notice that he or she is in violation of the ordinance and continues until the owner complies with the ordinance or the matter is litigated to a final resolution. *See* ***id.*** at 479-80.

¶36 Schmitz argues that his compliance with the ordinances was excused once the Settlement Agreement was reached on March 8, 2004. By Schmitz's calculation, the proper formula would incorporate a $25 daily forfeiture from the date of service on June 2, 2003, to the date of the Settlement Agreement on March 8, 2004, for a total forfeiture of $7025. Schmitz offers no legal authority to support his position, but attempts to distinguish his case from ***Village of Sister Bay***, where the court held that a circuit court cannot ignore an ordinance that clearly sets a minimum forfeiture for a violation and defines each day of noncompliance as a separate violation. *See* ***id.*** at 479. Schmitz argues that the critical difference here is the impact of the Settlement Agreement. He specifically contends:

> Schmitz's compliance with the ordinance was excused while the parties performed the Settlement Agreement that existed resolving the claim. As of March 8, 2004, the Town informed Schmitz that the terms of the Agreement,

> not the terms of the ordinance controlled. So fining Schmitz for violating an ordinance during a period of time that the ordinance's application was suspended by agreement between the parties is simply wrong….

¶37 The Town responds that, by the terms of the Settlement Agreement, it expressly reserved the right to seek forfeitures for ongoing violations in the event Schmitz did not meet his obligations under the Settlement Agreement. The construction of a Settlement Agreement, as guided by contract law, presents a question of law for our de novo review. *See* ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). When the language of an agreement is unambiguous, we apply its plain meaning. *See* ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276.

¶38 The terms of the Settlement Agreement between Schmitz and the Town are clearly stated. The parties agreed to attempt to "voluntarily resolve the matter without further litigation," and engaged in a cooperative effort to bring Schmitz into compliance. The Settlement Agreement set certain deadlines which Schmitz was required to meet. For example, Schmitz was to submit all required professionally-prepared plans by May 1, 2004. He was to provide additional renderings showing the existing building and proposed future expansions no later than May 30. He was to remove certain items, including seven disabled vehicles, from the property or have appropriate opaque screening installed by June 30. The record reveals that, though some progress was made, Schmitz did not meet all of the terms of the Settlement Agreement. Correspondence between the parties on July 8, August 6, August 18, and September 10, 2004, discussed what the Town considered the deficiencies in Schmitz's efforts. On December 14, 2004, the

Town advised Schmitz that he had "not complied with various provisions" of the Settlement Agreement and that, as a result, the Town would resume litigation.

¶39 Under the Settlement Agreement, the parties also established that "in the event the requirements set forth in this Agreement are not met," neither party had waived any available remedy. This provision clearly states that the daily forfeiture remained available to the Town if Schmitz failed to meet his obligations. The Town expressly reserved the right to seek forfeitures under its municipal ordinances.

¶40 We understand Schmitz to argue that fairness and equity should work to prevent the Town from collecting forfeitures while a settlement plan was in place and while he was working in good faith to comply with the terms. Though it may be a reasonable argument to make, there is simply no law to support it. The Town had the right to seek forfeitures for each violation, and each day that Schmitz failed to comply with the ordinance counted as a separate violation. Neither the circuit court nor this court has the authority to calculate the forfeiture award in any other way. *See* ***Village of Sister Bay***, 106 Wis. 2d at 479.

¶41 In the alternative, Schmitz asserts that the only reasonable remedy, "given the exorbitant fine imposed, would have been to order specific performance of the March 8, 2004 Settlement Agreement." Schmitz urges that specific performance of the contract, specifically ordering Schmitz to furnish adequate plans to the Town, would have been appropriate here because there is a binding Settlement Agreement between Schmitz and the Town. *See* ***Krause v. Holand***, 33 Wis. 2d 211, 214, 147 N.W.2d 333 (1967). Also, the Settlement Agreement has sufficiently certain terms such that specific performance is possible. *See* ***id.***

¶42 The Town responds that as the plaintiff, it has the choice of which remedy to pursue. *See* ***Harris v. Metropolitan Mall***, 112 Wis. 2d 487, 497, 334 N.W.2d 519 (1983). It further emphasizes that, by the express terms of the Settlement Agreement, it did not waive any rights or remedies in the event Schmitz did not comply with the Settlement Agreement. Because the circuit court does not have the discretion to choose the remedy for the plaintiff, the Town argues, the court properly imposed the forfeitures. We agree that the Town cannot be forced to accept specific performance as a remedy where it opted for the forfeitures due under the express terms of the ordinance.

## CONCLUSION

¶43 The Town never issued a building permit or site and grading permit to Schmitz for work in progress on his property. The circuit court properly granted summary judgment on these claims. Furthermore, the forfeiture award is supported by the record and is not subject to discretionary tinkering by a court. *See* ***Village of Sister Bay***, 106 Wis. 2d at 479. The court was required to impose no less than the minimum forfeiture for each day that Schmitz failed to comply with the municipal code. Although the parties entered into a Settlement Agreement, the agreement did not suspend the forfeitures but rather expressly reserved the rights of both parties to pursue all available remedies if the terms were not met. However, there are genuine issues of material fact that prevent summary judgment on the Town's public nuisance claim and summary judgment in this respect was improper. We remand to the circuit court for further proceedings on the public nuisance claim.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.