

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1508

Cir. Ct. No. 2007CV280

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

EMERGING ENERGIES, LLP,

PLAINTIFF-APPELLANT,

V.

MANITOWOC COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Manitowoc County:
DARRYL W. DEETS, Judge. *Affirmed.*

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

¶1 ANDERSON, P.J. Emerging Energies (EE) appeals from decisions of the circuit court that EE's challenge to Manitowoc County's ordinance governing large wind energy systems lacked the requisite ripeness and dismissing its declaratory judgment action. We affirm because EE has not pointed to any

adjudicative facts that permit a court to issue an opinion that declares the parties' respective rights.

¶2 EE develops renewable energy sources including wind energy. In 2005, it applied for a conditional use permit (CUP) under ch. 24, "Wind Energy System Ordinance," of the 2004 Manitowoc County Code, to build a seven turbine wind energy system in the town of Mishicot. One month after EE filed its application, the Manitowoc County board enacted a moratorium on granting permits for wind energy systems. In 2006, the County board adopted a revised ch. 24, "Large Wind Energy System Ordinance" with an effective date of May 1, 2006. The board of adjustment (BOA) considered EE's application in the spring and summer of 2006 and issued a CUP on July 17, 2006. Following the advice of Manitowoc County's corporation counsel, BOA issued the CUP under the 2004 version of ch. 24.

¶3 Opponents of the proposed wind energy system promptly filed a certiorari action in circuit court. The court found that BOA erred in applying the 2004 ordinance because the newly revised 2006 ordinance was in effect when BOA voted to issue the CUP. The court remanded the application to BOA to reconsider it under the terms of the 2006 version of ch. 24. EE did not appeal the circuit court's decision. Rather, it began the process of amending its application.

¶4 Before submitting an amended application, EE filed this declaratory judgment action making a challenge to the validity of a number of provisions of ch. 24. EE asserts that the ordinance conflicts with WIS. STAT. § 66.0401(1)

(2005-06)¹ and negatively impacts *any* wind energy system proposed for construction in Manitowoc County. EE filed a motion for partial summary judgment to have certain provisions of ch. 24 declared invalid and stricken from the ordinance.

¶5 The circuit court denied EE’s motion and dismissed the case, finding that EE’s complaint was “not ripe for judicial determination.” The court held that the provisions of WIS. STAT. § 66.0401(1) were to be applied on a case-by-case basis and EE could not mount a “facial” challenge to the statute. Rather, it had to go through the permit process and, if a CUP was denied, it would have to seek judicial review. EE appeals.

¶6 Our proper standard of review, when we are evaluating the circuit court’s legal conclusion that EE’s case was not ripe, was dissected in *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶32-39, 309 Wis. 2d 365, 749 N.W.2d 211. Here, we are reviewing both the court’s grant of summary judgment to Manitowoc and the reason for that decision, its determination that the case was not ripe. In *Olson*, the supreme court concluded that under such circumstances, our review is de novo. *Id.*, ¶39.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶7 EE argues that the circuit court erred in concluding that this case was not ripe for judicial determination.² It starts with the proposition that, on its face, Manitowoc County’s Large Wind System Ordinance conflicts with WIS. STAT. § 66.0401(1). It takes issue with the circuit court’s conclusion that the statute is to be applied on a case-by-case basis, that EE has to have a CUP denied by BOA and seek judicial review before it can challenge the validity of the ordinance’s provisions used to deny the CUP.

¶8 Relying on *Olson*, EE contends that it “only needed to show that the conduct of Manitowoc County, i.e., the enactment of the Ordinance, would result in injury to Emerging Energies’ interests. Emerging Energies did show that their interests would be adversely affected and impacted by the offending Ordinance provisions.” EE “wants a judicial determination of the validity of the Ordinance

² This court is somewhat at a loss as to the type of challenge being mounted by EE. In its amended brief in the circuit court, EE informed the court, “Consequently, the court and counsel must analyze the county’s ordinance for any proposed wind energy system in Manitowoc County and not specifically from the perspective of the Plaintiff’s project.” In EE’s reply brief, filed in this court, it states that this case is about whether parts of the ordinance “arbitrarily restrict the installation or operation of all wind energy systems” in violation of WIS. STAT. § 66.0401(1). However, several pages later it writes, it is entitled to declaratory relief “because the issue of whether the Ordinance is invalid as it has been applied to Emerging Energies’ current renewed application for a conditional use permit, is ripe for adjudication.”

“A facial challenge contends that a law or section thereof cannot be constitutionally applied to any set of facts, and an as applied challenge argues that the provision challenged is unconstitutional only as applied to the facts of the case under consideration.” *MDK, Inc. v. Village of Grafton*, 345 F. Supp. 2d 952, 960 n.10 (E.D. Wis. 2004).

Because EE did not argue an “as applied” challenge to the circuit court we could decline to address the “as applied” challenge raised before us. *Jackson v. Benson*, 218 Wis. 2d 835, 901, 578 N.W.2d 602 (1998) (“[I]ssues not considered by the circuit court will not be considered for the first time on appeal.”). But, this is a rule of judicial administration and we believe the circuit court rejected both EE’s “facial” challenge and “as applied” challenge and Manitowoc addressed both challenges in its brief; so in the interest of judicial economy we will address both challenges. *See id.*

through the Act because if portions are invalid, then Emerging Energies will not have to comply with those portions of the Ordinance and can finish the already-started application process.”

¶9 *Loy v. Bunderson*, 107 Wis. 2d 400, 320 N.W.2d 175 (1982), emphasizes that a declaratory judgment is fitting when a controversy is justiciable. *Id.* at 410. 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.

Id. (citation omitted). “If all four factors are satisfied, the controversy is ‘justiciable,’ and it is proper for a court to entertain an action for declaratory judgment.” *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991). Here, the circuit court held that the fourth factor was not present and it did not have the jurisdiction to issue a declaratory judgment.

¶10 In *Olson*, the supreme court defined the ripeness needed to entitle a party to a declaratory judgment action:

[A] plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself of the Act. What is required is that the facts be sufficiently developed to allow a conclusive adjudication. As we [have previously] stated, “the facts [must] be sufficiently

developed to avoid courts entangling themselves in abstract disagreements.” The facts on which the court is asked to make a judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment.

Olson, 309 Wis. 2d 365, ¶43 (citations omitted).

¶11 Whether EE’s case is ripe is dependent on WIS. STAT. § 66.0401(1):

(1) AUTHORITY TO RESTRICT SYSTEMS LIMITED. No county ... may place any restriction, either directly or in effect, on the installation or use of ... *a wind energy system* ... unless the restriction satisfies one of the following conditions:

(a) Serves to preserve or protect the public health or safety.

(b) Does not significantly increase the cost of *the system* or significantly decrease *its* efficiency.

(c) Allows for *an alternative system* of comparable cost and efficiency. (Emphasis added.)

¶12 The circuit court held the issue was not ripe because the statute prohibits restrictions on the installation or use of *a wind energy system*. The court reasoned that EE’s case was not ripe because there are no restrictions imposed against the use or installation of the seven wind turbines EE is proposing for its site in the town of Mishicot. In other words, the court said that before the case is ripe, there must either be a designed system with specific restrictions in a CUP granted by BOA or an application for a CUP which was rejected by BOA.

¶13 We are in agreement with the circuit court. First, the statute clearly requires that a county’s wind energy system’s ordinance be considered on a case-by-case basis because the statute specifically refers to *a* wind energy system; it does not refer to *any* wind energy system. A proposed restriction may be valid if it “serves to preserve or protect the public health or safety” *or* it “does not

significantly increase the cost of the system” *or* it does not “significantly decrease its efficiency” *or* it “allows for an alternative system of comparable cost and efficiency.” *See id.* The final three constraints on county imposed restrictions are quantitative, the specifics of the restrictions and of the proposed wind energy system must be known before the court can decide if a restriction is invalid. For example, without specifics it would be guesswork to decide if the restriction “allows for an alternative system of comparable cost and efficiency.” *See id.* In this case, without sufficiently developed facts about the wind energy system, it is impossible for a court to declare that the ordinance is in conflict with the statute. Therefore, EE’s facial challenge to the ordinance is not ripe for adjudication.

¶14 Second, EE’s attempt to challenge the ordinance as it is applied to its proposed seven turbine wind energy system fails because it would be pure guesswork to decide how BOA would apply the ordinance to EE’s proposal. The ordinance gives BOA wide discretion in fashioning and issuing a CUP.

The Board will grant a conditional use permit if it determines that the requirements of this ordinance are met and that granting the permit will not unreasonably interfere with the orderly land use and development plans of the county. The Board may include conditions in the permit if those conditions preserve or protect the public health and safety; do not significantly increase the cost of the system or significantly decrease its efficiency; or allow for an alternative system of comparable cost and efficiency.

MANITOWOC COUNTY CODE § 24.08(3) (2007).

¶15 The ordinance lists fourteen conditions the board may consider, MANITOWOC COUNTY CODE § 24.08(3)(a)-(n) (2007), and then provides:

The Board may waive or reduce the burden on the applicant of one or more of the factors in sub. (3) if it concludes that the purpose of this ordinance is met. The installation and continued operation of the large wind

system or wind farm system are contingent upon compliance with any conditions that are set by the Board.

MANITOWOC COUNTY CODE § 24.08(4) (2007).

¶16 Contrary to EE’s assertion, the affidavits from its experts detailing how the ordinance will impact its proposed wind energy system are not enough to make the case ripe for a judicial determination. Those affidavits fail to take into consideration the discretion BOA has in issuing a CUP. While EE’s experts may perceive a conflict between provisions of the ordinance and EE’s proposed wind energy system, it is impossible for a court to tell if BOA will perceive the same conflict. It is also impossible for a court to know how BOA will fulfill the ordinance’s mandate that conditions it impose “preserve or protect the public health and safety; do not significantly increase the cost of the system or significantly decrease its efficiency; or allow for an alternative system of comparable cost and efficiency.”³ MANITOWOC COUNTY CODE § 24.08(3) (2007). We agree that there is a factual void that prevents EE’s “as applied” challenge from being ripe for adjudication.

¶17 *Olson* is of no help to EE. In *Olson*, the Town of Cottage Grove conditioned final approval of a subdivision plat upon Olson’s obtaining ten “Transfer of Development Rights” (TDR) and transfer them to the Town and Dane county. *Olson*, 309 Wis. 2d 365, ¶¶10, 14. Olson claimed that it was cost prohibitive for him to obtain the TDRs. *See id.*, ¶15. Next, the Dane county board “rescinded” its action on Olson’s zoning petition and delayed the effective date of one year. *Id.*, ¶17. This triggered Olson’s filing of a declaratory judgment action.

³ We point out the obvious; this language in the ordinance is copied verbatim from WIS. STAT. § 66.0401(1).

Id., ¶¶17, 18. The relief he sought included a declaration that the town ordinance establishing the TDR program was void. *Id.*, ¶18. The circuit court held the case was not ripe because the county board had rescinded its conditional approval of the plat. *Id.*, ¶22. The court of appeals reversed, holding this was a textbook example of a declaratory judgment case. *Id.*, ¶41.

¶18 *Olson* is easily differentiated from this case. In *Olson*, the Town had given conditional approval of Olson’s plat subject to his obtaining and transferring ten TDRs. Because Olson had demonstrated more than a passing interest in developing his property, the supreme court held that the case was ripe for adjudication. *Id.*, ¶64. Here, EE has not made any substantial effort to apply for a CUP. All that it has done is to look at its 2005 CUP application—that has been remanded for consideration under the 2006 “Large Wind Energy System Ordinances”—and the terms of the ordinance and decide that rather than do the work of completing the application, it will ask the court if it will ultimately get a CUP. EE is seeking an advisory opinion.

¶19 In conclusion, EE’s facial challenge to MANITOWOC COUNTY CODE ch. 24 is not ripe for adjudication; WIS. STAT. § 66.0401(1) requires a case-by-case approach because the information needed to evaluate the impact of the ordinance on the proposed wind system is quantitative. EE’s “as applied” challenge is likewise unripe because the opinions of its experts fail to take into consideration the discretion vested in BOA.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

