COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0279 **Cir. Ct. No. 01 CV 3399**

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

CITY OF WEST ALLIS AND COMMUNITY DEVELOPMENT AUTHORITY OF THE CITY OF WEST ALLIS,

PLAINTIFFS-RESPONDENTS,

V.

WEHR STEEL CORPORATION, CARNES COMPANY, INC., AND VENTUREDYNE, LTD.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Dismissed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 SCHUDSON, J. Wehr Steel Corporation, Carnes Company, Inc., and Venturedyne, Ltd., (collectively, "Carnes") appeal from the circuit court

judgment granting summary judgment to the City of West Allis and the Community Development Authority of the City of West Allis (collectively, "City"). The judgment granted the City's request for authorization under Wisconsin's Blight Elimination and Slum Clearance Act, *see* WIS. STAT. § 66.1333 (1999-2000),[1] to enter Carnes' West Allis property to conduct environmental and geotechnical investigation and testing in preparation for possible condemnation proceedings and acquisition of the property.

¶2 Carnes also appeals from the circuit court's subsequent order denying its motion to vacate the summary judgment. The court rejected Carnes' argument, presented for the first time in support of its motion to vacate, that the court lacked competency to exercise subject matter jurisdiction over the City's suit because, as Carnes contended, the City had failed to comply with the statutory prerequisites for access to the property.

¶3 Specifically, on appeal, Carnes contends that because the City sought "spot" blight elimination under WIS. STAT. § 66.1333(5)(c), and failed to follow the statutory procedures for designation of a "project area" for blight elimination under WIS. STAT. §§ 66.1333(5)(a)3 and 66.1333(6), the circuit court was not competent to authorize the City's access to the property—access, Carnes maintains, which could only have followed upon a "project area" designation. Additionally, Carnes contends, even assuming the court was competent to order such access, it erred in granting the City's request because the City did not demonstrate any necessity to enter the property, and could not establish such necessity because the property's environmental condition, and the need for further

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

testing, had been conclusively litigated in an earlier action involving the property owner and the Wisconsin Department of Natural Resources (DNR)[2].

¶4 The City responds that: (1) Carnes waived its challenge to the competency of the circuit court; (2) it (the City) was not required to seek designation of the property as a "project area" in order to gain the requested order because, under the statutory general grants of authority, *see* WIS. STAT. §§ 66.1333(5)(a) & (17), the court could order access for "spot" blight elimination; (3) previous litigation involving the property-owner and the DNR did not include the City and had not conclusively resolved the issues in the instant action; and (4) the undisputed record established the necessity for entry.

¶5 Following extensive briefing, and based on the oral argument before this court, we conclude that we need not reach the underlying issues because the City, acting in accordance with the judgment authorizing access to the property, has conducted the investigation and testing it desired. Thus, the matters in controversy are moot. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy."). Accordingly, this appeal is dismissed.

I. BACKGROUND

¶6 For many years, the Wehr Steel Corporation operated a foundry on a thirty-two acre property in West Allis and West Milwaukee. In 1986, Wehr filed

[2] The City and Carnes, in the circuit court and on appeal, interchangeably refer to the plaintiff in the previous litigation as either the Wisconsin Department of Natural Resources or the State of Wisconsin. For purposes of our review, we will refer to the plaintiff in the previous litigation as the Wisconsin Department of Natural Resources (DNR).

for bankruptcy; in 1990, its trustee transferred the property to Carnes Company, Inc.[3] The underlying action involved the twelve-acre portion of the property located in West Allis.

¶7 In 1988, the DNR filed an environmental enforcement action covering the entire thirty-two acre site. In 1991, the action culminated in a stipulated settlement and judgment closing the property and extensively detailing the remedial actions that would be required for any further development of the property. The stipulation also provided that, regarding ground water monitoring, the DNR continued "to retain its authority to act or require action under its lawful authority, should there be any new and substantial evidence showing a significant negative change in groundwater quality."

¶8 In 1999, in anticipation of its effort to acquire the twelve West Allis acres, implement their remediation, and restore them to economically productive use, the City applied to the United States Environmental Protection Agency for a grant to participate in its Brownfield Assessment Pilot Project.[4] The goals for the proposed site were:

> (1) to determine environmental conditions on the Wehr Steel Site, which may adversely affect the acquisition and/or redevelopment of the site; (2) to fully characterize environmental impacts, which may be discovered; (3) to plan remedial activities to address environmental impacts and estimate the costs of said remedial activities; and (4) to conduct assessment and remedial planning in accordance

[3] According to Carnes, although Wehr was dissolved in 1993, the City "asserted in the trial court that [it] was unsure of the ownership of the Property and thus brought suit against all three defendants, *i.e.*, Carnes, the dissolved Wehr[,] and Carnes' sister corporation, Venturedyne, Ltd."

[4] A brownfield is a site, or portion thereof, that has actual or perceived contamination and an active potential for development or reuse. *See* U.S. Envtl. Prot. Agency, *Brownfields Fact Sheet*, EPA Publication Number EPA 500-F-00-241 (Oct. 2000). The funding is provided to assess brownfield sites and to test clean-up and redevelopment models. *See* ***id.***

> with the guidelines of the Wisconsin Act 453 Land Recycling Law.

Later that year, the West Allis Common Council approved a resolution authorizing the City to acquire the twelve acres as "blighted property." *See* WIS. STAT. § 66.1333(5)(c). The City held a public hearing and adopted the Common Council's resolution. *See* WIS. STAT. § 66.1333(5)(c)2. Carnes, however, refused to allow the City to enter the property. Thus, on April 19, 2001, the City filed the underlying action seeking access to the property under WIS. STAT. § 66.1333(5)(c).[5]

¶9 The City argued that undisputed evidence of the past activities at the property, and the virtual absence of any information about the property's current environmental condition, established the necessity for investigation and testing. Carnes responded that the stipulated settlement of the prior action between the DNR and Wehr Steel provided the City with sufficient environmental information and foreclosed any possibility that the City could establish the necessity for entry to the site to conduct further investigation and testing.

[5] In its complaint, the City first referred to its authority under WIS. STAT. "§ 66.1333, The Blight Elimination and Slum Clearance Act." It then stated that, under WIS. STAT. "§ 66.1333(5)(c)1g.a. and b.," it had sought "advance approval for acquisition" of the property, and, under WIS. STAT. "§ 66.1333(5)(c)2," it had "held a Public Hearing … to determine if the Site was blighted property." Later in the complaint, the City also referred to its "request[]" and "demand" to Carnes for access to the property "for purposes of an environmental and geotechnical investigation in furtherance of the [its] acquisition process," under WIS. STAT. "§ 66.1333(5)(a)3" and "§ 66.1333(5)(c)1r." Ultimately, the complaint reiterated its first and more general statutory reference, "demand[ing] the following relief: … Judgment and issuance of an order declaring the [City's] right to conduct the necessary investigations to fulfill its legislative mandate pursuant to [WIS. STAT.] § 66.1333."

At oral argument before this court, the City clarified that it always had been proceeding under WIS. STAT. § 66.1333(5)(c), targeting "spot" blight elimination, and, as Carnes' contended, that it never had proceeded on any theory involving "project area" designation.

¶10 On November 27, 2001, the circuit court, ruling on cross-motions for summary judgment, concluded that the 1991 settlement did not preclude the City's suit because the earlier action did not involve the City as a party, had not "fully examine[d] the environmental status of the lot in question," and, in that earlier action, the parties had not "fully litigate[d] the environmental status of the site." The court further explained:

> The Wisconsin Department of Natural Resources made certain that [the West Allis property] was closed as an immediate environmental hazard through the 1991 Stipulation and made sure that Venturedyne was complying with the State's environmental laws. The Wisconsin Department of Natural Resources did not bring the action to fully explore the future development possibilities of [the property]. This is the exact reason why the Legislature created the [community development authorities—]to develop brownfields and other troubled properties, not to enforce the environmental laws.

The court also concluded that the City had established that "entry onto the property" was necessary. The court explained:

> The site's long history of industrial use provides a basis to believe that pollution exists on the site. The record clearly shows that testing on [the property] was minimal at best. One monitoring well was put in on the site previously, and when analyzed in 1990 revealed multiple Preventive Action Levels were exceeded. One soil boring was carried out in 1989, but apparently analytical chemical data is wanting from those borings. To the Court's knowledge, no other analysis has been undertaken in recent years.
>
> … [T]here is no information on how great a risk, or how contaminated, [the property] may be. Certainly this is information crucial to the valuation of the land and to an analysis of its potential to be developed.

Thus, the court granted the City's request and entered a judgment authorizing access to the property for environmental investigation and testing. Two months later, the court rejected Carnes' argument, presented for the first time in Carnes'

motion to vacate the judgment, that it lacked competency to exercise subject matter jurisdiction.

¶11 Carnes moved for relief pending appeal; the circuit court denied the motion. On February 1, 2002, this court denied Carnes' request for a stay of the circuit court judgment pending disposition of this appeal.

¶12 On November 5, 2002, this court heard oral argument. Counsel for the City, arguing that the case was moot, informed the court that the City had entered the property, conducted the investigation and obtained the soil samples it needed, and carried out the testing, and that it anticipated no further need for access to the property for such purposes. Counsel for Carnes, challenging the City's mootness claim, responded that: (1) in some undefined way, the possible future use of the test results could be improper if the samples were not obtained in conformity with the statutes; and (2) in some undefined suit, Carnes might bring an action against the City as a result of its allegedly improper method of obtaining access to the property.

II. DISCUSSION

¶13 As we recently reiterated: "An issue is moot when its resolution will have no practical effect on the underlying controversy. In other words, a moot question is one which circumstances have rendered purely academic. Generally, moot issues will not be considered by an appellate court." ***Olson***, 2000 WI App 61 at ¶3 (citations omitted). Here, while the parties have presented several intriguing issues, our resolution of them can have no practical effect on whether the City gains access to the property to conduct its desired investigation and testing. It is undisputed that the City has already entered the property and conducted the investigation and testing.

¶14 Still, "there are exceptions to the rule of dismissal for mootness." ***Id.*** We explained:

> We will consider a moot point if "the issue has great public importance, a statute's constitutionality is involved, or a decision is needed to guide the trial courts." Furthermore, we take up moot questions where the issue is "likely of repetition and yet evades review" because the situation involved is one that typically is resolved before completion of the appellate process.

Id. (citations omitted). Here, no such exception applies.

¶15 The constitutionality of the statutes involved in the parties' arguments is not at issue. *See* ***id.*** The issues are not ones that would necessarily or typically evade review before completion of the appellate process.[6] *See* ***id.*** And, given the unique and fact-intensive nature of the underlying controversy, our determination of these issues would not necessarily address any issue of recurring great public importance or provide needed guidance to the trial courts. *See* ***id.*** Carnes' comments at oral argument, about some future use of the tests or some future action against the City, were entirely speculative and do not alter the analysis. Accordingly, "the rule of dismissal for mootness" requires us to dismiss this appeal. *See* ***id.***

By the Court.—Appeal dismissed.

[6] Indeed, in this case, we denied a stay of the circuit court judgment not because we did not recognize the potential immediacy and significance of the City's entry to the property. In our order denying relief, we commented that "it is certainly true that, once West Allis representatives begin testing, that act cannot be undone." We concluded, however, that, in part, because the circuit court hearing on Carnes' request for relief pending appeal was held off the record, and because Carnes had not even provided this court with the City's circuit court submissions in opposition to its request for a stay, Carnes had failed to provide a record that could allow us to conclude that it had carried its burden "to establish that the circuit court erroneously exercised discretion when it denied relief pending [disposition of this] appeal."

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