

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 22, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2009AP3025

Cir. Ct. No. 2009CV1427

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JEANNE TOMLIN AND GARY ANLIKER,

PETITIONERS-APPELLANTS,

V.

VILLAGE OF ORFORDVILLE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County:
JAMES WELKER, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. Jeanne Tomlin and Gary Anliker appeal a circuit court order affirming the Village of Orfordville Board's denial of their application for a kennel license. They argue that Village of Orfordville Ordinance (VOO) § 106-3B, relating to kennel licensing, is vague and therefore, facially

unconstitutional. They further contend that because § 106-3B is unconstitutional, its incorporation into VOO § 106-19C, limiting the number of dogs allowed, renders that ordinance facially unconstitutional as well. We disagree and affirm.

Background

¶2 Tomlin and Anliker¹ reside in Orfordville, Wisconsin. Under VOO § 106-19C(1), a resident may not “own, harbor or keep in its possession more than three dogs” Additionally, under VOO § 106-3A(1), all dogs more than five months of age must be licensed. On June 23, 2008, Tomlin appeared before the Village Board requesting permission to exceed the three-dog residential occupancy limit. The Village Board denied their request.²

¶3 In December 2008, Tomlin applied to the Village of Orfordville for a kennel license for their nine dogs, pursuant to VOO § 106-3B(1). The Village Board denied Tomlin’s application for a kennel license. Tomlin appealed, citing a procedural error relating to the Village’s failure to give proper notice of the required public hearing under VOO § 106-3B, and the matter was remanded by stipulation of the parties. The Village Board then provided a notice of public hearing on Tomlin’s kennel license application.

¶4 The Board held the properly noticed public hearing on May 26, 2009, to consider Tomlin’s application for a dog kennel license. After taking

¹ For convenience of the reader, when referring to the appellants Tomlin and Anliker jointly, we will refer to them as “Tomlin”; when we refer to them as individuals, we use the last name of each person.

² Although Tomlin is challenging the constitutionality of Village of Orfordville Ordinance (VOO) § 106-19C as it incorporates VOO § 106-3B, they are not appealing the Village Board’s denial of their request to exceed the three-dog limit.

public comment, hearing from Ms. Tomlin and her counsel, reviewing written submissions, and hearing discussion by fellow Board members, the Board denied Tomlin's kennel license. Tomlin filed a second petition for writ of certiorari with the Rock County Circuit Court. In the second petition, Tomlin asserted that VOO § 106-3B³ was unconstitutionally vague, because it does not provide objective

³ VOO § 106-3B provides:

B. Kennel licenses.

(1) Any person who keeps or operates a kennel may, instead of the license tax for each dog required by this chapter, apply for a kennel license for the keeping or operating of the kennel. Such person shall pay for the license year a license tax as set by the Village Board. Upon payment of the required kennel license tax and, if required by the Village Board, upon presentation of evidence that all dogs over five months of age are currently immunized against rabies, the Village Clerk-Treasurer shall issue the kennel license and a number of tags equal to the number of dogs authorized to be kept in the kennel. Kennels may only be located in residential areas following a public hearing and approval by the Village Board. The Board may attach conditions to such approval as a conditional use under Chapter 320, Zoning

(2) The owner or keeper of a kennel shall keep at all times a kennel license tag attached to the collar of each dog over five months old kept by the owner or keeper under a kennel license, but this requirement does not apply to a show dog during competition, to a dog securely confined indoors or to a dog securely confined in a fenced area. These tags may be transferred from one dog to another within the kennel whenever any dog is removed from the kennel. The rabies vaccination tag or substitute tag shall remain attached to the dog for which it is issued at all times, but this requirement does not apply to a show dog during competition, to a dog securely confined indoors or to a dog securely confined in a fenced area. No dog bearing a kennel tag shall be permitted to stray or to be taken anywhere outside the limits of the kennel unless the dog is on a leash or temporarily for the purpose of hunting, breeding, trial, training or competition.

(3) The term "kennel" means any establishment wherein or whereon three or more dogs are kept.

(continued)

factors the Village Board must consider in determining whether to issue or deny a dog kennel license and that they had no “fair notice” as to what factors the Village Board would consider in granting or denying such license so they could demonstrate compliance with such factors when requesting such a license. Tomlin further asserted that because VOO § 106-19C⁴ incorporated § 106-3B by reference, it was also unconstitutional. The circuit court held that § 106-3B was not unconstitutionally vague and affirmed the Board’s denial of the kennel license. Tomlin appealed. Additional facts, as necessary, are set forth in the discussion section.

(4) No kennel license shall be issued to the keeper or operator of a kennel who fails to provide proper food and drink and proper shelter for the dogs in said kennel or who neglects or abandons said dogs. The Chief of Police or other designated official shall investigate any complaints regarding the failure to maintain proper standards or investigate any kennel premises upon his own initiative. Expressly incorporated by reference in this section as minimum standards for kennel keepers or operator are the relevant provisions of Ch. 951, Wis. Stats.

⁴ VOO 106-19C states:

C. Number limited.

(1) No family shall own, harbor or keep in its possession more than three dogs on any residential lot without the prior approval of the Village Board, except that a litter of pups or a portion of a litter may be kept for not more than eight weeks from birth. If more than one family resides on a residential lot, then only a total of three dogs shall be allowed on the residential lot unless prior approval is obtained from the Village Board.

(2) The above requirement may be waived with the approval of the Village Board when a kennel license has been issued by the Village. Such application for waiver shall first be made to the Village Clerk-Treasurer.

(Footnote omitted.)

Discussion

¶5 The dispositive issue in Tomlin’s appeal is whether VOO § 106-3B is unconstitutional for failing to provide standards for issuing a kennel license. This is a facial challenge to the constitutionality of the ordinance, which is subject to de novo review. See *Town of Rhine v. Bizzell*, 2008 WI 76, ¶13, 311 Wis. 2d 1, 751 N.W.2d 780. Legislative enactments, including ordinances, are entitled to a presumption of constitutionality. *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328; *Metropolitan Milwaukee Ass’n of Commerce v. City of Milwaukee*, 2011 WI App 45, ¶56, 332 Wis. 2d 459, 798 N.W.2d 287. In *Cole*, the supreme court noted:

This court has repeatedly held that it indulges every presumption to sustain the law if at all possible, and if any doubt exists about a statute’s constitutionality, we must resolve that doubt in favor of constitutionality. A petitioner seeking to prove a statute unconstitutional faces a heavy burden. In the face of a strong presumption, it falls to the party challenging the constitutionality of a statute to prove that the statute is unconstitutional beyond a reasonable doubt. This court has noted: It is insufficient to merely establish doubt as to an act’s constitutionality nor is it sufficient to establish the act is probably constitutional. If any doubt remains, this court must uphold the statute as constitutional.

Id., ¶11 (citations and quotations omitted).

¶6 Tomlin’s constitutional challenge to VOO § 106-3B is that it is void for vagueness. Vagueness, in constitutional terms, is based on the principle that “procedural due process requires fair notice and proper standards for adjudication.” *Larson v. Burmaster*, 2006 WI App 142, ¶29, 295 Wis. 2d 333, 720 N.W.2d 134. While both parties focus their analyses on whether the ordinance is unconstitutionally vague, from our review of Tomlin’s arguments, we

conclude that their true challenge is that § 106-3B is unconstitutional because it fails to provide adequate or any standards to govern the Village Board's exercise of discretion in determining whether to grant Tomlin a kennel license. Thus, rather than vagueness, the constitutional challenge here goes to whether the ordinance permits "unbridled discretion" in the Village officials in determining whether to issue a kennel license. *See City News & Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 106, 604 N.W.2d 870 (Ct. App. 1999). We conclude that § 106-3B contains sufficient standards to govern the Village Board's licensing decision and that it provides notice of those specific conditions that a licensee must meet in order to obtain a kennel license.

¶7 Tomlin first argues that VOO § 106-3B "fails to state any factors the Village Board must examine when determining whether to grant or deny a kennel license" and that this failure denies applicants, such as Tomlin, "fair notice of what factors are examined so that they can conform their conduct in line with such factors." We disagree.

¶8 We begin our review with the language of VOO § 106-3B. We interpret statutory language "in the context in which it is used; not in isolation, but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. "If the meaning of the statute is plain, we ordinarily stop the inquiry and apply that meaning." *Id.*, ¶45. The purpose of statutory interpretation is to give full effect to the policy choices of the legislature. *See id.*, ¶44. We use the same methodology for interpreting ordinances. *See Murr v. St. Croix Cnty. Bd. of Adjustment*, 2011 WI App 29, ¶9, 332 Wis. 2d 172, 796 N.W.2d 837.

¶9 Subsection (1) of the ordinance contains several guidelines that must be met before the Village will issue a kennel license. First, an applicant is required to pay for the license tax, which amount is set by the Village Board. The applicant must also prove that all dogs that are to be kept in the kennel shall be over five months of age and have been immunized against rabies. Furthermore, for those applicants seeking to locate their kennels in residential areas, subsec. (1) provides that the Village Board, in granting the license, may attach conditions it deems appropriate as a conditional use under VOO ch. 320 (zoning).⁵

¶10 Subsection (4) of VOO § 106-3B also provides standards by which the Board can assess license applications. Of particular pertinence to the issue raised here, subsec. (4) provides that: “No kennel license shall be issued to the keeper or operator of a kennel who fails to provide proper food and drink and proper shelter for the dogs in said kennel or who neglects or abandons said dogs.” Subsection (4) expressly incorporates by reference as minimum standards for kennel keepers or operators, the relevant provisions of WIS. STAT. ch. 951, governing cruelty to animals. We conclude that the plain language of the ordinance provides sufficient standards governing the issuance of a kennel license.

¶11 Tomlin argues that subsec. (4) applies only to current kennel license holders and, therefore, fails to provide standards for the original issuance of a

⁵ The Village argues that because the ordinance provides for the Board to grant conditional approval, standards under VOO § 320-30A are applicable to the Board’s decision here. Because we conclude that VOO § 106-3B provides sufficient standards and because no license was ever approved in this case, conditional or otherwise, we do not address this argument. See *State ex rel. Wis. Envtl. Decade, Inc. v. Joint Comm. for Review of Admin. Rules*, 73 Wis. 2d 234, 236, 243 N.W.2d 497 (1976).

license. We disagree. We conclude the only reasonable reading of subsec. (4) is that it provides criteria for the original issuance of kennel licenses.

¶12 Subsection (4) begins with the language “[n]o kennel license *shall be issued* to the keeper or operator of a kennel.” VOO § 106-3B(4) (emphasis added). By its plain terms, subsec. (4) applies not only to license renewal, but as well to a person initially seeking a license. We agree with the Village’s argument that had the Village Board intended for this subsection to apply only to license renewal, it would have included language in the ordinance referring specifically to license renewal. However, no such language is contained in the ordinance. In addition, Tomlin misreads the word “kennel” in arguing that subsec. (4) applies only to license renewal. Tomlin assumes that the word “kennel” in subsec. (4) necessarily means that a keeper or operator of a kennel already has a license. But that is an unreasonable reading of the subsection. Moreover, the term “kennel” is defined in the ordinance in the immediately preceding subsection, VOO § 106-3B(3), as meaning “any establishment wherein or whereon three or more dogs are kept.” The plain reading of the definition of kennel shows that it simply refers to the number of dogs that are being kept in an establishment. Here, that establishment is Tomlin’s house.

¶13 Tomlin next argues that the Village Board did not follow the provisions of WIS. STAT. ch. 951 in its decision denying Tomlin’s kennel license application, which, according to Tomlin, indicates the ch. 951 standards do not apply to initial applicants of a kennel license. Tomlin maintains that had the Board “felt that Chapter 951 ... applied, then it would have applied its standards in its determination prior to voting whether to grant or deny” Tomlin’s application for a kennel license. Tomlin appears to argue that because VOO § 106-3B(4) applies only to current kennel licensees, the standards set forth in WIS. STAT.

§§ 951.13 and 951.14, relating to requiring a “person” who owns or is responsible for confining animals, such as dogs, to provide them adequate food, water, and shelter, must also apply only to current licensees. Because we have concluded that § 106-3B(4) does apply to initial license applicants, for the same reasons we conclude the requirements in §§ 951.13 and 951.14 also apply to initial license applicants.

¶14 Tomlin next argues that VOO § 106-19C is unconstitutional because it is incorporated by reference into VOO § 106-3B. We reject this argument. We first observe that both statutes relate to different topics. That is, § 106-19C(1) establishes the maximum number of dogs that may reside at a residence. On the other hand, § 106-3B governs the issuance of kennel licenses. Thus, whether § 106-3B is constitutional has no relevance as to whether § 106-19C is constitutional. In addition, as the Village points out, there is no language in § 106-19C that appears to cross-reference § 106-3B.

¶15 More to the point, the only issue in this case related to the denial of Tomlin’s application for a kennel license, pertains only to VOO § 106-3B. The Village properly observes that Tomlin had previously applied for a waiver of the three-dog limit under VOO § 106-19C, which was denied. Tomlin did not seek judicial review of that decision and therefore a decision under that ordinance is not properly before us.

Conclusion

¶16 In sum, we conclude that VOO § 106-3B provides sufficient standards governing the Village’s exercise of discretion in determining whether to

issue a kennel license to a qualified licensee. We therefore conclude that the ordinance is constitutional.⁶ Accordingly, we affirm the circuit court's order affirming the Village Board's decision denying Tomlin's application for a kennel license.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁶ Tomlin does not challenge the Village's application of VOO § 106-3B to the facts of this case. Therefore, that issue is not before us.

