COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 19, 1995

No. 94-2632

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

STATE OF WISCONSIN
EX REL. PAUL KELNHOFER,

Petitioner-Appellant,

v.

VILLAGE OF EPHRAIM,
and DIANE KIRKLAND,
Zoning Administrator,

Respondents-Respondents.

APPEAL from an order of the circuit court for Door County: DENNIS J. MLEZVIA, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Paul Kelnhofer appeals a trial court order, issued on certiorari review, that upheld a land use decision by the Village of Ephraim. The Village denied Kelnhofer a building permit and land disturbance permit for

his hotel building project after he declined to provide the Village an Environmental Impact Audit (EIA) for the project, to be conducted by a third party consultant. On appeal, Kelnhofer submits several arguments: (1) the Village's ordinances did not authorize it to condition building and land disturbance permits on EIA's; (2) the character of his project did not warrant an EIA; (3) the Village's decision constituted a taking of property without due process and merits a remand for a lawsuit for damages; (4) the Village has no power to subject his project to ordinances subsequently enacted by the Village and wetland maps subsequently drawn by the Department of Natural Resources; and (5) the Village improperly decided to use DNR administrative regulations on DNR environmental impact statements as a model for Kelnhofer's EIA. We reject these arguments and therefore affirm the trial court's order.

The Village has enacted "erosion control" and "wetland" ordinances giving it considerable power over construction projects. Section 16.03(1) and (2) of the erosion control ordinance makes the ordinance applicable to "land disturbing" activities and requires landowners pursuing building projects to obtain land disturbance permits, whether they are also seeking regular building permits or conditional use building permits. In reviewing applications for land disturbance permits, the Village must consider some kinds of environmental impacts; specifically, it must examine the impact of a project's anticipated erosion and drainage on flora, fauna, wildlife, and water. EPHRAIM, WIS., ORDINANCES §§ 16.05(5)(h) and 16.01(2) (1989). In addition to identifying specific information that applicants must furnish, the ordinance expressly authorizes the Village to require applicants to supply "such other information as may be designated." ***Id***. § 16.06(3)(d). In a similar vein, the Village's wetland ordinance requires landowners pursuing building projects on wetlands to obtain conditional use permits. ***Id***. §§ 17.27(4)(d) and 17.15(1)(b). This ordinance likewise lists specific data that the applicant must provide and empowers the Village to seek "other requested information." ***Id***. § 17.27(4)(c)5. Last, the Village's conditional use ordinance empowers the Village to seek "additional information as may be required ... in order to determine full compliance with the requirements of this chapter." ***Id***. § 17.44(2)(h).

Kelnhofer first argues that the Village had no power under its ordinances to require EIA's. In cases of certiorari review, trial and appellate courts have limited powers over municipal land use decisions. We examine such matters only for jurisdictional excesses by the municipality, or for

arbitrary, capricious, and unreasonable governmental actions. ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 23-24, 498 N.W.2d 842, 846 (1993). Further, villages have a measure of freedom in the way they interpret their own ordinances. *See* ***State ex rel. Beidler v. Williams Bay Bd. of Appeals***, 167 Wis.2d 308, 311, 481 N.W.2d 669, 671 (Ct. App. 1992). We will uphold their interpretations if they have a reasonable basis. *See* ***id***. Moreover, villages have the implicit powers needed under their ordinances to carry out their express duties, and particularly those duties concerning building permits. *Cf.* ***Town of Clearfield v. Cushman***, 150 Wis.2d 10, 20-21, 440 N.W.2d 777, 781 (1989). As a general rule, courts may assume that legislative enactments imposing specific duties on a governmental entity also convey implied powers of a kind and degree sufficient for the entity to carry out its express duties. *Cf.* ***id***.

Here, the Village cited its erosion control and wetland ordinances as the source of its EIA power. This was a rational interpretation. These ordinances empowered it to require permit seekers to supply "other requested information" and "other designated information." Drafters often use general expressions like "other information" as a means to grant comprehensive power, by supplying the grantee flexibility to address a variety of problems and situations. *See, e.g.,* ***Wilke v. First Fed. Sav.***, 108 Wis.2d 650, 654, 323 N.W.2d 179, 181 (Ct. App. 1982). Like the Village, we conclude that such general language empowered the Village to demand EIA's, should the character of any project reasonably warrant them; we agree with the Village that it did not need an express EIA authorization in its ordinances to demand one. The ordinances sought to use regular, conditional use, and land disturbing permits as means to help control erosion and safeguard wetlands. Except for the constraints implicit in the ordinances' focus on erosion control and wetland preservation, the ordinances nowhere purport to limit the kinds of information the Village could demand. They left the Village the freedom to seek any "other information," as long as the information could rationally help explain the project's effect on erosion control and wetland preservation. In sum, we are satisfied that the ordinances granted the Village sufficient power, express and implied, to require EIA's in appropriate cases.

Kelnhofer next argues that the character of his project made the Village's EIA demand arbitrary, capricious, and unreasonable. He states that his project had good erosion control and was outside the wetlands area, which he claims exempted it from wetlands controls and related conditional use permits. Municipalities have broad powers to protect land use, ***Cohen v. Dane***

Cty. Bd. of Adj., 74 Wis.2d 87, 90, 246 N.W.2d 112, 114 (1976), and may limit one parcel for the general welfare. *See* ***Cushman v. City of Racine***, 39 Wis.2d 303, 310-11, 159 N.W.2d 67, 71-72 (1968). Here, the risk the general welfare faced helped define the scope of the information the Village could seek; the Village could reasonably call for information proportionate to the degree of erosion and wetland risks that it perceived the project to pose. Kelnhofer does not dispute his project's proximity to wetlands. His project's size and wetlands proximity raised legitimate erosion and wetlands concerns. At the permit application stage, the Village need not show the level of such risks with absolute certainty. *Cf.* ***Delta Bio. Res., Inc. v. Zoning Appeals Bd.***, 160 Wis.2d 905, 913, 467 N.W.2d 164, 167-68 (Ct. App. 1991). It may require EIA's as means to measure existing risk levels, to ascertain a project's fitness for land disturbance permits, and to determine whether a project has wetland implications needing conditional use permits. We see nothing arbitrary in the Village's decision.

Finally, none of Kelnhofer's remaining claims merit relief. Inasmuch as the Village could rationally require the EIA, Kelnhofer has no basis to claim a due process violation. *See, e.g.,* ***Laskaris v. City of Wisconsin Dells***, 131 Wis.2d 525, 533-34, 389 N.W.2d 67, 71 (Ct. App. 1986). We also see nothing arbitrary, capricious, or unreasonable in the Village's decision to use DNR administrative regulations on DNR environmental impact statements as a model for Kelnhofer's EIA. Kelnhofer has not shown that the DNR model will prove burdensome; the Village's concerns are limited to erosion and wetlands, and that focus automatically narrows the scope of Kelnhofer's EIA to the same focused subject matter. Last, we reject Kelnhofer's request that we remand the matter to the Village with directions that it consider his application and an EIA in conjunction with the DNR wetlands maps and Village ordinances in effect when he made his initial application, without regard to wetlands maps and ordinances created since then. In certiorari review of land use decisions, we generally limit our examination to the municipality's past actions; we ordinarily will not supervise or control hypothetical future issues and proceedings. Until the Village first resolves such questions itself, they are not ripe for judicial review. *See* ***Tooley v. O'Connell***, 77 Wis.2d 422, 439, 253 N.W.2d 335, 342 (1977). Kelnhofer must first present such matters to the Village.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.