COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1759 **Cir. Ct. No. 2008CV1786**

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

TOWN OF BRADFORD,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

DAVID G. MERRIAM, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY A. MERRIAM,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

BRIAN HUBREED,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Rock County: KENNETH W. FORBECK, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. The Town of Bradford appeals an order of summary judgment and a judgment of the circuit court in favor of David G. Merriam, the present owner of Shady Hill Mobile Home Court located in Bradford, and Brian Hubreed, the owner of mobile home unit #1 in Shady Hill.[1] The Town brought this action against Merriam and Hubreed claiming that unit #1 encroached upon the Creek Road right-of-way. Merriam counterclaimed, seeking a declaration that Shady Hill is a valid, nonconforming use and, as such, is not subject to Bradford's zoning code provisions governing mobile home parks. The circuit court determined that unit #1 does not encroach into the Creek Road right-of-way and that Shady Hill is a nonconforming use and, therefore, not subject to the Town's zoning ordinances. The circuit court further determined that although Shady Hill is a nonconforming use, the mobile homes located within Shady Hill are subject to the Town's zoning ordinances if they are replaced or improved by 50 percent in value. We affirm.

BACKGROUND

¶2 Shady Hill is a mobile home park in the Town of Bradford and has been in existence since at least 1956. Located within Shady Hill is mobile home unit #1, which is located south of Creek Road, an unrecorded public highway within the township of Bradford, near the intersection of State Highway 140. Unit #1 has been positioned relatively in the same location since at least 1969.

¶3 In 1981, Creek Road was the subject of a road improvement project near Shady Hill. As part of the project, the centerline of Creek Road was moved

[1] Hubreed is not a party to this appeal.

north, away from Shady Hill, in a curved trajectory at the intersection between Creek Road and State Highway 140.[2] Prior to the 1981 road improvement project, unit #1 was located between 21.5 and 22 feet from the centerline of Creek Road. Following the roadway project, unit #1 was located approximately 50 to 52 feet from the new centerline of Creek Road.

¶4 In July 2008, the Town served upon Merriam an order for the removal of unit #1, which it claimed encroached into the Creek Road right-of-way by approximately 13 feet. Following Merriam's refusal to move unit #1, the Town brought the present action against Merriam and Hubreed, seeking an order requiring the removal of unit #1 on the basis that it encroached upon the right-of-way of Creek Road. According to the Town, although the centerline of old Creek Road had been moved north away from unit #1 in 1981, the road's right-of-way had not moved along with it. Rather, the relocation of the road's centerline expanded the dimensions of the right-of-way by 11 feet, as measured from the centerline of old Creek Road, to encompass both the right-of-way from the new centerline and the right-of-way as it existed prior to 1981. Thus, according to the Town, although the road's centerline had been moved north away from unit #1 in 1981, unit #1 remained within the right-of-way. Merriam denied that unit #1 lies within Creek Road's right-of-way. He also filed a counterclaim against the Town seeking a declaratory judgment that Shady Hill is not in violation of any of the Town's ordinances. Merriam alleged that Shady Hill is a valid, nonconforming use and therefore is not subject to any of the Town's zoning ordinances governing

[2] To assist the reader, we will refer to Creek Road as it existed prior to the road's 1981 relocation as "old Creek Road" and we will refer to the road following the relocation as "Creek Road."

mobile home parks, which were adopted in 2005. Merriam also alleged that the replacement of mobile homes, or changes in the occupancy of existing mobile homes, does not enlarge Shady Hill's non-conforming use.

¶5 Both the Town and Merriam moved for summary judgment. Following a hearing on the motions, the circuit court concluded that the facts are undisputed that unit #1 does not encroach into the new Creek Road right-of-way because old Creek Road and its right-of-way were abandoned when that road was rerouted. The court further concluded that new Creek Road has a 66 foot right-of-way (33 feet on either side of the new centerline), and that unit #1 sits "approximately 52 feet from the center line of [new Creek Road]," which, according to the court "puts [unit #1] outside of the roadway by 19 feet." As to Merriam's counterclaim, the court concluded that "there is nonconforming use with regard to the land or park" that "also applies to the [mobile home] structures," and as nonconforming uses, Shady Hill and the mobile homes within it are not subject to the Town's ordinance. The court further concluded that a change in occupancy of a mobile home does not affect the mobile home's status as a valid non-conforming use and that the ordinance is incorrect to the extent it provides otherwise. However, the court concluded that under WIS. STAT. § 62.23(7)(h) (2009-10),[3] if any mobile unit is abandoned for 12 months or repaired in excess of 50 percent of its value, the mobile home's nonconforming use status is lost and the Town's zoning ordinances would then apply. Summary judgment was entered accordingly. The Town appeals and Merriam cross-appeals. Additional facts will be discussed below as necessary.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

STANDARD OF REVIEW

¶6 "We review summary judgments de novo, applying the same methodology as the circuit court." ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2).

DISCUSSION

1. Unit #1 Does Not Encroach into Creek Road's Present Right-of-Way

¶7 The Town contends on appeal that the circuit court erred in determining that unit #1 does not encroach into the Creek Road right-of-way because the portion of the right-of-way unit #1 previously encroached upon was discontinued by the Town following the relocation of Creek Road near Creek Road's intersection with State Highway 140. The Town argues that the right-of-way was extended, not moved, as a result of the relocation of Creek Road so that the current right-of-way encompasses the pre-1981 right-of-way in addition to the right-of-way created by the relocation of the road.

¶8 Creek Road is an unrecorded highway, which has been in existence since at least 1879. Any unrecorded highway that has been worked as a public highway for 10 years or more is presumed to be 66 feet wide. WIS. STAT. §82.31(2)(a). Any encroachment upon this 66 foot right-of-way may be removed by the Town. *See* WIS. STAT. § 86.04(1). The burden of proof to establish an encroachment rests with the party asserting the encroachment. ***Thornton v. Loiselle***, 270 Wis. 1, 3, 70 N.W.2d 32 (1955).

¶9 It is undisputed by the parties that unit #1 was situated between 21.5 and 22 feet from the centerline of old Creek Road, thus within the old Creek Road right-of-way. It is also undisputed that currently unit #1 is situated approximately 50 to 52 feet from centerline of new Creek Road. What is in dispute is whether, following the relocation of Creek Road, old Creek Road and its accompanying right-of-way were discontinued. When a highway is discontinued, the land reverts to the adjoining landowner. ***Miller v. City of Wauwatosa***, 87 Wis. 2d 676, 680, 275 N.W.2d 876 (1979); WIS. STAT. § 66.1005(1). As we explain below, if old Creek Road and its right-of-way were discontinued, the Creek Road right-of-way would extend only 33 feet on either side of that road's centerline, and unit #1 would not be encroaching into Creek Road's right-of-way.

¶10 The Town contends that old Creek Road has not been discontinued because the procedural requirements to discontinue the road have not been initiated or completed. *See* WIS. STAT. § 66.1003 (discontinuance of public road). However, the procedures set forth in § 66.1003 are not the only methods by which a highway can be discontinued. A highway may also be discontinued by the method set forth in WIS. STAT. § 82.19(2)(b)2. Section 82.19(2)(b)2. provides that "[a]ny highway that has been entirely abandoned as a route of vehicular travel, and on which no highway funds have been expended for 5 years, shall be considered discontinued."

¶11 Referencing an earlier version of WIS. STAT. § 82.19(2)(b)2., the supreme court stated in ***Miller***, 87 Wis. 2d at 681:

> although the alteration of a highway by changing its course is different from a proceeding to discontinue a highway, an alteration of an existing road constitutes a discontinuance of that part of the old road that is not included within the limits of the new road, even though no formal order of discontinuance is made.

The supreme court stated this is also true in cases in which the entire width of a portion of an existing roadway is eliminated by a relocation of that portion of the roadway. ***Id.***

¶12 Notwithstanding the supreme court's holding in ***Miller***, the Town appears to argue that the relocation of Creek Road did not result in the discontinuance of old Creek Road because the requirements of WIS. STAT. § 82.19(2)(b)2.—abandoned as a route of vehicular travel and no highway funding for five years—have not been established.

¶13 With respect to the first requirement, the Town argues that there is no evidence in the record that would substantiate a finding that Creek Road has been entirely abandoned, suggesting as evidence of this the existence of public utilities which are situated directly over unit #1. WISCONSIN STAT. § 82.19(2)(b)2. specifies that the public highway must be "entirely abandoned as a route of vehicular travel." We fail to see how the existence of public utility lines over unit #1 is evidence that old Creek Road remains open for vehicular travel and the Town does not elaborate on how or why the existence of public utilities constitutes evidence of "vehicular travel" under § 82.19(2)(b)2. We have reviewed the record and have found no evidence that old Creek Road has been used for any vehicular travel since the 1981 relocation, and the Town does not claim that there has been any. Accordingly, we conclude that old Creek Road has been entirely abandoned for vehicular travel.

¶14 As to the second requirement, the Town argues that there is evidence in the record that it has spent money on maintaining old Creek Road. In support of this argument, the Town refers us to the deposition a land surveyor retained by the town to "locate the southerly line of Creek Road and position [unit #1] … in its

relative position to [the] south right-of-way line." The surveyor stated that it was his belief that the Town maintained old Creek Road. The surveyor's opinion, which does not detail any specific expenditures of money, does not establish that the Town has spent money maintaining old Creek Road since the relocation of Creek Road in 1981, and the Town does not direct this court to any other evidence that it did.

¶15 In summary, we conclude that the evidence is undisputed that Creek Road has been entirely abandoned for vehicular travel and, in the past five years, the town has not spent money maintaining it. Accordingly, we conclude that old Creek Road and its accompanying right-of-way, have been discontinued. The current right-of-way of new Creek Road lies thirty-three feet on either side of new Creek Road's centerline. It is undisputed that unit #1 is situated outside that right-of-way. Accordingly, we conclude that unit #1 does not encroach into the right-of-way.

2. The Town's Ordinance Regulating Mobile Home Parks

¶16 In 2005, the Town adopted ordinance No. 1-05, which "amend[ed] chapter 1 of the code of ordinances of the Town of Bradford, the zoning ordinance, relating to mobile home parks." Among other things, ordinance No. 1-05 established setback restrictions on mobile homes located within a mobile home park. The circuit court, essentially concluding that ordinance No. 1-05 is a zoning ordinance, determined that Shady Hill is a nonconforming use under WIS. STAT. § 62.23(7)(h),[4] and as such, is not presently subject to the ordinance. The court

[4] WISCONSIN STAT. § 62.23(7) addresses zoning by a municipality. Subsection (h), which addresses nonconforming uses, provides:

(continued)

further concluded, however, that any unit within Shady Hill that is abandoned for 12 months or repaired in excess of 50 percent of the unit's value will lose its nonconforming use status and become subject to ordinance No. 1-05.

¶17 The Town contends the court erred in concluding that Shady Hill is not subject to ordinance No. 1-05. We understand the Town's argument to be that ordinance No. 1-05 is a non-zoning ordinance enacted pursuant to the Town's police powers regulating mobile homes for "health and safety reasons," not a zoning ordinance and, thus, Shady Hill is not afforded the nonconforming use protections under WIS. STAT. § 62.23(7)(h).

¶18 Under its police power, a local government may enact both zoning ordinances and non-zoning ordinances. *See* ***Zwiefelhofer v. Town of Cooks Valley***, 2012 WI 7, ¶5, 338 Wis. 2d 488, 809 N.W.2d 362. Both types of ordinances "inhabit closely related spheres" and distinguishing between the two is not a simple task. ***Id.*** As noted by the supreme court, "'[t]he line distinguishing general police power regulation from zoning ordinances is far from clear.'" ***Id.***, ¶33 (citation omitted).

> *Nonconforming uses*. The continued lawful use of a building, premises, structure, or fixture existing at the time of the adoption or amendment of a zoning ordinance may not be prohibited although the use does not conform with the provisions of the ordinance. The nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building, premises, structure, or fixture shall not during its life exceed 50 percent of the assessed value of the building, premises, structure, or fixture unless permanently changed to a conforming use. If the nonconforming use is discontinued for a period of 12 months, any future use of the building, premises, structure, or fixture shall conform to the ordinance.

¶19 There is no bright-line rule for determining whether an ordinance is a zoning ordinance or a non-zoning ordinance. ***Id.***, ¶8. Instead, a "functional approach" is utilized. ***Id.*** As explained in ***Zwiefelhofer***:

> We catalogue the characteristics of traditional zoning ordinances …. We then compare the characteristics and purposes of the Ordinance to the characteristics and purposes of traditional zoning ordinances to determine whether the Ordinance should be classified as a zoning ordinance.
>
> No single characteristic or consideration is dispositive of the question whether the Ordinance is a zoning ordinance. Nor may a court simply add up the number of similarities a challenged ordinance has to traditional zoning ordinances or the number of differences a challenged ordinance has from traditional zoning ordinances to determine whether a challenged ordinance is a zoning ordinance. Some characteristics, under the circumstances of the case, may be more significant than others.

Id., ¶¶8-9.

¶20 In ***Zwiefelhofer***, the court was tasked with determining whether a town mining ordinance was a zoning ordinance or a non-zoning ordinance enacted under the town's police powers. *See* ***id.***, ¶4. The court compared the ordinance at issue with a non-exhaustive list of characteristics that are traditionally present in a zoning ordinance: (1) the division of a geographic area into multiple zones or districts; (2) the allowance and disallowance of certain uses by landowners within established districts or zones; (3) an aim at directly controlling *where* a use takes place, as opposed to *how* that use takes place; (4) the classification of uses in general terms and the attempt to comprehensively address all possible uses in a geographic area; (5) a fixed, forward-looking determination about what uses will be permitted as opposed to a case-by-case, ad hoc determination of what landowner will be allowed to use; and (6) the allowance by certain landowners to

maintain their use of the land even though such use is not in conformance with the ordinance because the landowners' use of their land was legal prior to the adoption of the zoning ordinance. ***Id.***, ¶¶36, 38-42. We apply the same approach in the present case.

¶21 First, like traditional zoning ordinances that create districts or zones in a town, ordinance No. 1-05 applies only to mobile home parks. It does not apply universally to all land in the Town.

¶22 Second, like traditional zoning ordinances that list uses permitted as of right in each district or zone and prohibit those not listed, ordinance No. 1-05 permits as of right the location of mobile homes in approved mobile home parks in the manner specified in the ordinance.

¶23 Third, like traditional zoning ordinances that directly control the location of activities, ordinance No. 1-05 controls the location of mobile homes in mobile home parks.

¶24 Fourth, like traditional zoning ordinances that endeavor to address and organize comprehensively all potential land uses in a geographic area in order to separate incompatible land uses, ordinance No. 1-05 addresses where mobile homes may be located in mobile home parks. The term "comprehensive" in this context "does not ordinarily refer to an ordinance that thoroughly, that is, comprehensively, regulates a single activity. The phrase ordinarily refers to an ordinance that addresses what classes of activities might be pursued in geographic areas." ***Id.***, ¶57.

¶25 Fifth, like traditional zoning ordinance that feature fixed rules, ordinance No. 1-05 does not operate on a case-by-case basis. Ordinance No. 1-05 applies to all mobile homes.

¶26 Sixth, like traditional zoning ordinances that allow certain preexisting uses to remain although they do not conform to the ordinance, ordinance No. 1-05 allows mobile homes in place as of November 17, 2004, to remain in place even if those mobile homes did not meet the setback requirements of ordinance No. 1-05.

¶27 All of the traditional characteristics of a zoning ordinance are present in ordinance No. 1-05. Our examination of the substantial similarities ordinance No. 1-05 has to traditional zoning ordinances leads us to conclude that ordinance No. 1-05 is a zoning ordinance. Thus, the nonconforming use protections of WIS. STAT. § 62.23(7)(h) apply.

¶28 It is well established that "'a nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by statute or ordinance, where it is a lawful business or use of property and is not a public nuisance or harmful in any way to the public health, safety, morals or welfare.'" ***Des Jardin v. Town of Greenfield***, 262 Wis. 43, 47, 53 N.W.2d 784 (1952) (citation omitted). Only when a valid, nonconforming use constitutes a public nuisance, or is harmful to public health, safety or welfare, may it be prohibited or restricted. ***Town of Delafield v. Sharpley***, 212 Wis. 2d 332, 337-38, 568 N.W.2d 779 (1997); *see also* ***Highway 100 Auto Wreckers, Inc. v. City of West Allis***, 6 Wis. 2d 637, 647-48, 96 N.W.2d 85 (1959) (evidence of the existence of potential fire hazard to the public justified application of restrictive ordinance to nonconforming use).

¶29 We have reviewed the summary judgment submissions in this case and there are no facts to suggest that Shady Hill is "harmful to public health, safety or welfare." ***Delafield***, 212 Wis. 2d at 337. Accordingly, we agree with the circuit court that Shady Hill is a valid nonconforming use which cannot be prohibited or restricted by ordinance No. 1-05.

3. The Mobile Homes within Shady Hill

¶30 Merriam contends on cross-appeal that the circuit court erred in determining on Merriam's counterclaim for declaratory relief that the mobile homes within Shady Hill are "structures" and, therefore, if they are abandoned for 12 months or repaired or altered by more than 50 percent of the structure's assessed value, the mobile home loses its nonconforming use status and must comply with the Town's zoning ordinance.

¶31 WISCONSIN STAT. § 62.23(7)(h) addresses nonconforming uses for purposes of zoning. It provides:

> The total structural repairs or alterations in [] a nonconforming building, premises, structure, or fixture [existing at the time of the adoption of the adoption or amendment of a zoning ordinance] shall not during its life exceed 50 percent of the assessed value of the building, premises, structure, or fixture unless permanently changed to a conforming use. If the nonconforming use is discontinued for a period of 12 months, any future use of the building, premises, structure, or fixture shall conform to the ordinance.

¶32 Merriam does not dispute that the mobile homes within Shady Hill are structures. Merriam argues, however, that the replacement of a mobile home within the park should not result in the loss of that mobile home's nonconforming use protection because "[t]he nonconforming use is the use of the property as a

mobile home community" and "[t]he replacement of homes within Shady Hill[] does nothing to alter or enlarge the nonconforming use of the property."

¶33 WISCONSIN STAT. § 62.23(7)(h) lists three instances where nonconforming status will be lost: (1) the nonconforming use is extended; (2) total repairs or alterations of a nonconforming structure are made in excess of 50 percent of the structure's assessed value; or (3) the use of the nonconforming structure is discontinued for a period of 12 months. WIS. STAT. § 62.23(7)(h). In ***County of Columbia v. Bylewski***, 94 Wis. 2d 153, 170, 288 N.W.2d 129 (1980), the supreme court addressed whether the replacement of a mobile home, which was exempt from a county zoning ordinance because it was a nonconforming use, with a new mobile home resulted in the loss of the protection of the nonconforming use doctrine. The supreme court determined that when the old mobile home was removed and substituted with a new mobile home, alterations were made in excess of 50 percent of the assessed value of the nonconforming structure, which resulted in the loss of the protection afforded by the nonconforming use doctrine, meaning the new mobile home was subject to the county's zoning ordinance. ***Id.***

¶34 Although ***Bylewski*** addressed a county zoning ordinance enacted under WIS. STAT. § 59.97, the predecessor to the current zoning statute pertaining to counties, WIS. STAT. § 59.69, the nonconforming use protections and limitations afforded under § 59.69(10) and WIS. STAT. § 62.23(7)(h) are substantially the same.[5] Accordingly, we agree with the circuit court that if the

[5] WISCONSIN STAT.§ 59.69(10) provides:

(continued)

replacement of a mobile home located in Shady Hill that is protected by the nonconforming use doctrine is removed and replaced with a new one, which alters the assessed value of the protected mobile home by 50 percent, protection afforded by the nonconforming use doctrine is lost and the Town's zoning ordinance becomes applicable to the new mobile home.

CONCLUSION

¶35 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

> Nonconforming uses…. (am) An ordinance enacted under this section may not prohibit the continuance of the lawful use of any building, premises, structure, or fixture for any trade or industry for which such building, premises, structure or fixture is used at the time that the ordinances take effect, but the alteration of, or addition to, or repair in excess of 50 percent of its assessed value of any existing building, premises, structure, or fixture for the purpose of carrying on any prohibited trade or new industry within the district where such buildings, premises, structures, or fixtures are located, may be prohibited. The continuance of the nonconforming use of a temporary structure may be prohibited. If the nonconforming use is discontinued for a period of 12 months, any future use of the building, premises, structure, or fixture shall conform to the ordinance.

Similarly, WIS. STAT. § 62.23(7)(h) provides:

> The total structural repairs or alterations in such a nonconforming building, premises, structure, or fixture shall not during its life exceed 50 percent of the assessed value of the building, premises, structure, or fixture unless permanently changed to a conforming use. If the nonconforming use is discontinued for a period of 12 months, any future use of the building, premises, structure, or fixture shall conform to the ordinance.