OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

June 19, 2019

To:

Hon. Joseph W. Voiland
Circuit Court Judge
Ozaukee County Circuit Court
1201 S. Spring St.
Port Washington, WI 53074

Marylou Mueller
Clerk of Circuit Court
Ozaukee County Circuit Court
1201 S. Spring St.
Port Washington, WI 53074-0994

Remzy D. Bitar
Matteo Reginato
Municipal Law & Litigation Group
P.O. Box 1348
Waukesha, WI 53187

Brad M. Hoeft
Antoine, Hoeft & Eberhardt SC
P.O. Box 366
Port Washington, WI 53074-0366

Jonathan E. Sacks
Mallery & Zimmerman, S.C.
731 N. Jackson St., Ste. 900
Milwaukee, WI 53202

Ronald S. Stadler
Jackson Lewis, P.C.
330 E. Kilbourn Ave., Ste. 560
Milwaukee, WI 53202

You are hereby notified that the Court has entered the following opinion and order:

2018AP1234 Town of Cedarburg v. Brian L. Beschta (L.C. #2015CV369)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brian L. Beschta appeals from a judgment declaring that his use of property he owns in the Town of Cedarburg is an unlawful business use under the Town's zoning code, imposing a $50 daily forfeiture for his violation of the zoning code, and dismissing his counterclaims. The

issue is whether Beschta's use of the property is permitted as a prior nonconforming use. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm the judgment in part, reverse in part, and remand with instructions to enter judgment dismissing the Town's complaint.

Beschta operates general contracting and property maintenance businesses from his property in the Town. Over the years he kept on the property zero-turn lawn mowers, skid loaders, backhoes, dump trucks, lawn trailers, construction materials and waste, a large commercial dumpster, semi-tractors, semi-trailers, and miscellaneous waste items including junk vehicles and tires. For more than ten years, the community complained to the Town board about the condition of the property and Beschta was asked to clean it up. In 2015 the Town commenced this action for a declaration that Beschta is violating the zoning code by keeping three semi-trailers, a semi-tractor, an open landscaping trailer, a commercial dumpster, and a skid tractor on the property. The Town sought to enjoin Beschta from use of the property that violates the zoning code and a forfeiture for each day after May 28, 2014, that Beschta is in violation of the code. Beschta counterclaimed for a declaration that his use of the property may be continued as a legal nonconforming use. He also made claims under 42 U.S.C. § 1983 for a denial of equal protection and substantive due process and for attorney fees and costs under 42 U.S.C. § 1988. On cross-motions for summary judgment and the parties' joint statement of undisputed facts, the circuit court determined that Beschta's use of his property violates the zoning code, ordered removal of the "Offending Items" in sixty days, enjoined Beschta from

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

using the property for his businesses without first obtaining proper zoning permits, imposed a daily forfeiture totaling $66,400, and dismissed Beschta's counterclaims.[2]

Beschta purchased his property in 2006. At that time, the property was zoned B-1 Neighborhood Business District under CEDARBURG, WIS., CODE OF ORDINANCES § 320-19 (May 2006) (hereafter TOWN CODE). In 2006, § 320-19 listed principal uses as "none." The provision listed a wide variety of conditional uses consisting of retail establishments selling and storing only new merchandise. The permissible conditional uses did not include a general contracting business like Beschta's. In 2009, the Town amended § 320-19 to provide: "Principal Uses: drug stores, delicatessens, florists, business and professional offices." TOWN CODE § 320.19 (August 23, 2016). It is undisputed that the Town can neither identify why there were no permitted uses in the B-1 zoning district from 2000-2009 nor identify any unique features or characteristics that would require no permitted uses.

Beschta argues that the zoning code in effect when he brought his property was unconstitutional, and therefore, his use of his property is a legal nonconforming use when the zoning code was amended in 2009. We agree under the holding in ***Town of Rhine v. Bizzell***, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780. In ***Bizzell***, ¶54, the ordinance at issue made every use within a particular zoning classification a conditional use; there were no permitted uses

[2] We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2).

expressly allowed for the land. The court held that the zoning ordinance was unconstitutional because the limitation bore "no substantial relation to the public health, safety, morals or general welfare." ***Id.***, ¶47. Here TOWN CODE § 320-19, in effect in 2006, stands on equal footing. It did not permit any uses as of right.[3] Under the stipulated facts, the Town cannot establish any relation of the limitation in the B-1 zoning district to the public health, safety, morals, or general welfare. As it existed in 2006, the Town's B-1 zoning of Beschta's property was unconstitutional and therefore unenforceable.

It follows that Beschta's use of his property was legal before the 2009 amendment of TOWN CODE § 320-19. The parties stipulated that his use of the property has been in substantially the same manner since 2006. His use of the property is a legal nonconforming use despite the 2009 amendment of the code. *See* ***Waukesha County v. Seitz***, 140 Wis. 2d 111, 114-15, 409 N.W.2d 403 (Ct. App. 1987).

We turn to consider the dismissal of Beschta's 42 U.S.C. §§ 1983 and 1988 counterclaims. "Section 1983 provides a tort remedy when the government, acting under the color of state law, deprives a person of his or her rights under federal law or the United States

[3] The Town attempts to distinguish its code from that found unconstitutional in ***Town of Rhine v. Bizzell***, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780, because its code includes a provision recognizing that legal nonconforming uses continue after a zoning amendment. *See* CEDARBURG, WIS., CODE OF ORDINANCES § 320-63B (August 23, 2016). It contends because Beschta was allowed to continue to use his property as a residence when B-1 zoning was put in place, there was a permitted use. As Beschta points out, all landowners are entitled to nonconforming use as a matter of law. *See* ***Town of Cross Plains v. Kitt's Field of Dreams Korner, Inc.***, 2009 WI App 142, ¶18, 321 Wis. 2d 671, 775 N.W.2d 283. The landowner in ***Bizzell*** had the right to continue any preexisting use before the unconstitutional code was enacted and that fact did not cause the court to conclude that permitted uses were allowed. Further, a nonconforming use is not the same as a permitted use as of right since its continuation can be lost by an identifiable change or enlargement in use. *See* ***Hussein v. Vill. of Germantown Bd. of Zoning Appeals***, 2011 WI App 96, ¶14, 334 Wis. 2d 764, 800 N.W.2d 551.

Constitution." ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶19, 235 Wis. 2d 610, 623, 612 N.W.2d 59 (footnote omitted). Beschta alleges that the Town violated his rights to equal protection and substantive due process by its enforcement of the current version of TOWN CODE § 320-19 despite his protected property interest in his legal nonconforming use.

The Town first argues that Beschta failed to exhaust his administrative remedies, which the Town claims is a prerequisite to bringing 42 U.S.C. § 1983 claims.[4] However, exhaustion is not a prerequisite to § 1983 claims brought in state court. ***Casteel v. Vaade***, 167 Wis. 2d 1, 17, 481 N.W.2d 476 (1992). The exhaustion requirement does apply to a challenge to the constitutional validity of a zoning ordinance by an action for declaratory judgment. *See* ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis. 2d 416, 426, 254 N.W.2d 310 (1977); ***Kmiec v. Town of Spider Lake***, 60 Wis. 2d 640, 645, 211 N.W.2d 471 (1973). Further, "[t]he rule of exhaustion contemplates a situation where some administrative action is under way but is as yet uncompleted." ***State v. Dairyland Power Coop.***, 52 Wis. 2d 45, 54, 187 N.W.2d 878 (1971). Here Beschta brought his claims in response to a lawsuit started by the Town for injunctive relief and forfeitures. No administrative proceeding was pending in which Beschta could pursue his claims.

[4] In support of its proposition, the Town cites authorities that apply a special doctrine of ripeness applicable to constitutional property rights claims regarding conditional approval of plats or land uses. Although in 2012 and 2013 Beschta applied for rezoning and a conditional use permit, final decisions were made on those applications. No ripeness problem exists here.

Beschta's equal protection claim is based on the "class of one" theory[5]—that is, "like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review." ***Reget v. City of La Crosse***, 595 F.3d 691, 695 (7th Cir. 2010). The claim requires the plaintiff to establish that he or she was intentionally treated differently than others similarly situated and there is no rational basis for the difference in treatment. ***Id.*** Even assuming Beschta can establish he was treated differently, Beschta does not establish "no rational basis" for such treatment.[6] The existence of any conceivable rational basis will defeat a class of one claim. *See* ***D.B. ex rel. Kurtis B. v. Kopp***, 725 F.3d 681, 686 (7th Cir. 2013). The parties' statement of undisputed facts outlines the numerous citizen complaints the Town received about Beschta's property. The record is devoid of similar complaints against other B-1 zoned properties. A rational basis exists for the Town to treat the complained about property differently.

Beschta's substantive due process claim suffers from a flaw similar to the equal protection claim. Beschta alleges that the Town's action in seeking to restrict his use of his property and in ignoring his legal nonconforming use is arbitrary and unreasonable and constitutes a deprivation without due process of law. The scope of substantive due process is very limited and requires a showing that the government entity "exercised its power without

[5] Specifically, he alleges that he was arbitrarily and unreasonably treated differently in terms of zoning enforcement than others in B-1 zones similarly using their property for the operation of landscaping and/or construction businesses and the storage of similar equipment. In opposition to the Town's motion for summary judgment, Beschta submitted a picture of a drive-in business operated in a B-1 zone which depicted a semi-trailer on the property for storage. The drive-in was not prosecuted for the presence of the semi-trailer.

[6] Beschta is not claiming membership in any suspect class so the rational basis test applies. ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶42, 235 Wis. 2d 610, 612 N.W.2d 59.

reasonable justification in a manner that 'shocks the conscience.'" ***Bettendorf v. St. Croix County***, 631 F.3d 421, 426 (7th Cir. 2011); *see also* ***Eternalist Found. v. City of Platteville***, 225 Wis. 2d 759, 777, 593 N.W.2d 84 (Ct. App. 1999). Where, as here, the governmental action does not encroach upon a fundamental right, "substantive due process requires only that the practice be rationally related to a legitimate governmental interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." ***Gen. Auto Serv. Station v. City of Chicago***, 526 F.3d 991, 1000 (7th Cir. 2008). In light of the numerous citizen complaints received by the Town, it is not conscious-shocking or arbitrary that the Town acted to restrict Beschta's use of his property. There are no allegations of outrageous or malicious behavior by the Town in attempting to satisfy the clamor for action in regards to Beschta's property. That the Town was wrong about its interpretation of its zoning code and the legality of Beschta's nonconforming use is not a violation of due process. *See* ***Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County, Ind.***, 57 F.3d 505, 514 (7th Cir. 1995).

We conclude that Beschta's 42 U.S.C. §§ 1983 and 1988 claims were properly dismissed and we affirm that part of the judgment. The judgment declaring Beschta's use illegal and imposing the daily forfeiture is reversed. On remand, judgment should be entered in Beschta's favor dismissing the Town's complaint.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed in part and reversed in part, and the cause remanded with directions pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals