

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2004

Cornelia G. Clark
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. 03-3445
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000168

**IN COURT OF APPEALS
DISTRICT III**

HUDSON DIESEL, MPPP,

PLAINTIFF-APPELLANT,

v.

**ROSE OTTUM, OFFICES OF THE REGISTER OF DEEDS,
PAUL L. SYVERSON, TREMPPEALEAU COUNTY, NAOMI C.
HALE AND TOWN OF TREMPPEALEAU,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Trempealeau County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Hudson Diesel, MPPP, appeals a summary judgment dismissing its action to compel Trempealeau County, its clerk and the Register of Deeds, the Town of Trempealeau and its clerk to certify and record a

plat. The County objected to the plat on the ground that Hudson Diesel failed to secure the Town's approval of new town roads. Hudson Diesel argues that the Town approved the plat by operation of law when it failed to act within sixty days as required by WIS. STAT. § 236.11(2)¹ and therefore Hudson Diesel satisfied the County's condition for approval. It also argues that the Town's moratorium on road construction that the County enforced by its objection violated Hudson Diesel's procedural and substantive due process rights. We reject these arguments and affirm the judgment.²

¶2 Shortly before Hudson Diesel presented a rough draft proposal for a new plat to the town board, the board passed a moratorium that prohibited construction of new roads. Hudson Diesel asked for a waiver of the moratorium for its project. The board notified Hudson Diesel that its counsel recommended against the waiver, but the board did not specifically rule on the request until after it was deemed to have approved the plat under WIS. STAT. § 236.11(2). The County, however, within the time for raising objections, required Hudson Diesel to get the Town's approval of the planned roads. In the context of the moratorium,

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. WISCONSIN STAT. § 236.11(2) in relevant part provides:

(2) The body or bodies having authority to approve plats shall approve or reject the final plat within 60 days of its submission, unless the time is extended by agreement with the subdivider. ... If the approving authority fails to act within 60 days and the time has not been extended by agreement and if no unsatisfied objections have been filed within that period, the plat shall be deemed approved, and, upon demand, a certificate to that effect shall be made on the fact of the plat by the clerk of the authority which has failed to act.

² Because we conclude that Hudson Diesel did not satisfy the County's objection and the trial court properly dismissed this action on the merits, we need not decide whether Hudson Diesel complied with WIS. STAT. § 893.80.

we construe the County's objection as requiring Hudson Diesel to secure the Town's affirmative waiver of the moratorium.

¶3 The Town's default approval of the plat did not satisfy the County's objection. The objection did not require the Town to approve the plat. It required the Town to specifically approve the road construction. *State ex rel. Lozoff v. Board of Trustees*, 55 Wis. 2d 64, 197 N.W.2d 798 (1972), does not compel a different result. There, a municipality failed to object to a plat even though the plat violated a municipal ordinance. The court concluded that the municipality's failure to act within the time set out in WIS. STAT. § 236.11 resulted in constructive approval of the plat. Here, the County interposed a timely objection. Its objection, not the terms of the Town moratorium, prevents approval of the plat. Because Hudson Diesel did not satisfy the County's condition for approval, the defendants appropriately refused to certify the plat.³

¶4 Hudson Diesel argues that the moratorium the County enforced by its objection violates Hudson Diesel's procedural and substantive due process rights. The procedural rights arise out of WIS. STAT. § 60.61 relating to the procedure for enacting zoning ordinances. Hudson Diesel argues that the Town failed to follow these provisions for notice and hearings. However, the road moratorium is not a zoning ordinance. Therefore, the Town was not required to comply with the statutory procedures for creating zoning ordinances.

³ In this appeal we do not consider the validity of the County's objection, only its timeliness and whether it was satisfied. The validity of the objection was not raised in the trial court or briefed in this court.

¶5 The substantive due process argument alleges that the Town discriminated against developers by imposing a road moratorium. That argument fails because Hudson Diesel's supporting papers did not establish any discriminatory purpose behind the moratorium. The only evidence it presented is the fact that the moratorium passed at the same board meeting that Hudson Diesel presented its rough draft proposal for the development and prior to its presentation. That fact does not create an inference of invidious discrimination. The general moratorium applied to all road construction. Hudson Diesel presented no evidence of any other applications being accepted or denied. The denial of Hudson Diesel's application does not, by itself, suggest discrimination.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

