

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2007

David R. Schanker
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. 2006AP1817

Cir. Ct. No. 2005CV3712

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WILLIAM K. GARFOOT,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

TOWN OF SPRINGDALE,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. William Garfoot appeals a summary judgment decision that dismissed his declaratory judgment action against the Town of Springdale. Garfoot sought to have declared void a recorded affidavit in which Springdale stated that it did not recognize the validity of a certified survey map

which Garfoot had previously filed. He further sought a declaration that the certified survey map had in fact been properly recorded. Springvale cross-appeals the trial court's denial of alternate procedural grounds for judgment in its favor. We affirm the trial court's dismissal of the declaratory judgment action on its merits, and therefore do not reach the procedural issues raised on the cross-appeal.

BACKGROUND

¶2 Garfoot is the owner of real property in the Town of Springdale in Dane County. On May 8, 2001, Garfoot filed a certified survey map with the Dane County Department of Planning and Development, seeking approval to divide his property. The county's plat review officer forwarded a courtesy copy of the certified survey map to the Town. On May 14, 2001, the town board issued what Garfoot understood to be a temporary stay or moratorium on further land divisions within the Town. On July 17, 2001, after receiving approval from the county officer and having heard nothing from the Town, Garfoot recorded his certified survey map with the Dane County Register of Deeds.

¶3 A year and a half later, by letter dated January 31, 2003, the Town informed Garfoot that, because he had not separately sought review and approval for a land division from the Town as required by a town ordinance which had been amended on January 10, 2000, the Town did not recognize the validity of the certified survey map. On August 18, 2003, the Town also recorded an affidavit labeled as a "Statement" with the Dane County Register of Deeds, stating that it

did not recognize the validity of any land division attempted by Garfoot's certified survey map.¹

¶4 On January 8, 2004, Garfoot filed a declaratory judgment against the Town which was dismissed for failure to file a notice of claim under WIS. STAT. § 893.80(1)(b) (2005-06).² On April 24, 2005, Garfoot sent the Town a notice of injury and notice of claim seeking to have the recorded statement rescinded. After the Town denied the claim, Garfoot filed the present declaratory judgment action on November 11, 2005.

¶5 In the present action, Garfoot provided affidavits averring that— notwithstanding a town ordinance which required an applicant seeking approval for a land division to file twelve copies of a certified survey map along with a filing fee—it had been the Town's practice to act upon certified survey maps that had been forwarded to it by county officials, and to collect the filing fee later. When the town board did not act within ninety days, a submitted map was deemed to have been approved. Garfoot claimed that the trial court should direct his certified survey map to be approved because the enforcement of the town ordinance against him in a manner inconsistent with past practice was “arbitrary, unreasonable or discriminatory.”³

¹ The statement also referred to two other certified survey maps which are not at issue on this appeal.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

³ The complaint cited WIS. STAT. § 236.13(5), which authorizes a trial court to direct approval of a plat when the municipality's rejection of the plat was “arbitrary, unreasonable or discriminatory.” Garfoot concedes on appeal that the statutory section is inapplicable because the Town did not act upon his certified survey map. However, he contends that essentially the same

(continued)

¶6 The Town moved to dismiss on multiple grounds, arguing that Garfoot had still not properly complied with the notice of claim statute; that the present suit should be barred under principles of claim preclusion; that Garfoot did not pursue a timely appeal of the rejection of his certified survey map; and that he did not comply with the requirements for Town approval of his certified survey map. The trial court rejected the Town’s procedural notice of claim and claim preclusion arguments, but agreed with its contention that Garfoot had failed to follow the application procedures required to obtain valid approval of the certified survey map. After noting it was undisputed that Garfoot had failed to comply with the town ordinance by submitting twelve copies of his certified survey map to the Town along with a filing fee, the trial court construed Garfoot’s argument that providing the certified survey map to county authorities should have been sufficient as a request for equitable estoppel. It then concluded that Garfoot had failed to establish the elements of equitable estoppel, and granted summary judgment in the Town’s favor.

STANDARD OF REVIEW

¶7 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any

“arbitrary, unreasonable or discriminatory” standard would still apply under general principles of due process.

material facts in dispute that entitle the opposing party to a trial. *Id.*, ¶24. We view the materials in the light most favorable to the party opposing the motion. *Id.*, ¶23.

DISCUSSION

¶8 Garfoot first contends that the trial court misconstrued his argument regarding the Town’s past practice as a request for equitable estoppel relief, when the actual basis for his declaratory judgment action is that “the Town arbitrarily and unreasonably exercised its police powers to accept and review certified survey maps, thereby discriminating against Garfoot and depriving him of due process of law.” Because Garfoot disavows that his complaint raised an equitable estoppel claim, we will not discuss the elements of such a claim, and will instead proceed to consider whether Garfoot’s complaint and summary judgment materials established a due process violation.⁴

¶9 Garfoot cites *Chicago & North Western Railway Co. v. La Follette*, 43 Wis. 2d 631, 645, 169 N.W.2d 441 (1969), for the general proposition that due process demands that governmental regulation “shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.” The governmental

⁴ The Town asserts that Garfoot waived any due process argument by failing to make it to the trial court. Because waiver is a doctrine of judicial administration, however, we retain the authority to address an issue on appeal even if it has not been properly preserved. *Wirth v. Ehly*, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980). We conclude that it would be inappropriate to apply waiver here because: (1) Garfoot’s trial brief was filed in response to the Town’s motion to dismiss and thus organized around the Town’s arguments, rather than in support of a motion for summary judgment in his own favor; (2) there do not appear to be any additional factual assertions the Town would have been able to make had Garfoot framed his argument in due process terms; and (3) we are applying de novo summary judgment review anyway. See *Hart v. Bennet*, 2003 WI App 231, ¶¶33-34, 267 Wis. 2d 919, 672 N.W.2d 306.

regulations at issue here were the town ordinance requirements that Garfoot submit twelve copies of his certified survey map to Town officials with a filing fee in order to apply for a subdivision of land. Garfoot maintains that it was arbitrary, unreasonable and discriminatory for the Town to impose these requirements on him without notice in a manner inconsistent with the Town's past practice of acting on copies of certified survey maps that had been informally forwarded from county officials without prepayment of a filing fee, as if they had been applications formally filed with the Town. We do not agree.

¶10 First of all, we see nothing inherently unreasonable about requiring an applicant to pay a filing fee and submit multiple copies of the document for which approval is sought. Such application requirements are commonplace and rationally related to the legitimate goal of having the people who are using certain government services help to defray their cost.

¶11 Secondly, the application requirements at issue here were plainly and unambiguously set forth in the town ordinances. Therefore, Garfoot would have had the same notice of the requirements as any other member of the public who could be expected to consult the ordinances before seeking Town approval of a land division. Garfoot has not provided us with any authority which would compel the conclusion that the Town's past failure to require full compliance with its ordinance requires some additional notice before the Town may more strictly enforce the ordinance. We find the Town's analogy to the selective enforcement of traffic laws to be instructive on this point. Just because law enforcement personnel have not ticketed traffic violators in the past does not mean that it is discriminatory to ticket future violators, absent some indication that the laws are only being enforced against some person on a specifically prohibited basis. *See also Village of Menomonee Falls v. Michelson*, 104 Wis.2d 137, 145-46, 311

N.W.2d 658 (Ct. App. 1981) (discussing selective enforcement of municipal ordinances in an equal protection context).

¶12 In any event, even assuming that there could be some instances in which the selective enforcement of a Town's land division application procedures could be arbitrary or discriminatory, we are not convinced that it was arbitrary or discriminatory for the Town to refuse to recognize Garfoot's recorded certified survey map under the specific circumstances of this case. Not only did Garfoot fail to comply with the formal application procedure set forth in the ordinance, but his summary judgment materials do not show that he complied with the Town's more informal past practice for allowing review and approval of land division requests. According to Garfoot's affidavits, the Town had in the past collected filing fees later in the process and had deemed applications to be approved if not acted upon within ninety days of having received a forwarded copy of a certified survey map from a county official. But Garfoot did not allege that he had *ever* paid a filing fee in this matter, and he filed his certified survey map with the Dane County Register of Deeds only sixty-eight days after he had first sent it to the county official who had forwarded it to the Town. There is nothing in the summary judgment materials to suggest that the Town had previously allowed other certified survey maps to be recorded without any payment of a filing fee and before they might have been deemed approved by the Town by the lapse of time under the Town's past practice.

¶13 The bottom line is that Garfoot had not obtained the Town's approval to divide his land—either by the formal procedures set forth in the Town's ordinance, or by a more informal practice that the Town had sometimes allowed in the past—before he recorded his certified survey map. Therefore, the trial court correctly determined that Garfoot's materials failed to establish that the

certified survey map was valid or that the Town's affidavit of nonrecognition was invalid, and the court properly granted summary judgment in the Town's favor. In light of our conclusion that the summary judgment materials failed to establish the merits of Garfoot's claim, we need not address whether his claim would also have been procedurally barred by claim preclusion or failure to give sufficient notice of claim.

By the Court.—Judgment affirmed.

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

