

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 29, 2012**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2011AP1204**

**Cir. Ct. No. 2008CV1020**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**PETER J. BUTZEN, D/B/A FALLS METALS, INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**CITY OF SHEBOYGAN FALLS,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Sheboygan County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Peter J. Butzen, d/b/a Falls Metals, Inc., appeals from a judgment dismissing his regulatory takings and substantive due process claims against the City of Sheboygan Falls. Butzen argues that the takings

resulted from a City zoning ordinance later ruled unconstitutional.<sup>1</sup> He fails to challenge certain critical findings, such that he has not established cause or injury, dooming his takings claim. We commend the circuit court for a careful and thorough decision and affirm the judgment.

¶2 Butzen owns a parcel of property along State Highway 32 in the City's C2 commercial zoning district. He operated a scrap metal recycling business on the property during the 1990s. As the business grew, so did the amount of scrap metal on site, giving it the look of a junkyard. In January 2000, the city plan commission decided that the use of the property had evolved into one not allowed under the zoning code. Butzen was advised that with specified cleanup and modifications, he could run a commercial recycling center if he obtained a conditional use permit. Butzen applied for a permit in February 2000.

¶3 In April, before acting on Butzen's application, the city council amended the ordinance under which Butzen applied by enacting Ordinance No. 11 1999/2000. Ordinance No. 11 grew out of the City's comprehensive plan, enacted in 1997, which aimed to maintain a "pleasant viewshed" along the STH 32 corridor into the city. Ordinance No. 11 eliminated all permitted uses in C2 zoning districts unless the property owner obtained a conditional use permit.

¶4 The city council's Public Health and Welfare Committee advised Butzen that if he performed the required cleanup, the committee would consider recommending that his permit application be granted. Butzen took some remedial steps over the next months. The City, which still had not acted on his application,

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<sup>1</sup> Butzen affirmatively abandons his substantive due process claim on appeal.

gave Butzen until December 25, 2000 to complete the cleanup or risk denial of the permit, but then set three new deadlines in 2001 for various aspects of the cleanup: January 15, February 1 and July 1. After Butzen failed to meet the first two deadlines, the city council denied his application and ordered him to cease all operations on the property. Butzen did, but negotiated one more deadline of June 29, 2001. The cleanup remained uncompleted. The property sat dormant.

¶5 Butzen did not appeal to the Board of Appeals, *see* WIS. STAT. § 62.23(7)(e) (2009-10),<sup>2</sup> the plan commission's determination that he needed a conditional use permit, nor did he initiate an administrative review of the city council's 2001 denial of his conditional use permit application, *see* WIS. STAT. ch. 68. In November 2007, Butzen filed a permit application for a conditional use under Ordinance No. 11. It was rejected as incomplete, and he did not resubmit it.

¶6 On July 1, 2008, the supreme court issued *Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780, which held that a zoning provision such as Ordinance No. 11 is unconstitutional on its face if it precludes any use as of right in a zoning district and if the limitation bears no substantial relation to the public health, safety, morals or general welfare. *See id.*, ¶34. In response to the *Town of Rhine* decision, and while considering how to address it, the City of Sheboygan Falls common council passed a moratorium ordinance prohibiting all development within its C1, C2 and C3 zoning districts.

¶7 When Butzen learned about the *Town of Rhine* ruling, he resumed use of his property. He then commenced a certiorari complaint against the City

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

seeking a judicial determination as to the constitutionality of Ordinance No. 11 1999/2000 in light of *Town of Rhine* and as to the validity of the City's moratorium ordinance.<sup>3</sup>

¶8 The circuit court determined that Ordinance No. 11 was unconstitutional under *Town of Rhine*, but that the moratorium ordinance was constitutional.<sup>4</sup> Butzen then filed an amended complaint asserting (1) an inverse condemnation claim, on the basis that Ordinance No. 11 was so restrictive as to amount to a regulatory taking of his property during the time before it was held to be unconstitutional; and (2) a substantive due process claim under 42 U.S.C. §1983, on the basis that the City's efforts to pursue and enforce the various ordinance violations against him were arbitrary and capricious.

¶9 After a bench trial, the circuit court concluded that Butzen did not establish either a takings or a substantive due process violation. The court found that Butzen's claims were barred by six-year statutes of limitations under WIS. STAT. §§ 893.52 (damages for injury to property) and 893.53 (42 U.S.C. §1983 actions);<sup>5</sup> that his claims were not ripe because he failed to exhaust his administrative remedies; that he did not demonstrate that the unconstitutional

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<sup>3</sup> While his case was pending, Butzen stepped up business operations in a manner the City believed contrary to its building codes and its public nuisance and moratorium ordinances. In February 2009, the fire inspector again notified Butzen that he was out of compliance with fire code mandates and gave him a deadline for remediation. Butzen did not meet it and was issued a \$109 citation. By May 2009 Butzen had amassed forty-seven more warning letters and citations. In November 2009, Butzen failed to appear at the circuit court hearing on the violations and a default judgment was entered against him.

<sup>4</sup> The city council ultimately passed a new ordinance ending the moratorium and revising the zoning code for the C2 district.

<sup>5</sup> See *Hemberger v. Bitzer*, 216 Wis. 2d 509, 519, 574 N.W.2d 656 (1998).

ordinance was a “substantial factor” in any injury to him; and that his need for or the denial of a conditional use permit did not constitute a deprivation of all economically beneficial or productive use of his land. The court dismissed Butzen’s claims, and this appeal followed.

¶10 Butzen limits his appellate argument to the “takings” claim. He contends that, because of the *Town of Rhine* ruling, Ordinance No. 11 unconstitutionally eliminated all use of his C2-zoned property without a conditional use permit, resulting in a regulatory taking.

¶11 “The property of no person shall be taken for public use without just compensation therefor.” WIS. CONST. art. I, § 13. A regulatory taking occurs when a regulation denies a landowner all or substantially all practical uses of his or her property. See *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 373-74, 548 N.W.2d 528 (1996). Whether a property owner has been deprived of substantially all the beneficial use of the property ultimately is a question of law that we review de novo. *Mentzel v. City of Oshkosh*, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988). The circuit court’s findings of fact, however, will not be set aside unless they are clearly erroneous. *Id.*; see also WIS. STAT. § 805.17(2).

¶12 Butzen tries mightily to shoehorn his takings claim into a *Town of Rhine* framework by focusing on Ordinance No. 11. In so doing, he overlooks two key factual findings and legal conclusions. First, the circuit court found that the determination that Butzen needed a conditional use permit and the denial of his permit application both were premised on the prior ordinance, such that the subsequent determination that Ordinance No. 11 was unconstitutional was not a substantial factor in Butzen’s claimed injury. And second, it found that the determination that Butzen needed a conditional use permit to run his business did

not deprive him of substantially all the beneficial use of his property because he still was entitled to operate any other kind of business that conformed with other permitted uses under the preexisting ordinance. Thus, because Butzen failed to establish that Ordinance No. 11 played a substantial factor in his injury and that his property rights were fully taken, the court concluded that he has no actionable takings claim.

¶13 Conduct is causal if it is a substantial factor in producing the injury. *See Clark v. Leisure Vehicles, Inc.*, 96 Wis. 2d 607, 617, 292 N.W.2d 630 (1980). For a regulatory taking to occur, a regulation must deprive a landowner of substantially all practical uses of the property. *See Zealy*, 201 Wis. 2d at 373-74. By not disputing the trial court's adverse rulings, Butzen has abandoned those issues without establishing cause or injury—the basis for an actionable takings claim. We therefore need explore the matter no further. *See Reiman Assocs., Inc. v. R/A Advertising, Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).<sup>6</sup>

*By the Court.*—Judgment affirmed.

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

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<sup>6</sup> We also find no error in the circuit court's statutes of limitations and ripeness determinations. We are not swayed by Butzen's arguments that he could not have known about Ordinance No. 11's unconstitutionality until *Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780, was decided and that the ripeness doctrine does not apply to facial challenges. Those assertions are beside the point because, as just explained, Butzen's injury, if any, did not result from Ordinance No. 11 but from decisions City entities made pursuant to the prior ordinance.



