

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2012

Diane M. Fremgen
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. 2011AP2689

Cir. Ct. No. 2009CV1678

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VILLAGE OF NEWBURG,

PLAINTIFF-RESPONDENT,

V.

DEERPRINT ENTERPRISES, LLC,

DEFENDANT-APPELLANT,

STEVEN S. MEYER AND ANN M. MEYER,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Washington County: TODD K. MARTENS, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Deerprint Enterprises, LLC, filed a motion for summary judgment seeking a declaration that the condominium plat the Town of Trenton approved in 2007 is not subject to the Village of Newburg's extraterritorial plat-approval ordinances. The Village likewise filed a motion for summary judgment, its motion seeking a declaration that the Town's earlier approval is void, such that Deerprint's development must be reapproved. The circuit court granted the Village's motion and denied Deerprint's. We affirm.¹

¶2 This is the parties' second trip here. Deerprint's six-unit condominium development sits on a thirty-five-acre parcel of land the Town has zoned CES-5 Country Estate. The zoning allows one single-family residential development per minimum of five acres. One of the condominium units initially was commercial/industrial. The Village objected to the Town's April 2007 approval of a Planned Development Overlay (PDO) designation for the mixed-use development and sought a declaration that the Town's approval was invalid because it violated the Village's extraterritorial zoning change moratorium in place at the time. In *State ex rel. Village of Newburg v. Town of Trenton*, 2009 WI App 139, 321 Wis. 2d 424, 773 N.W.2d 500, we agreed, holding that the Town's action ran contrary to its own ordinances and constituted de facto rezoning during the moratorium. *Id.*, ¶1. We remanded with directions that the circuit court proceed to the merits of the Village's declaratory judgment action. *Id.*, ¶19.

¶3 On remand, the circuit court held that the Town's decision to issue a PDO zoning designation for Deerprint's property was null and void *nunc pro tunc*

¹ The Town and Steven S. and Ann M. Meyer, the owners of one of the condominium units, were parties to the underlying action but are not parties on appeal.

and granted summary judgment in favor of the Village. Deerprint's response was to amend the condominium declaration to make all the units residential use. The Village again objected. It argued that no valid condominium plat exists because the one approved and recorded in April 2007 was based on a since-invalidated approval by the Town and, further, never was submitted to the Village for its review and approval. The Village also sought to enjoin Deerprint from selling any condos without Village approval of the condo plat.

¶4 The circuit court found that simply amending the rejected declaration to eliminate the offending use was insufficient. Because the Town's ordinances permit only one single-family residence per five acres, the court concluded that the six-unit condominium development, even if all residential, still violated the Town's existing zoning and thus required another PDO to allow the desired use. The court denied the Village's request for injunctive relief but granted its motion for summary judgment. Deerprint appeals, essentially trying for a second kick at the same old cat.

¶5 We review a circuit court's summary judgment decision de novo, owing no deference to it. *Waters v. United States Fid. & Guar. Co.*, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995); *see also* WIS. STAT. § 802.08(2) (2009-10).² Further, the filing of cross-motions for summary

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

judgment has the effect of leaving only issues of law. *See Selzer v. Brunsell Bros., Ltd.*, 2002 WI App 232, ¶11, 257 Wis. 2d 809, 652 N.W.2d 806.

¶6 Deerprint first asserts that the circuit court erred because neither the Town’s zoning authority nor the Village’s extraterritorial plat-approval authority can prohibit the condominium form of ownership. *See* WIS. STAT. § 703.27(1) (“A zoning or other land use ordinance or regulations may not prohibit the condominium form of ownership”).³ We disagree with Deerprint’s take on the court’s decision.

¶7 First, the circuit court did not require Deerprint to obtain approval to permit condominium ownership but to permit a multi-family residential development on property zoned to allow only one single-family residential structure per five-acre parcel. As the court correctly noted, WIS. STAT. § 703.27 does not exempt condominiums from zoning regulations. Since Deerprint’s development does not conform to the restrictions of CES-5 Country Estates zoning, allowing it to go forward once again would de facto rezone the parcel to

³ WISCONSIN STAT. § 703.27(1) provides in full:

A zoning or other land use ordinance or regulations may not prohibit the condominium form of ownership or impose any requirements upon a condominium that it would not impose if the development were under a different form of ownership. No provision of a state or local building code may be applied differently to a building in a condominium than it would be applied if the building were under a different form of ownership unless the different application is expressly permitted in that provision and the different application is reasonably related to the nature of condominium ownership. No subdivision ordinance may apply to any condominium unless the ordinance is, by its express terms, applicable to condominiums and the application is reasonably related to the nature of condominium ownership.

other than CES-5 Country Estates. Rezoning via another PDO is required because the Village's zoning change moratorium invalidated the first PDO.

¶8 Second, the circuit court correctly described what WIS. STAT. § 703.27(1) does do: it (1) prohibits zoning ordinances from either outlawing the condominium form of ownership or imposing on condominiums requirements not imposed on other forms of ownership; and (2) requires a municipality to pass an ordinance if it wants to apply subdivision ordinances to condominiums. The statute neither explicitly nor implicitly exempts condominiums from a town's zoning laws or a village's extraterritorial plat-approval authority. WISCONSIN STAT. § 236.10(1)(b) requires approval of a plat by both the town and governing body of the municipality for property situated in the extraterritorial plat review jurisdiction.

¶9 The Village's extraterritorial plat-approval authority encompasses the creation and adoption of the condominium plat, in part by virtue of a Village ordinance that makes subdivision and platting regulations applicable to condominiums and planned unit developments as authorized by WIS. STAT. ch. 236. *See* VILLAGE OF NEWBURG, WIS., ORDINANCES ch. 18, § 18.04(6)(b) (2007). We reject Deerprint's contention that the ordinance, enacted on May 3, 2007, does not apply because it postdates the April 2007 recording of the declaration and plat. As the Town's original approval is void, the timing of the ordinance enactment does not matter; it is effective now.

¶10 In addition, WIS. STAT. § 236.45 authorizes a municipality to regulate subdivisions. Subdivision regulations are applicable outside city and village boundaries. WIS. STAT. § 236.02(5). WISCONSIN STAT. § 703.27(1) authorizes a municipality to include condominiums in its subdivision regulations.

For the subdivision ordinance to apply to condominiums, it must expressly refer to condominiums. *See id.* The Village's ordinance does so. The Village's subdivision ordinance therefore is applicable to Deerprint's parcel, whether developed as a subdivision plat or a condominium plat.

¶11 Deerprint's final argument is that the circuit court's decision creates uncertainty and administrative difficulties with respect to the creation of the condominium form of ownership. To the contrary, the court simply held that all zoning provisions have to be met for a condominium to be valid.

¶12 In sum, under WIS. STAT. § 236.10(1)(b), a plat requires approval by both the Town and the Village. The approval requirement applies to a condominium plat because, under WIS. STAT. § 703.27(1), a condominium development is subject to a subdivision ordinance if the ordinance, by its express terms, is made applicable to the condominium development. Here, Deerprint has neither Town nor Village approval. The Town's 2007 approval is invalid because it was based on illegal, *if de facto*, rezoning and despite that its parcel undisputedly lies within the Village's extraterritorial jurisdiction, Deerprint never has sought plat approval from the Village.

By the Court.—Judgment affirmed.

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

