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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1881

Town of Brook Park,
Respondent,

vs.

Steve Tretter,
Appellant.

Filed September 6, 2011
Affirmed
Stoneburner, Judge

Pine County District Court
File No. 58CV08152

Tim A. Strom, Scott A. Witty, Hanft Fride, P.A., Duluth, Minnesota (for respondent)

Karen E. Marty, Marty Law Firm, L.L.C., Bloomington, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Johnson, Chief Judge; and Willis, Judge.*

U N P U B L I S H E D   O P I N I O N

STONEBURNER, Judge

Appellant challenges summary judgment in favor of respondent town, enjoining appellant from continued operation of his commercial salvage and scrap business. Because the district court did not err by concluding that the town's zoning ordinance is

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

valid and does not authorize the town to permit operation of appellant's business, we affirm.

FACTS

In 1992, respondent Brook Park Township (the town) adopted a zoning ordinance under the authority granted by Minn. Stat. § 462.357 (1992). The zoning ordinance provides, in relevant part, for conditional use of agricultural-residential-use land for "general commercial" purposes when 13 requirements described by the ordinance are satisfied, including the requirement that commercial properties have a minimum of 300 feet of frontage on state trunk highways.

On October 27, 2005, appellant Steve Tretter applied for a conditional-use permit (CUP) to operate a salvage yard in an agricultural-residential zone. The cover letter to the application asserts that the application meets 12 of the 13 requirements. It is undisputed that the property for which Tretter sought the CUP does not have any frontage on a state trunk highway.

Tretter inquired about the status of his application at a November 9, 2005 meeting of the town board, and the minutes of the meeting reflect that a hearing on the application was to be scheduled for December. On November 24, 2005, the town published notice in a local newspaper, announcing a December 10, 2005 public hearing on Tretter's application. The next day, the town mailed notice of the hearing to all residents within a quarter mile of the affected property. There is no evidence that notice was mailed to Tretter.

Tretter did not appear at the December 10 public hearing before the town planning commission. The planning commission considered Tretter's application, a cover letter from his attorney, and a letter opposing the application. Two members of the commission expressed concern on the record: one discussed pollution and the other discussed the effect on local property values. The planning commission made no findings and unanimously recommended denial of the application.

At the town board's regular meeting on December 13, 2005, a member of the planning commission informed the board of the planning commission's recommendation to deny Tretter's CUP request. The board, without making or adopting findings, unanimously granted a motion to deny the CUP. The minutes of the meeting state that "[t]he details of the Planning Commission meeting can be found in there [sic] minutes from the meeting. It was noted that [Tretter] did not attend the Planning Commission hearing or the Township meeting this evening." Tretter asserts that he was not notified of the meeting and was not aware of the denial until he received a letter postmarked January 28, 2006.[1]

Tretter's attorney advised him that his application had been approved by operation of the "60-day rule" contained in Minn. Stat. § 15.99, subd. 2 (2004). By letter dated April 3, 2006, Tretter's attorney explained to the planning commission that Tretter's application was submitted on October 25, 2005, and that a letter postmarked January 28,

[1] Tretter's brief on appeal refers to "[a] letter dated January 28, 2006," without any citation to the record. The letter does not appear to be in the record, but the parties agree that this was the first written notice to Tretter of the denial of his CUP application. There is no indication that the letter contained any findings.

2006, "included a denial of the [CUP] application." Tretter's letter states that Minn. Stat. § 15.99, subd. 2, plainly provides that an agency must approve or deny a request within 60 days, and that case law "clearly states that if a request is not denied within 60 days then it is deemed granted and the applicant may begin operating as though the permit had been granted." The letter states that Tretter had not yet begun to operate his business, but was prepared to do so as soon as he received all other required licenses and permits. The letter concludes with a request that Tretter be granted the CUP and a statement that if there is not a response within 30 days "we will file a declaratory judgment with the District Court."

The town board concluded that it was obligated to grant a CUP and notified Tretter that his presence was required at a meeting to authorize a CUP. Tretter and his attorney attended the meeting but left before it was concluded because they did not agree with the conditions proposed for the CUP. The fact that Tretter lacks state-highway frontage and, therefore, did not qualify for a CUP was mentioned at the meeting but the town board nonetheless issued a CUP with conditions, including a limitation on the number of vehicles on the property; a requirement that, before beginning operation, a privacy fence be built along part of the property abutting a county road; and a condition allowing town officials to inspect the property.

By letter dated May 3, 2006, Tretter's attorney informed the planning commission and town board that Tretter was pleased with the issuance of a CUP but not pleased with the "unreasonable restrictions and limitations which are included." The letter asserts that, to successfully operate his business, Tretter will need more than 20 cars on the property

at one time and explains why restriction of that need effects a hardship on Tretter. The letter noted that similar restrictions were not imposed on similarly situated parties. The letter stated that Tretter does not object to the requirement of a privacy fence but objects to being required to construct the fence before starting the business and requested that he be allowed to begin operating before installing the fence "with the understanding that as soon as the logger has completed his job, the fence will be installed."

Tretter did not install a fence, did not adhere to the 20-car limitation, and refused to allow town officials to inspect the property. By letter dated September 8, 2006, the town's attorney, at the request of the board, sent a letter to Tretter advising him that he was in violation of the CUP and advising him to "cease and desist from any further operations on the property until the privacy fence is installed." Tretter did not stop operating the business or install the fence. The town then noticed a public hearing concerning Tretter's alleged CUP violations. The hearing occurred on November 15th and 20th. At the hearing, Tretter asserted that his CUP was granted without restrictions due to the town's failure to deny his application within 60 days. The town board disagreed and revoked the CUP and started this action in district court to enjoin Tretter from continuing to operate his business without a permit.

Tretter asserted affirmative defenses, including, in relevant part, that the conditions contained in the CUP were arbitrary. The town moved for partial summary judgment, arguing that the board lacked authority to grant the application. The district court noted factual disputes about whether Tretter received notice of the December hearings and whether the town adopted written reasons for the denial of the CUP at the

time of denial. The district court also noted the unsettled legal issue of whether either of these procedural defects, if established, would trigger application of the 60-day rule contained in Minn. Stat. § 15.99. But the district court concluded that the ordinance plainly deprived the town of authority to issue a CUP that did not meet highway-frontage requirements and held that Tretter was not entitled to automatic issuance of a CUP that was beyond the town's authority to issue. The district court granted the town's motion for partial summary judgment.

Tretter filed a motion in limine to exclude evidence relating to the town's ordinance, arguing that the ordinance is not valid because it was not adopted under the requirements of Minn. Stat. §§ 366.10–.181 (1992). The district court treated this motion as a motion for summary judgment, because a ruling in Tretter's favor would have been dispositive. The motion was denied based on the district court's conclusion that the ordinance was validly adopted under Minn. Stat. §§ 462.351–.365 (1992). The district court rejected the town's alternative argument that, notwithstanding adoption requirements, the ordinance, which has been published for more than three years, is conclusively valid under Minn. Stat. § 599.13 (2008).

Tretter was allowed to amend his answer to assert additional affirmative defenses, including the assertion that the town violated his right to equal protection and engaged in discriminatory enforcement of the law. The town moved for summary judgment, arguing that there are no issues of material fact regarding Tretter's equal-protection and discriminatory-enforcement claims and that, because Tretter admits that he is operating his salvage yard without a valid permit, the town is entitled to judgment. The district

court agreed and granted summary judgment to the town, enjoining Tretter from continued operation of his salvage business. This appeal followed.

D E C I S I O N

On appeal from summary judgment, a reviewing court examines whether (1) there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Appellate courts review these questions de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

I. Validity of the town's zoning ordinance

Tretter argues that the district court erred by concluding that a town may adopt a zoning ordinance under Minn. Stat. §§ 462.351–.365 without meeting the requirements of Minn. Stat. §§ 366.10–.181. We disagree with Tretter's argument.

Chapter 366 of the Minnesota Statutes deals, in relevant part, with town boards. Minn. Stat. § 366.10 has, since 1939, provided that the board of supervisors of a town may submit to the legal voters of the town the matter of whether the board shall adopt land-use and zoning regulations and restrictions in the town. Tretter asserts that a town is precluded from enacting a zoning ordinance without submitting this question to the voters. But, effective January 1, 1966, the legislature, by enacting the Municipal Zoning Act (the act), provided for municipal planning by authorizing zoning, official maps, subdivision regulation, and other official controls. 1965 Minn. Laws, ch. 670 §§ 1–15, at 995–1009 (codified, as amended, at Minn. Stat. §§ 462.351–.365 (2010)). Under the act, any town may regulate land use by enacting a zoning ordinance. Minn. Stat. §§ 462.352,

subd. 2 (defining "municipality" to include "any town"); .357, subd. 1 (providing that municipalities may, by ordinance, regulate land use through a zoning ordinance).

Tretter argues that a town may not enact a zoning ordinance under section 462.357 without first obtaining voter approval under section 366.10 and that allowing a town to enact a zoning ordinance without voter approval creates an irreconcilable conflict between the statutes. But both statutes are permissive. Minn. Stat. § 645.44, subd. 15 (2010) (noting that the word "may," as used in the Minnesota Statutes, is permissive). We conclude that the statutes are not in conflict, and, applying the statutes' ordinary meanings, we conclude that a town is not mandated to obtain voter approval for zoning before enacting a zoning ordinance under section 462.357.[2] *See Altenburg v. Bd. of Sup'rs*, 615 N.W.2d 874, 878 (Minn. App. 2000) (citing Minn. Stat. §§ 462.351–.365, for the proposition that "[t]ownships are vested with the statutory authority to enact official controls, such as zoning ordinances"), *review denied* (Minn. Nov. 21, 2000). The district court did not err by holding that the town's zoning ordinance was validly enacted under Minn. Stat. §§ 462.351–.365.

II. Lack of authority to grant Tretter's CUP application

Minn. Stat. § 15.99, subd. 2(a), provides that "[f]ailure of an agency to deny a [CUP] request within 60 days is approval of the request." Tretter's counterclaim asserted that the town's failure to notify him of denial of his application within 60 days of its

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[2] Because the statutes are not ambiguous, we do not address Tretter's analysis based on the legislative history of Minn. Stat. §§ 462.351–.365. *See State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996) (stating that if a statute, construed according to ordinary rules of grammar, is unambiguous, a court may not engage in further statutory construction and must apply its plain meaning).

submission triggered automatic and unconditional approval of his application under the statute. But, as the district court correctly held, the Minnesota Supreme Court rejected this argument in *Hans Hagen Homes, Inc., v. City of Minnetonka*, 728 N.W.2d 536, 540 (Minn. 2007) (holding that failure to provide applicants with written reasons for denial of a zoning request within 60 days does not trigger automatic approval under Minn. Stat. § 15.99, subd. 2(a)).

Tretter also asserted that procedural defects—the town's failure to mail notice of the December meetings to him and its failure to adopt findings for the denial at the time it denied the application—triggered automatic approval of his CUP under Minn. Stat. § 15.99, subd. 2(a). The district court noted that there are material fact questions concerning the alleged procedural defects, and the law was (at that time) unsettled about whether the asserted procedural defects trigger automatic approval. *See Hans Hagen Homes*, 728 N.W.2d at 540 (leaving open the question of whether a municipality's failure to adopt written reasons for decision within 60 days would result in automatic approval).[3] But the district court correctly dismissed Tretter's claim on the basis that the town lacked authority under its ordinance to grant Tretter's application because Tretter's property, which does not have state-highway frontage, does not qualify for a general-commercial CUP.[4] *See Breza v. City of Minnetrista*, 725 N.W.2d 106, 114 (Minn. 2006) (stating that

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[3] In *Johnson v. Cook Cnty.*, 786 N.W.2d 291, 296 (Minn. 2010), the supreme court held that the requirement for adopting written reasons for a decision within 60 days is directory rather than mandatory, such that failure to comply with that requirement does not result in automatic approval under Minn. Stat. § 15.99, subd. 2(a).

[4] Despite its lack of authority to grant a CUP to Tretter, the town issued CUP #9, allowing Tretter to conduct his salvage business with conditions on property that lacked

the automatic-approval provision of Minn. Stat. § 15.99 does not authorize automatic approval of a permit that exceeds the agency's authority to grant such approvals under state law); *PTL, L.L.C. v. Chisago Cnty. Bd. of Comm'rs*, 656 N.W.2d 567, 575 (Minn. App. 2003) (stating that "standards established in the zoning ordinance are conclusive until the board rezones the district or amends the zoning ordinance through proper legislative channels"). Although *Breza* involved a state law, we conclude that the principle–that the automatic-approval provision of Minn. Stat. § 15.99 does not expand an agency's authority to issue a CUP–applies to the circumstances of this case.

On appeal, Tretter does not argue that automatic approval under Minn. Stat. § 15.99, subd. 2(a), could waive the frontage requirement contained in the town's ordinance. Tretter argues that the town cannot rely on the state-highway-frontage requirement to preclude automatic approval of his CUP application because enforcement of the requirement against him is arbitrary and capricious. Tretter's argument is premised on his assertions that (1) enforcement of the CUP conditions violates his right to equal protection under the law; (2) the town's failure to give him notice of the December hearings violated his right to due process; and (3) because state law permits townships to allow commercial uses at any location, the town should not be allowed "to use a local restriction to defeat Minn. Stat. § 15.99."

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state-highway frontage. Tretter did not challenge the conditions in a legal proceeding: he merely asserted that he was entitled to an unconditional CUP. CUP #9 was revoked for noncompliance, and Tretter has never sought reinstatement of CUP #9. The validity of CUP #9 was not an issue in the district court and is not an issue on appeal.

Tretter's equal-protection argument was rejected by the district court because Tretter failed to present sufficient evidence to survive summary judgment. And on appeal, Tretter has failed to point to evidence in the record that would have created a genuine issue for trial on his equal-protection claim. And the fact that the town may have erroneously issued CUPs in the past does not create a right to require continuation of such error. *See Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 607 (Minn. 1980) (explaining that "administration of zoning ordinances is a governmental . . . function, and the municipality cannot be estopped from correctly enforcing the ordinance even if the property owner relied to his detriment on prior [inconsistent] city action"). The district court did not err by rejecting this argument.

Tretter's arguments concerning alleged notice and procedural violations have been addressed above. He has not presented any authority for the argument that procedural violations in the handling of his CUP application affect the validity of the highway-frontage requirement in the zoning ordinance. And we find no merit in Tretter's assertion that the town used a local restriction to defeat Minn. Stat. § 15.99, subd. 2(a), because there is nothing in the record that shows that the town enacted the highway-frontage provision for the purpose of avoiding application of Minn. Stat. § 15.99, subd. 2(a). The district court did not err in granting summary judgment to the town.

Affirmed.