COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-0091

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

PARAS REDDY,

PLAINTIFF-RESPONDENT,

V.

TOWN OF BELMONT,

DEFENDANT-APPELLANT.

PARAS REDDY,

PLAINTIFF-RESPONDENT,

V.

TOWN OF BELMONT, AND BELMONT TOWN BOARD,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. The Town of Belmont and the Belmont Town Board (individually, Town and Board; collectively, Belmont) appeal a judgment which directs the Board to approve the final plat submitted to it by Paras Reddy and invalidates the Town's subdivision ordinance as to Reddy's plat, and concludes that the moratorium, upon which the Board based its denial,[1] does not prohibit Reddy's plat. Belmont claims that the circuit court erred when it refused to dismiss Reddy's consolidated declaratory judgment and certiorari actions for failure to comply with the notice of claim statute and when it concluded that the Board's denial of Reddy's plat was arbitrary. For the reasons discussed below, we agree with the circuit court and affirm.

BACKGROUND

Reddy sought to divide a parcel of land into nine lots for a housing development. He submitted a preliminary plat for the Board's approval in May of 1996. On June 11, 1996, the Town adopted a moratorium which stated in relevant part:

> THEREFORE BE IT RESOLVED, that the Town of Belmont adopt a moratorium for the issuance of building permits for any land division and residential subdivisions for a period of not more than nine (9) months.

The moratorium had been posted, but not published, prior to its adoption. Later in the same June 11th meeting, the Board denied Reddy's request for preliminary plat approval. The minutes of the Board meeting stated:

[1] Because the moratorium at issue has now expired, the propriety of the summary judgment declaring it unenforceable is now a moot issue. We will therefore consider the validity of the moratorium only to determine whether it was available to support the Board's action.

> Chairman Nodolf pointed out that the Subdivision request was not in compliance with the Lafayette County Zoning Ordinance. He also stated that the Town of Belmont had adopted a Subdivision Ordinance on March 27, 1996 and the plan for a subdivision does not meet its criteria.
>
> After much discussion, a motion was made by Supervisor DeBuhr to deny the request for the subdivision until the moratorium is lifted and the Zoning Committee makes a decision. Second by Supervisor Austin. Motion carried.

On August 16, 1996, Reddy served the Town with a written notice of circumstances of claim and claim. The Town served Reddy with a notice of disallowance of claim on September 9, 1996. On February 24, 1997, Reddy filed an action for declaratory and injunctive relief which sought to invalidate the Town's subdivision ordinance and the moratorium. Reddy later voluntarily dismissed and refiled his declaratory judgment action adding the Board as a party and requesting that it be enjoined from enforcing the ordinance or moratorium against him.

Meanwhile, in January of 1997, Reddy submitted a final subdivision plat for the Board's approval. The Board denied his request at a meeting on February 13, 1997 on the basis of the moratorium and a lack of positive response. The Town formally notified Reddy by letter on March 8, 1997 that his request had been denied. Reddy sought certiorari review of that determination, which was consolidated with his declaratory judgment action. After finding that the declaratory judgment claim was moot with respect to the moratorium, the circuit court granted Reddy summary judgment declaring the Town's ordinance invalid. The court also concluded that the Board had acted arbitrarily and directed it to approve Reddy's final subdivision plat upon its filing with the Town.

DISCUSSION

Standard of Review.

It is well established that this court applies the same summary judgment methodology as that employed by the circuit court. Section 802.08, STATS.; ***State v. Dunn***, 213 Wis.2d 363, 368, 570 N.W.2d 614, 616 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. ***Id.*** If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** at 368, 570 N.W.2d at 616-17. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. ***Id.*** at 368, 570 N.W.2d at 617.

On certiorari review under § 236.13(5), STATS., we will not disturb the factual findings of the approving authority so long as "any reasonable view of the evidence sustains them." ***Hoepker v. City of Madison Plan Comm'n***, 209 Wis.2d 633, 643, 563 N.W.2d 145, 149 (1997) (citation omitted). However, "whether an approving authority exceeded its statutory or constitutional authority is a question of law, which we review *de novo*."[2] ***Id.*** at 644, 563 N.W.2d at 149.

Notice of Claim.

Belmont contends that Reddy's claims should be barred for failure to provide an adequate notice of claim. Section 893.80, STATS., requires that a

[2] Contrary to Belmont's assertion, we are not limited to considering whether the Board acted arbitrarily because, as will be discussed more fully below, the Board's decision was not a discretionary one. It is therefore irrelevant to our analysis whether the Board's action was reasonable in light of its belief that it was acting pursuant to a valid ordinance.

claimant give notice to the attorney general within 120 days of the event giving rise to a claim against a government entity, such as a town.

The notice served on the attorney general on August 16, 1996, informed Belmont that Reddy intended to file an action for declaratory and injunctive relief challenging the validity of the subdivision ordinance and moratorium and the denial of his subdivision request. The notice referred to the preliminary plat, rather than the final plat, because the final plat had not yet been submitted.

Belmont asserts that Reddy was required to file a new notice of claim before refiling his declaratory judgment action, based primarily on ***Vanstone v. Town of Delafield***, 191 Wis.2d 586, 530 N.W.2d 16 (Ct. App. 1995), and similar cases. Unlike the plaintiff in ***Vanstone***, however, Reddy is not relying on a previously-filed lawsuit to provide actual (as opposed to formally-served) notice of claim.[3] Rather, Reddy supplied a timely document which both identified the factual circumstances of his claim and included an itemized statement of the relief which he sought. Because his initial notice of claim had already satisfied the requirements of § 893.80, STATS., Reddy was not required to file another notice before commencing the declaratory judgment lawsuit.

Furthermore, Belmont cites no authority, and we could find none, for the proposition that a notice of claim is required for a certiorari action. To the contrary, case law establishes that the more specific requirements of § 236.13(5), STATS., take precedence over the more general notice of claim provision. ***Little***

[3] It does appear that the plaintiff in ***Vanstone*** had also filed a notice of claim during the pendency of his prior lawsuit. However, the validity of that notice of claim was not raised on appeal.

Sissbagama Lake Shore Owners Assoc. v. Town of Edgewater, 208 Wis.2d 259, 559 N.W.2d 914 (Ct. App. 1997). In any event, the denial of Reddy's application for plat approval demonstrates that Belmont had actual notice of his subdivision request and was not prejudiced by any lack of formality in that regard. *See* § 893.80(1)(a), STATS. Thus, we need not decide whether the initial notice of claim's reference to the preliminary, rather than the final plat, sufficiently described the circumstances of Reddy's certiorari claim.

Plat Approval.

Under § 236.13(1), STATS., plat approval is conditioned on compliance with relevant statutory provisions and municipal ordinances. This court has previously characterized a town board's plat approval role as ministerial in nature. ***State ex rel. Columbia Corp. v. Pacific Town Bd.***, 92 Wis.2d 767, 780, 286 N.W.2d 130, 136 (Ct. App. 1979). Therefore, a town board "is not to make general policy determinations, but rather to determine whether previously enacted policies will be violated by the plat being reviewed." ***Id.***

We agree with Reddy that, by relying on the lack of a "positive response" to his plat, the Board clearly exceeded its statutory authority and took policy considerations into account as if its approval were a discretionary rather than a ministerial matter. We further agree that, regardless of its validity, the moratorium was an improper basis on which to deny plat approval because the moratorium's plain language indicates that it applies to building permits, not to subdivisions. Finally, we conclude, as did the circuit court, that the subdivision ordinance was invalid as to Reddy.

Section 236.45(2)(a), STATS., allows any town which has established a planning agency to adopt ordinances governing the subdivision of land.

However, the record shows that the Town attempted to enact its subdivision ordinance two months *before* it created a planning agency. Although Belmont does not concede that the Town's ordinance was invalid, it offers no argument in support of the ordinance's validity. Because the issue was not briefed, we need not discuss the subdivision ordinance further, other than to conclude that it was not a proper basis upon which to deny Reddy's plat. *See* ***Goossen v. Estate of Standaert***, 189 Wis.2d 237, 252, 525 N.W.2d 314, 320 (Ct. App. 1994).

Remedy.

Finally, Belmont claims for the first time on appeal that it lacks authority to approve the final plat as directed by the court, because there is no certification of state approval affixed to the plat. The certification requirement to which Belmont refers is set forth in § 236.12, STATS., and applies only to subdivisions which create lots less than one-and-a-half acres in area. Reddy's proposed lots were approximately two acres in area. Therefore, even if Belmont did not waive this argument, we consider it to be without merit.

By the Court.—Judgment affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)5., STATS.