COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3347 **Cir. Ct. No. 02-SC-62**

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

WOOD COUNTY,

PLAINTIFF-RESPONDENT,

V.

GREGORY L. SWANK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Gregory L. Swank appeals from a forfeiture of $500.00 plus costs. He makes the following arguments: (1) Wood County had no legislative authority to adopt Wood County Private Sewage System Ordinance

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

(PSSO) 702.04(4)A.3.d.; (2) the fee constituted an unlawful tax or special assessment; (3) PSSO 702 violates equal protection principles; (4) Wood County's amendment of PSSO 702 violated procedural due process; (5) Wood County unlawfully delegated or bargained away its police power; (6) the fee takes private property contrary to article X, section 2 of the Wisconsin Constitution and the Fifth and Fourteenth Amendments to the United States Constitution; (7) PSSO 702 interferes with his right to contract; and (8) he has already paid the fee PSSO imposes. We conclude Swank's arguments have no merit and affirm.

FACTS

¶2 The parties stipulated to the basic facts of this case. Swank has a holding tank for sewage on his property. Wood County zoning requires him to have a sanitary permit for this tank. Accordingly, he signed a Holding Tank Agreement that provided, among other things, that Swank would:

> pay charges and costs incurred by the municipality or county for inspection, pumping, hauling or otherwise servicing and maintaining the holding tank in such manner as to prevent or abate any nuisance or health hazard caused by the holding tank …. In the event the owner does not pay the costs within thirty (30) days, the owner specifically agrees that all the costs and charges may be placed on the tax roll as a special assessment for the abatement of a nuisance, and the tax shall be collected as provided by law.

The agreement provided further that:

> The owner agrees to contract with a person licensed ... who shall submit to the municipality and to the county a report in accord with ILHR 83.18(4)(a)2., Wis. Admin. Code for the servicing on a semi-annual basis.

¶3 On February 22, 2000, the Wood County Planning and Zoning Committee (Committee) entered into a contract requiring Wood County to employ

Carmody, Inc., which sells electric alarm systems. The contract had a liquidated damages clause that required Wood County to pay between 80% and 100% of all the fees that would have been payable to Carmody during the original seven-year term of the contract if Wood County breached the contract. The contract required Carmody to design, install, and maintain an alarm system that would report the conditions of holding tanks. Essentially, the alarm system would notify a septic carrier when a tank was full. The carrier would notify the database once it emptied the tank. This would relieve Wood County from recording and monitoring the levels of holding tanks. Wood County was responsible for collecting from the holding tank owners the $36 fee Carmody charges for each holding tank.

¶4 The Committee held a public hearing to receive testimony on a proposal to establish a fee and collection procedure for costs related to the Carmody reporting system. Subsequently, the Committee amended PSSO 702 "for the purpose of promoting and protecting the public health, safety, general welfare and natural resources of Wood County …." The amendment, PSSO 702.04(4)A.3.d,[2] required tank owners to pay "an annual reporting service fee," which the Committee set at $36.

¶5 Wood County prosecuted Swank in small claims court because he did not pay his $36 fee. The county sought a civil forfeiture of $500 pursuant to

[2] PSSO 702.04(4)A.3.d provides: "All owners of holding tank systems shall pay an annual reporting service fee as set by Wood County and this ordinance. All such payments are due and owing for each holding tank system by August 31 of each year."

PSSO 702.09(2).[3] The circuit court ordered a forfeiture of $500 plus costs. Swank appeals.

STANDARD OF REVIEW

¶6 This appeal requires us to interpret and apply statutes and municipal ordinances to undisputed facts. The application of the law to a particular set of facts is a question of law. ***Bucyrus-Erie Co. v. DIHLR***, 90 Wis. 2d 408, 417, 280 N.W.2d 142 (1979). We review questions of law de novo. ***First Nat'l Leasing Corp. v. Madison***, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977).

DISCUSSION

1. Wood County May Adopt PSSO 702.04(4)A.3.d.

¶4 Swank asserts that no statute empowers the county to impose the $36 fee. Wood County claims it imposed the fee pursuant to its general police power to promote public health and safety.[4] We conclude that WIS. STAT. § 145.20(4)[5] authorizes a governmental unit to assess tank owners "for costs relating to the pumping of a septic or holding tank." Swank interprets this statute to mean that

[3] PSSO 702.09(2) provides in pertinent part: "Any person who fails to comply ... shall, upon conviction thereof, forfeit not less than $25.00 nor more than $200.00 and costs of prosecution for each violation. Each day a violation exists or continues shall constitute a separate offense."

[4] We note that Swank's reply brief does not contest Wood County's assertion that its police power authorized it to adopt PSSO 702.

[5] WISCONSIN STAT. § 145.20(4) provides: "SPECIAL ASSESSMENT FOR HOLDING AND SEPTIC TANK PUMPING. A governmental unit may assess the owner of a private sewage system for costs related to the pumping of a septic or holding tank. The governmental unit shall make any assessment in the same manner that a city, village or town makes an assessment under s. 66.0703."

Wood County may only assess a fee if it actually pumps the tank. We disagree. Nothing in the statute limits fee assessment to situations where the government pumps the tank. The phrase "costs related to the pumping" has much broader implications. Recordkeeping is a cost related to pumping. Section 145.20(4) allows Wood County to assess that cost against tank owners. Wood County had authority to adopt PSSO 702.04(4)A.3.d.

2. $36 Is A Fee, Not A Special Assessment or Tax

¶7 Swank contends the $36 fee constitutes an impermissible tax or special assessment because the tank owners do not receive a unique benefit from the new recordkeeping system. He claims that WIS. STAT. § 145.20(4) "strongly suggests that any special assessment" imposed must conform with "the rigors of" WIS. STAT. § 66.60.[6] We disagree. WISCONSIN STAT. § 145.20(4) authorizes Wood County to assess charges for costs related to holding tanks and specifies that the government may collect those charges as it would under WIS. STAT. § 66.0703. Section 66.0703 provides for the collection of special assessments. However, the legislature has not required the county to conform with § 66.0703 in order to collect fees under § 145.20(4). We addressed a similar situation in ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, 264 Wis. 2d 318, 667 N.W.2d 14. In that case, we discussed the interplay of WIS. STAT. § 88.90 and § 66.0703. ***Id.***, ¶13. Section 88.90 allowed the government to collect a fee

[6] WISCONSIN STAT. § 66.0703(1) governs special assessments generally and provides in pertinent part that a governmental unit may "collect special assessments upon property in a limited and determinable area for special benefits conferred upon the property by any municipal work or improvement ...." The statute also provides a procedure for imposing the special assessments and addresses assessment made pursuant to police power. *See* § 66.0703(2)-(14).

"as other special assessments are collected." We concluded that this reference to special assessments did not render the charges under § 88.90 special assessments:

> The intent of the legislature is plainly conveyed by the language of these statutes. If a municipality charges and assesses costs that are authorized under WIS. STAT. § 88.90, it may collect them in the same manner it collects special assessments under [WIS. STAT. § 66.0703]. However, the municipality charges and assesses those costs under the authority granted in § 88.90, not [66.0703]. It therefore need not comply with the requirements for special assessments contained in those subsections.

Id., ¶14. Under ***Town of Bristol***, the statute does not require Wood County to comply with the requirements of § 66.0703. Section 145.20(4) authorizes Wood County to assess the $36 fee against Swank to recover the "costs related to the pumping of a septic or holding tank." We conclude the charge is not a special assessment.

¶8 Swank also asserts that the $36 charge is a tax because it raises revenue that benefits the general public. He claims Wood County employees no longer need to monitor tank levels, which allows the workforce to do other things. Likewise, protecting the groundwater from sewage contamination also protects the general public.

¶9 To ascertain whether a charge is a fee or a tax, we focus on the substance and not the form of the imposition. ***River Falls v. St. Bridget's Catholic Church***, 182 Wis. 2d 436, 442, 513 N.W.2d 673 (Ct. App. 1994). "[I]f the primary purpose of a charge is to cover the expense of providing services, supervision or regulation, the charge is a fee and not a tax." ***Id.*** Wood County charged Swank $36, which was the cost of maintaining the reporting system. Common sense tells us that this charge recovers costs rather than raises revenue; a direct correlation exists between the cost of Carmody's services and the amount of

the fee. The fee does not serve the general benefit of the public as Swank contends; rather, it holds tank owners responsible for the costs of recordkeeping related to monitoring tanks.

¶10 Finally, Swank urges us to follow ***River Falls v. St. Bridget's Catholic Church***, where we distinguished governmental functions from proprietary functions and reasoned that a municipality acting in a proprietary capacity imposed a fee, not a tax. ***Id.*** at 442-43. Swank argues that monitoring the tank levels is a government function because it promotes public welfare; thus, the charge is a tax. However, Swank focuses only on our distinction between government and proprietor functions in ***River Falls***. The probative test remains whether the charge raises revenue or recoups costs for "services, supervision or regulation." ***Id.*** at 442. We conclude that the $36 charge recovers costs and constitutes a fee.

3. Ordinance Does Not Violate Equal Protection

¶11 Swank contends that selectively requiring holding tank owners to finance an improvement to Wood County's recordkeeping system violates equal protection provisions in the Fourteenth Amendment to United States Constitution and article I, section 1 of the Wisconsin Constitution. The parties agree that PSSO 702 classifies people as either residents that own tanks or residents who do not. Swank contends that tank holders receive disparate treatment because residents who do not own tanks pay nothing, yet benefit equally from the reduced workload of county employees.

¶12 To comport with equal protection requirements, a "reasonable and practical ground for the classification" must exist. ***State v. Bleck***, 114 Wis. 2d 454, 470, 338 N.W.2d 492 (1983). "If a statutory classification does not involve a

suspect class or a fundamental interest, it will be sustained if there is any rational basis to support it." ***Id.*** at 468.

¶13 Wood County asserts that it is reasonable to require only tank owners to pay the costs of keeping records related to tank reporting. It argues that PSSO 702 treats all tank owners the same. We agree. PSSO 702 appropriately charges only tank owners $36 for the cost of Carmody's services. The very nature of any fee is to charge persons who benefit from a service. If a tank monitoring fee violates equal protection, all fees would do so. We find no merit in Swank's argument that the purpose of PSSO 702 is to benefit Wood County residents generally by alleviating the workload of county employees.

4. Ordinance Does Not Violate Due Process

¶14 Swank contends that he did not have a meaningful opportunity to be heard because Wood County contractually bound itself to pass PSSO 702 before it held a hearing on the issue. He concedes that he did not actually participate in the hearing; nevertheless, he claims that he would have been deprived of a meaningful opportunity to be heard because Wood County faced liquidated damages if it did not amend PSSO 702.

¶15 We need not address Swank's challenge to procedural due process because he did not avail himself of the opportunity to be heard. We refuse to decide issues based on hypothetical facts. ***Pension Mgmt, Inc. v. DuRose***, 58 Wis. 2d 122, 128, 205 N.W.2d 553 (1973).

5. Wood County May Contract With Private Businesses

¶16 Swank also generally contests Wood County's decision to contract with a private business for recordkeeping services. He claims that Wood County

has unlawfully bargained away its police power. We are not persuaded. Swank has not shown that Wood County used its police power to serve a private purpose. PSSO 702 clearly states that its purpose is to "promote and protect public health, safety, general welfare and natural resources." Whether Wood County or a private business executes that purpose is immaterial.

¶17 Swank also contends that WIS. STAT. § 145.20 assigned the responsibility of regulating sewage systems to Wood County. He argues that a county employee must monitor when the holding tanks are pumped. We disagree. Section 145.20(1) allows the government to assign administration duties to "any office, department, committee, board, commission, position or employee of that governmental unit." The Wood County Board of Supervisors assigned the duty of administering private sewage to the Wood County Department of Planning & Zoning, which hired Carmody. Nothing in § 145.20 prohibits the department from relying on a private entity to collect the data on holding tanks. The department still has the responsibility of supervising the recordkeeping. Wood County has not unlawfully exercised, or delegated, its police power.

6. Ordinance Not Unlawful Taking of Property

¶18 Swank claims that the fee takes private property contrary to article X, section 2 of the Wisconsin Constitution and the Fifth and Fourteenth Amendments to the United States Constitution because it serves a private, non-public purpose. He does not develop the argument beyond this broad allegation. Wood County notes that "Swank does not argue that the County has unlawfully taken private property for a public use; he argues that the County has taken private property for a private use." It argues that neither the United States Constitution nor the Wisconsin Constitution safeguard against taking private funds for private

purposes. In Swank's reply brief, he does not dispute Wood County or further develop his argument that the fee constitutes an unconstitutional taking. We will not consider constitutional claims merely raised but not argued. ***Dumas v. State***, 90 Wis. 2d 518, 523, 280 N.W.2d 310 (Ct. App. 1979). And issues to which no response is made are deemed confessed. ***State ex rel. Blank v. Gramling***, 219 Wis. 196, 199, 262 N.W. 614 (1935).

7. Ordinance Does Not Unconstitutionally Interfere With Swank's Right To Contract

¶19 Swank claims that a *de facto* contract exists between him and Carmody. He alleges that Wood County is merely a middleman in this contractual relationship. He contends the contract is invalid because he did not consent to the contract terms. Wood County asserts that Swank offers no evidence or legal authority to support its claim. It argues that Swank pays the fee to the county and that he has no legal obligations to Carmody. We agree. By Swank's own admission, he and Carmody never entered into a contract. We will not conclude a contract exists when no evidence supports such a conclusion.

¶20 Swank also claims that Wood County effectuated a *de fac*to modification of the terms of his Holding Tank Agreement. He argues that the agreement identifies narrow circumstances under which the county may charge a special assessment against him. None of those circumstances include recordkeeping costs. Therefore, he claims that he never agreed to pay for such costs. Wood County asserts that PSSO 702 establishes the $36 fee, not Swank's Holding Tank Agreement. It argues that the Holding Tank Agreement does not exclusively govern the regulation of Swank's tank; rather, "many provisions, regulations, ordinances and statutes" govern private sewage systems in Wood

County. We agree. Swank must comply with Wood County Ordinances as well as the terms of the Holding Tank Agreement. Because PSSO 702 does not contradict any of the terms of the Holding Tank Agreement, we need not address which provision supercedes. The fee does not constitute a *de facto* modification of the Holding Tank Agreement.

8. Swank Did Not Already Pay Fee

¶21 Swank contends that he paid $61 pursuant to WIS. STAT. § 145.19 for a sanitary permit. He claims the county cannot charge him $36 annually for recordkeeping costs because he already paid for his sanitary permit. Wood County asserts that the permit fee and recordkeeping fees are separate charges. We agree. Section 145.19 authorizes the $61 fee for the permit; PSSO 702 imposes the $36 fee annually for the costs of recordkeeping. Swank has not persuaded us that these fees are redundant.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.