COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2008

David R. Schanker
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 Nos. 2008AP1839-FT
2008AP1840-FT

Cir. Ct. Nos. 2006CV226
2006CV227

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2008AP1839-FT

TOWN OF MANITOWISH WATERS,

PLAINTIFF-RESPONDENT,

V.

PHILIP MALOUF,

DEFENDANT-APPELLANT.

NO. 2008AP1840-FT

TOWN OF MANITOWISH WATERS,

PLAINTIFF-RESPONDENT,

V.

MARCELLA MALOUF,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Marcella and Philip Malouf appeal judgments entered for violations of a town ordinance on their respective properties. The Maloufs contend the ordinance is unconstitutional and, alternatively, they had a vested right to the existing use of their land. We disagree and affirm the judgments.

BACKGROUND

¶2 The Town of Manitowish Waters cited both Marcella and Philip Malouf for exceeding the permissible number of licensed vehicles stored outdoors on each of their properties. Following an adverse determination in the municipal court, the Maloufs requested a circuit court trial. The court denied their motion challenging the ordinance's constitutionality on equal protection and due process grounds and concluded Marcella and Philip both violated the ordinance.

¶3 Marcella and Philip, mother and adult son, each own and reside upon separate parcels of land. At the time the citations were issued, there were thirteen vehicles stored on Philip's property and over thirty vehicles accumulated on Marcella's property. There were four licensed drivers residing at Philip's property and no licensed drivers residing at Marcella's property. Most, if not all, of the vehicles had current registration and were operable.

[1] These appeals were consolidated by court order dated November 24, 2008. Furthermore, these are expedited appeals under WIS. STAT. RULE 809.17 and are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 The accumulation and restoration of vehicles was a family hobby the circuit court characterized as "an unusual fascination … with ownership of rather ordinary vehicles." However, Philip testified the family used the vehicles in parades and exhibited vehicles "at Indianapolis" on several occasions. Philip had stored numerous vehicles on the properties for many years prior to enactment of the ordinance.

DISCUSSION

¶5 The constitutionality of a statute presents a question of law this court decides independently. ***State v. McKenzie***, 151 Wis. 2d 775, 778, 446 N.W.2d 77 (Ct. App. 1989). Ordinances are treated like statutes and are presumed constitutional by the court. ***Peppies Courtesy Cab Co. v. City of Kenosha***, 165 Wis. 2d 397, 400-01, 475 N.W.2d 156 (1991). However, a petitioner can overcome this presumption by proving the ordinance is unconstitutional beyond a reasonable doubt. ***Id.*** at 400.

¶6 An ordinance violates due process if it lacks a rational basis for accomplishing its purpose. ***Id.*** at 404-05. Similarly, under an equal protection analysis, we will uphold an ordinance if a rational basis exists to support the classification, unless the ordinance impinges on a fundamental right or creates a classification based on a suspect criterion. ***McKenzie***, 151 Wis. 2d at 779. The test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification.

¶7 MANITOWISH WATERS, WIS., ord. 2-06 (May 18, 2006), provides in relevant part:

> No person, except [a motor vehicle dealer], shall accumulate, store, or allow to remain outside of any

> building on real estate located within the Town and zoned single family residential, licensed motor vehicles exceeding the number of legally licensed drivers plus one, who occupy and reside at said real estate for a period of more than fourteen (14) days. Licensed motor vehicles exceeding the number of individuals who occupy and reside upon the subject real estate shall be in violation of this ordinance.

¶8 The Maloufs contend the ordinance lacks a rational basis, and thus violates their due process rights, because it treats all lots the same regardless of size or use and because it sets a relative, rather than finite, limit on the number of licensed vehicles. They also assert there is no rational relationship between the vehicle storage restriction and any permissible public objective. The Maloufs do not deny that preservation of community aesthetics is a reasonable goal of the ordinance, but argue the vehicle restriction does not address that concern because it does not affect all properties equally. They emphasize that the ordinance would permit the thirteen vehicles to be stored outside at Philip's residence if there were twelve licensed drivers residing there, but prohibit the keeping of a single vehicle outside Marcella's residence.[2] Thus, a property with very few vehicles outside could violate the ordinance but not appear aesthetically objectionable, while another property with ten or more vehicles might be aesthetically unpleasing yet not violate the ordinance.

¶9 The Maloufs do not articulate any reasons why it would be irrational for the ordinance to apply to all lots regardless of size or use. Thus, they have not met their burden on that argument. This position is also contrary to their argument

[2] We disagree with this interpretation of the ordinance regarding Marcella's residence. The ordinance permits the outdoor storage of vehicles in a number equal to "the number of legally licensed drivers plus one." MANITOWISH WATERS, WIS., ord. 2-06 (May 18, 2006). Thus, Marcella could lawfully store one vehicle outside her residence.

that there should be a finite vehicle limit for all properties. Further, because the ordinance applies only to properties zoned single-family residential, it *is* limited in scope relative to lot size and use. In addition, the ordinance contains a use exemption for motor vehicle dealers.

¶10 The Town asserts the purpose of the ordinance is to promote the visual integrity of the Town and preserve property values. As the circuit court correctly recognized, these are valid objectives of zoning restrictions. ***Kmiec v. Town of Spider Lake***, 60 Wis. 2d 640, 650, 211 N.W.2d 471 (1973); ***State ex rel. Saveland Park Holding Corp. v. Wieland***, 269 Wis. 262, 270-72, 69 N.W.2d 217 (1955). We conclude the ordinance is rationally directed at these goals.

¶11 The Maloufs' hypotheticals regarding large numbers of vehicles are unlikely to occur given that the ordinance applies only to properties zoned single-family residential. It would be most unusual to have ten to twenty licensed drivers residing in a single-family home. Regardless, the ordinance restricts the outdoor storage of licensed vehicles to that minimal amount reasonably necessary at a given property. Tying the number of permissible licensed vehicles to the number of licensed drivers is perfectly rational. Further, the ordinance includes an allowance for one additional vehicle per lot and places no restrictions on the number of additional vehicles that may be stored indoors. Thus, the ordinance is clearly directed at the unusual case where there are excessive vehicles stored outside. The accumulation of vehicles in a residential neighborhood is an aesthetic concern and might reasonably be expected to detract from property values. Indeed, the neighbors of both properties here complained of both concerns to the Town.

¶12 The equal protection analysis differs little from the due process analysis in this case because the Maloufs have not claimed there is any impingement of a protected right nor that they are members of a suspect class. The Maloufs contend three of the five equal protection standards for determining whether classifications have a rational basis are relevant here. The three relevant standards are: (1) All classification must be based upon substantial distinctions which make one class really different from another; (2) The classification adopted must be germane to the purpose of the law; and (3) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. ***State ex rel. Wis. Real Estate Exam'g Bd. v. Gerhardt***, 39 Wis. 2d 701, 710-11, 159 N.W.2d 622 (1968).

¶13 The Maloufs assert the ordinance differentiates "households that have more than one licensed vehicle in excess of the number of licensed drivers residing therein from all other households." The Maloufs' proffered dual classification scheme improperly focuses on violators versus nonviolators; the ordinance actually creates numerous incremental classifications, based on the number of licensed drivers residing at a property. Indeed, the Maloufs' various arguments reflect the incremental classification scheme.

¶14 The Maloufs argue the first standard is not met because the number of driver's licenses held by otherwise identical households does not constitute a substantial distinction making one class really different from another. Their argument misses the mark. The focus here is not on general similarities and differences between households, but whether a substantial distinction exists. The number of licensed drivers residing at a property is an objective and easily identifiable distinction. The distinction may be rather insignificant as between

households generally, but it is significant when comparing households' vehicle storage needs.

¶15 As already discussed in our due process analysis, the second standard is met because the licensed drivers classification directly correlates to a property owner's need to store vehicles, and the ordinance balances that need against the public interests involved. Thus, the classification is germane to the purpose of the law.

¶16 Finally, the Maloufs contend the third standard, that the characteristics of different classes be sufficiently different, is not met because citizens cannot ascertain the number of licensed residents when they pass by a property. Again, the Maloufs fail to focus on the basis for classification. The Town's incremental classification scheme is based on differences that, while not apparent to passersby, are rationally related to the goal of minimizing the number of vehicles stored outside on a property. The creation of incremental classes adequately accounts for the fact there is a minimal difference between households having one versus two licensed drivers, as opposed to households having one versus twelve licensed drivers.

¶17 The Town's zoning ordinance restricting the outdoor accumulation of vehicles is reasonably related to the public's interest in maintaining community aesthetics and property values. Furthermore, the vehicle restriction is rationally tied to the number of licensed drivers residing at a property. Contrary to the Maloufs' arguments, the ordinance would be more susceptible to constitutional scrutiny if it set an arbitrary, finite limit on the number of permissible licensed vehicles. We therefore conclude the Maloufs have not met their burden to prove the ordinance is unconstitutional. However, this does not end our analysis.

¶18 The circuit court found that the Maloufs had been storing numerous licensed vehicles outdoors on their properties prior to and since the adoption of the ordinance. A nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by ordinance, where it is a lawful use of property and not a public nuisance or harmful in any way to the public health, safety, morals, or welfare. ***Town of Delafield v. Sharpley***, 212 Wis. 2d 332, 337-38, 568 N.W.2d 779 (Ct. App. 1997). However, a public nuisance can always be abated and the police power of a municipality extends to declaring certain acts or conditions to be a public nuisance. ***Id.*** at 338.

¶19 Here, the circuit court determined the Maloufs did not have a valid right to the existing use of their properties because the conditions constituted a public nuisance. MANITOWISH WATERS, WIS., CODE OF THE TOWN OF MANITOWISH WATERS § 263-2 (2007), defines public nuisance, in relevant part, as follows: "A public nuisance is a … condition or use of property which continues for such length of time as to … [s]ubstantially annoy, injure or endanger the comfort, health, repose or safety of the public."[3] Based on the trial testimony and exhibits, the circuit court concluded the properties looked like junkyards and were "terribly unaesthetic." The court determined the condition of the properties therefore would substantially annoy, injure, or endanger the repose of the public, especially in a single-family residential zone.

[3] MANITOWISH WATERS, WIS., CODE OF THE TOWN OF MANITOWISH WATERS ch. 263 (2007), entitled "Nuisances," also contains the vehicle storage ordinance, which was renumbered to § 263-8 in the 2007 revision and codification of the Town's code. *See* ch. 1, art. II, § 1-5 (2007). The nuisance and vehicle storage ordinances were apparently also located in the same chapter of the code at the time the Maloufs were charged. The record on appeal does not contain a copy of the public nuisance ordinance, which the circuit court cited in only general terms. The current version of the code is available at http://ecode360.com/?custId=MA2637.

¶20 The Maloufs do not directly address the circuit court's analysis of the nuisance issue. Instead, they argue the condition of the properties constituted a private, rather than public, nuisance. The Maloufs claim a mere private nuisance would not invalidate their right to the existing use of their properties, citing ***Milwaukee Metropolitan Sewerage District v. City of Milwaukee***, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658, and ***Des Jardin v. Town of Greenfield***, 262 Wis. 43, 49, 53 N.W.2d 784 (1952).

¶21 The Maloufs argue their neighbors' dissatisfaction with the condition of the Maloufs' properties represented a private nuisance. Regardless, private and public nuisances are not mutually exclusive. "Since the term public nuisance refers to a broader set of invasions than private nuisance, a nuisance may be both public and private in character." ***Milwaukee Metro.***, 277 Wis. 2d 635, ¶29 (citation and punctuation omitted). The circuit court determined the Malouf properties were a public nuisance under the Town code because they interfered with public rights. That determination is not challenged, nor is it defeated by an assertion of private nuisance. The Maloufs are therefore bound by the same vehicle restrictions as the rest of the Town.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(4).