COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP360 **Cir. Ct. No. 2015CV188**

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

DODGE COUNTY,

PLAINTIFF-RESPONDENT,

V.

RONALD C. SEEBER AND KRISTINE J. SEEBER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dodge County: JOSEPH G. SCIASCIA, Judge. *Affirmed.*

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. Dodge County brought an enforcement action alleging that Ronald Seeber[1] violated the Dodge County Land Use Code by having a salvage yard on his property. The circuit court denied Seeber's motion to dismiss the action and, after a trial, found him to be in violation of the Code. Seeber argues that the charged sections of the Code are unconstitutionally vague and the County's definition of "salvage yard" is unconstitutionally overbroad. We reject both arguments and affirm.[2]

BACKGROUND

¶2 This appeal comes to us on review of a motion to dismiss so we consider the following facts taken from the County's Complaint.

¶3 Ronald Seeber resides in Dodge County on property located within an A-1 Prime Agricultural Zoning District. In March 2013, Dodge County's Planning and Development Department received a complaint that Seeber had several unlicensed junk vehicles on his property.

¶4 The next day, a Department representative performed a site visit in response to the complaint and saw several vehicles, abandoned non-operable equipment, and other salvage material at the premises. A few days later, the Department mailed a notice to the then-owner of the property, David Kopplin. The notice informed Kopplin that keeping those items on the premises constituted

[1] For clarity, we will refer only to Ronald Seeber although Kristine Seeber also holds an interest in the property.

[2] Seeber also asserts that the forfeiture set by the circuit court was excessive but does not develop this argument. Issues raised on appeal but not argued are deemed abandoned. ***A.O. Smith Corp. v. Allstate Ins. Cos.,*** 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). As a result, we will not consider whether the forfeiture imposed was excessive.

a salvage yard and, pursuant to the Code, salvage yards are not an approved use in an A-1 Prime Agricultural Zoning District. On April 1, 2013, Kopplin informed the Department that Seeber rented the property.

¶5 The following day, the Department informed Seeber that the unauthorized materials unrelated to agricultural activities constituted a violation of the Code. The Department performed another site inspection of the premises with Seeber on April 16, 2013. During that site inspection, the Department inventoried items on the property and informed Seeber what he needed to remove in order to comply with the Code.

¶6 From April 2013 to January 2014, the Department continued to monitor the premises and mailed violation/correction notices to Kopplin. Seeber took little to no corrective action during that time period. Seeber acquired the property by Warranty Deed on December 6, 2013.

¶7 From January 2014 to September 2014, the Department sent three subsequent written notifications to Seeber regarding violations of the Code. With each notice, the Department granted Seeber extended deadlines to bring the property into compliance. The Department performed additional site visits in April 2014 and September 2014.

¶8 Seeber filed a rezoning petition with Dodge County in April 2014 requesting to rezone his property from A-1 Prime Agricultural to A-2 General Agricultural. The reason given for rezoning was to allow for future salvage yard and truck company operations. The Dodge County Board of Supervisors denied Seeber's rezoning petition in June 2014.

¶9 Dodge County initiated this enforcement action in circuit court in April 2015. Seeber requested that the County's Complaint be dismissed because sections of the Code are unconstitutionally vague and overbroad. The circuit court denied the motion.

¶10 After a trial, the circuit court found that Seeber was maintaining a salvage yard in an A-1 Prime Agricultural District in violation of the Code. The circuit court imposed a forfeiture and ordered Seeber to bring the property into full compliance. Seeber appeals and renews his argument to dismiss the County's Complaint.

DISCUSSION

¶11 We review de novo a circuit court's decision to grant or deny a motion to dismiss. ***Lane v. Sharp Packing Sys., Inc.***, 2001 WI App 250, ¶15, 248 Wis. 2d 380, 635 N.W.2d 896. We assume that the facts alleged in the Complaint are true along with "reasonable inferences therefrom." ***Data Key Partners v. Permira Advisers, LLC***, 2014 WI 86, ¶¶18-19, 356 Wis. 2d 665, 849 N.W.2d 693.

¶12 The constitutionality of an ordinance is also a question of law which this court reviews de novo. ***Town of Rhine v. Bizzell***, 2008 WI 76, ¶13, 311 Wis. 2d 1, 751 N.W.2d 780. An ordinance is "presumed to be constitutional and must be sustained if at all possible." ***Walworth Cty. v. Tronshaw***, 165 Wis. 2d 521, 525, 478 N.W.2d 294 (Ct. App. 1991); *see* ***State v. Starks***, 51 Wis. 2d 256, 259, 186 N.W.2d 245 (1971). The party questioning the constitutionality bears a heavy burden because its invalidity must be established beyond a reasonable doubt. ***Town of Rhine***, 311 Wis. 2d 1, ¶26.

¶13 The rules for statutory interpretation apply to the interpretation of an ordinance. ***Stoker v. Milwaukee Cty.***, 2014 WI 130, ¶17, 359 Wis. 2d 347, 857 N.W.2d 102. Statutory and, therefore, ordinance interpretation is a question of law which we review de novo. ***Id.***, ¶18. We interpret statutory provisions in the context in which they are used as part of a whole rather than in isolation. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. So, we must interpret the language of these county ordinances as part of a whole rather than in isolation. *See* ***Stoker***, 359 Wis. 2d 347, ¶¶17-18.

¶14 Seeber argues that the charged sections of the Code are unconstitutionally vague and the County's definition of "salvage yard" is unconstitutionally overbroad. We address, and reject, each argument in turn.

A. The charged sections of the Dodge County Land Use Code are not unconstitutionally vague.

¶15 Vagueness rests upon the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. ***State v. Zwicker***, 41 Wis. 2d 497, 507, 164 N.W.2d 512. An ordinance is unconstitutionally vague where it "fails to afford proper notice of the conduct it seeks to proscribe" or if it encourages arbitrary and erratic enforcement. ***City of Milwaukee v. Wilson***, 96 Wis. 2d 11, 16, 291 N.W.2d 452 (1980). Accordingly, an ordinance is vague if persons of ordinary intelligence must guess as to its meaning and differ as to its applicability. ***Id.*** Language need not be mathematically precise to withstand a vagueness challenge. Rather, the language of an ordinance must be "sufficiently definite so that potential offenders who wish to abide by the law are able to discern when the region of proscribed conduct is neared and those who are charged either with enforcing or applying it are not relegated to creating their own standards of culpability ...." ***Id.***

¶16 Dodge County alleged that Seeber violated Dodge County Land Use Code §§ 1.4.4, 3.6-1, 3.6.5, and 11.2.1.A. Seeber contends that those sections of the Code are unconstitutionally vague because a reasonable person cannot ascertain what is required in order to be in compliance with the Code.[3] We conclude that Seeber's arguments fail because his interpretation ignores the permitting requirements set out in Chapter 3 of the Code and the rule of ordinance construction that specific sections of an ordinance cannot be read in isolation and must be read in context. ***Kalal***, 271 Wis. 2d 633, ¶46. We now consider the applicable Code sections in context.

¶17 Section 1.4.4, found in Chapter 1, General Provisions of the Code, states: "No ... land ... shall hereafter be used ... without a Land Use Permit and/or a Conditional Use Permit, if required ... without full compliance with the provisions of this Code ...." In short, this means that land use in applicable portions of Dodge County must comply with the Dodge County Land Use Code. Code § 11.2.1.A concerns permits. It notes that it is a violation of the Code "[t]o place any use ... upon land that is subject to this Code without all of the permits required by this Code." Seeber contends that these two Code sections are "circular" because, in isolation, they do not outline what permit is required for any specific use type or when a permit is required. However, Seeber's interpretation

[3] Seeber does not specify whether he is raising a facial or as-applied vagueness challenge. Usually when a court reviews a facial vagueness challenge, provided there is no protected conduct implicated, a court upholds "the challenge only if the enactment is impermissibly vague in all of its applications." ***State v. Wood***, 2010 WI 17, ¶44 n.15, 323 Wis. 2d 321, 780 N.W.2d 63 (quoting ***Hoffman Estate v. Flip Side***, 455 U.S. 489, 494-95 & n.7, 102 S. Ct. 1186 (1992)). As a result, courts look to the application of the challenged law to the challenger before considering hypotheticals. ***Wood***, 323 Wis. 2d 321, ¶44 n.15. Seeber makes no discernable argument in the vagueness context that his conduct is protected. So, we need not consider hypotheticals regarding Seeber's vagueness argument.

ignores crucial sections of the Code, including the other sections cited in the Complaint, §§ 3.6-1 and 3.6.5, as well as § 3.7. As we explain, these other sections show that Seeber's vagueness argument has no merit.

¶18 The Code has a Table of Contents which directs a reader to appropriate sections that may be relevant to his or her situation. A person of ordinary intelligence will use the Table of Contents to find the chapter containing the requirements in which the person is interested. Here, since Dodge County is divided into zoning districts, a person of ordinary intelligence in Seeber's position will consult Chapter 3 which addresses generally the available uses in the various zoning districts. Table 3.6-1 in Chapter 3 of the Code outlines the uses available in any particular zoning district. That table, and Code § 3.6.5, indicate that salvage yards are an approved use only in the Industrial 2 (I-2) and Agricultural 2 (A-2) zoning districts and, even in those zoning districts, a conditional use permit is required to operate a salvage yard. Accordingly, Seeber cannot operate a salvage yard on his property consistent with the Code for two reasons: (1) the property is not located in either an I-2 or A-2 district; and (2) he does not have a salvage yard permit. This is evident given the clear organizational structure of the Code.[4]

¶19 The Code identifies in § 3.7 the permitted uses in an A-1 Prime Agricultural Zoning District. Nowhere in that section is a salvage yard listed as a

[4] Seeber finds fault with the County's allegation that he did not have a permit for the salvage yard. He posits that the allegation must fail because it is not possible to get a permit for a salvage yard in an A-1 Prime Agricultural Zoning District in Dodge County. Seeber's argument misses the mark because the fact that he failed to comply with the first requirement to have a salvage yard (proper zoning) does not obviate his failure to comply with the second requirement (a permit).

permitted use. Accordingly, a person of ordinary intelligence can easily navigate the Code to determine what land uses are permitted in an A-1 Prime Agricultural Zoning District. The clarity of this section provides adequate notice to any person, including Seeber, that having a salvage yard in the zoning district in which he resides is not permitted by the Code.

¶20 We also conclude that the Code does not promote arbitrary enforcement of its provisions. Arbitrary enforcement is prevented where laws provide explicit standards for those who apply them. ***Grayned v. City of Rockford***, 408 U.S. 104, 108, 92 S. Ct. 2294 (1972). The Code sets out what is required for uses in any specific zoning district and explicit procedures for the County to follow before taking enforcement action against violators. As was shown, the Code outlines what use type is permitted in any particular zoning district in Chapter 3 and Table 3.6-1. Further, Code § 11.4.1 requires that potential violators receive notice and have the opportunity to take corrective action prior to any enforcement.

¶21 The County followed the latter requirement in notifying Seeber of his violations. The County sent to Seeber's landlord written notices of violations and that corrective action was needed in March 2013 and April 2013. After Seeber purchased the real estate, the County sent to him written notices of violations and the need for corrective action in January, June, and September 2014 and extended deadlines for Seeber at his request. In April 2013, a Department representative walked the property with Seeber and advised him of what needed to be removed for him to comply with the Code. There were further site visits from the Department in April 2014 and September 2014, but Seeber was still not in compliance. Seeber received adequate notice, consistent with Code requirements,

before any enforcement action was initiated. As a result, enforcement against Seeber was not arbitrary.

¶22 We conclude that the Code sections complained of are not unconstitutionally vague. Those Code sections, when read in context with each other and with other Code provisions, give persons of ordinary intelligence fair notice or warning and set reasonably clear guidelines for enforcement officers in order to prevent arbitrary enforcement.

B. The Dodge County Land Use Code's definition of "salvage yard" is not unconstitutionally overbroad.

¶23 Seeber asserts that the definition of "salvage yard" in the Code is unconstitutionally overbroad.[5] An ordinance is overbroad when its language "is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate." ***Wilson***, 96 Wis. 2d at 19. An ordinance is unconstitutionally overbroad if it extends activity prohibited by government into areas of a citizen's life which are beyond the proper reach of government. ***Starks***, 51 Wis. 2d at 263-64.[6]

¶24 Seeber's overbreadth argument is largely underdeveloped. He relies on ***Starks*** to demonstrate that an ordinance may be unconstitutionally broad on its face. In ***Starks***, our Supreme Court found that WIS. STAT. § 947.02(2) was

[5] Seeber does not present a developed argument that the definition of "salvage yard" is unconstitutionally vague and, as a result, we will not consider that contention. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

[6] The County argues there can be no overbreadth challenge outside the First Amendment context, and in his reply brief Seeber appears to respond to this argument by attempting to incorporate a First Amendment argument in his overbreadth challenge. We need not decide that issue because we resolve the overbreadth challenge on other grounds.

unconstitutionally overbroad on its face because the statute's use of the term "loitering" classified innocent conduct as criminal and susceptible to arbitrary enforcement. ***Id.*** at 262. However, unlike in ***Starks***, Seeber fails to show how the Code's definition of "salvage yard" causes innocent action to result in a violation of the Code.

¶25 "Salvage yard" is defined in the Code as "[a] parcel of land upon which wastes or used or secondhand materials are bought, sold, exchanged, stored, processed, or handled. Materials shall include, but are not limited to scrap iron and other metals, paper, rag, rubber tires, vehicles, equipment, and bottles." Dodge County Land Use Code, ch. 12. Seeber primarily focuses on the phrase "but are not limited to" in the Code's definition of "salvage yard" and asserts that the section is overbroad because a property owner will be cited for having a "salvage yard" for storing any secondhand materials on the property. But, that contention is true only if we interpret the definition to mean that *any* secondhand material on a property without a permit constitutes a violation of the Code. We do not reasonably interpret the definition of "salvage yard" in that way.

¶26 The canon of construction, "ejusdem generis," supports the analysis. This canon "instructs that, when general words follow specific words in the statutory text, the general words should be construed in light of the specific words listed." ***State v. Quintana***, 2008 WI 33, ¶27, 308 Wis. 2d 615, 748 N.W.2d 447 (citing ***Adams Outdoor Adver., Ltd. v. City of Madison***, 2006 WI 104, ¶62 n.15, 294 Wis. 2d 441, 717 N.W.2d 803).

¶27 The general language of "but not limited to" must be interpreted consistent with the specific words "scrap iron and other metals, paper, rag, rubber tires, vehicles, equipment, and bottles" in determining what constitutes materials

within the Code's definition of "salvage yard." Any one piece of secondhand material on a property does not constitute a salvage yard. Rather, a property constitutes a salvage yard only where the materials "bought, sold, exchanged, stored, processed, or handled" are consistent with those materials actually listed. Seeber's assertion that a single old bicycle might lead to a violation of the Code is nonsensical considering the first phrase of the definition prohibiting wastes and the materials specifically itemized in the definition.

¶28 The definition of "salvage yard" is limited by its own language and does not sweep in conduct which the State is not permitted to regulate. As a result, we conclude that the Code is not constitutionally overbroad in its definition of the term "salvage yard."[7]

CONCLUSION

¶29 For those reasons, we affirm the circuit court's denial of Seeber's motion to dismiss.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

[7] Seeber also contends that the definition of "structure" in the Code is unconstitutionally overbroad. However, his argument is irrelevant to the facts of this case. Nowhere in the Complaint was there any reference to a structure or a violation regarding a structure on Seeber's property. So, we need not consider further the arguments of Seeber concerning the use of the word "structure" in the Code.