

Bayfield County Committee For
Responsible Land Use, Russell Klinger,
David Martinson, Sam Atkins,
Mark Wendling and Kathy Wendling,
Thomas Galazen, and James Steffenson,

Plaintiffs,

vs.

Bayfield County,

Defendant.

FILED
Office of Clerk of Courts
BAYFIELD COUNTY

FEB 11 2010

Ray A. Cederberg

SUPPLEMENTAL WRITTEN DECISION

Case No. 09 CV 52

This matter comes before the circuit court on certiorari review. The parties have submitted briefs, and oral arguments were conducted on February 1, 2010. At the conclusion of the oral arguments, the circuit court ruled from the bench, and this written decision supplements the oral decision made on the record, February 1, 2010.

STANDARD OF REVIEW & PROCEDURAL POSTURE

The defendant, Bayfield County, by its board of supervisors, adopted Bayfield County Zoning Ordinance No. 2008-09 which approved the petition of CFS, LLC to rezone a 380 acre parcel of property located in section 28, and section 33, Township 51 North, Range 4 West, all in the Town of Russell, Bayfield County, Wisconsin. The property had previously been zoned agricultural 1 (Ag-1) / Forestry 1 (F-1) and was changed to residential recreational business (R-RB) and Commercial (C).

Plaintiff, Bayfield County Community for Responsible Land Use, is an unincorporated association consisting of various Bayfield County citizens and at least one adjoining property owner.

Generally speaking, judicial review by way of certiorari limits the scope of the court's inquiry into whether, 1) the board kept within its jurisdiction; 2) whether it proceeded on the correct theory of law; 3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and 4) whether the board might reasonably make the order or determination in question based on the evidence. *State v. Outagamie County Board of Adjustment*, 2001 WI 78 ¶ 26, 244 Wis. 2d. 613, 630 (2001). The creation or amending of a zoning district is purely a legislative function, therefore, judicial review is limited to cases of abusive discretion, excess of power, or error of law. *Buhler v. Racine County*, 3 Wis. 2d. 137, 146, 146 N.W. 2d. 403 (1966)

FACTS

There is no factual dispute between the parties. The owner of the subject property, CFS, LLC submitted a petition for zoning district map amendment on July 21, 2008. The purpose of the request to rezone was to allow for a proposed development known as Shadow Wood Landing. The proposed development envisions residential condominiums, a hotel, restaurant and bar, fuel station, and a private air strip.

On August 21, 2008, the Bayfield County Planning and Zoning Committee held a public hearing on the application to rezone submitted by CFS, LLC. The planning and zoning committee voted unanimously to approve the rezone plan.

On September 30, 2008, the Bayfield County Board of Supervisors took public comment and eventually voted to rezone the subject property as requested by the CFS, LLC. The

developer submitted to the county, as part of its petition to rezone, a preliminary wetland determination which indicated the existence of wetlands of less than two acres as mapped by the Department of Natural Resources, and it also indicated that an intermittent stream was located at the north end of the subject property as designated on the United States Geological Survey Topographic and Wisconsin Wetland Inventory Maps. The intermittent stream in question was described as a single thread headwater channel which was a tributary to North Pike's Creek. (R. 14, Preliminary Wetland Determination (P. App. 36), and (Map P. App. 33 40)).

APPLICATION OF LAW TO FACTS

Plaintiffs raise various issues contesting the validity of the county board's decision to rezone the property. This court agrees with the plaintiff's position that the county board proceeded on an incorrect theory of law and specifically finds that plaintiffs have standing to seek redress. The court need not address any other issues.

Where rezoning is sought for lands which contain navigable waters and shorelands, Wis. Stat. §59.692 governs. Bayfield County adopted its own shoreline zoning ordinance pursuant to legal authority under §59.692. (*See* Section 13 Chapter 3 Bayfield County Zoning Ordinance.) Also, §13-1-20(b)(2) of the Bayfield County Zoning Ordinance creates a legal presumption that any river or stream in Bayfield County shall be considered navigable, if it is designated as continuous waterway or intermittent waterway on the United States Geological Survey Quadrangle Map. The intermittent creek on the subject property is such a stream.

Bayfield County, in their briefs, and in oral arguments, all but conceded the presumption that the intermittent stream was navigable. This issue alone, is determinant of whether the board proceeded according to a correct theory of law. The applicant presented evidence which clearly

showed a presumed navigable waterway on the subject property. The county's failure to recognize that fact in the application constitutes an error of law, mandating reversal.

The issue of standing

Bayfield County argues that the plaintiff, an unincorporated association, together with various individuals, lacked the necessary legal standing to complain or seek redress to this court. While the county has every right to raise the issue of standing, it is a curious proposition for the county to all but admit that it failed to apply the shoreland zoning ordinance in this case, while at the same time arguing that citizens of this county have no right to require their legislative body to follow their own set of ordinances. Aside from this apparent intellectual contortion, it is clear that the plaintiffs together, and individually, have every right to seek enforcement of the laws governing a presumed navigable water body in the State of Wisconsin.

Bayfield County should be reminded of the long history that the public trust doctrine has in this State. Having its roots in the Northwest Ordinance of 1787, the public trust doctrine was incorporated into the Wisconsin Constitution when Wisconsin became a state in 1848. *Muench v. Public Service Commission*, Wis. 492, 499, 55 N.W. 2d. 40 (1952). The Wisconsin Constitution sets forth the trust doctrine in Section 1, Article IX, which actually incorporated verbatim the wording of the Northwest Ordinance. *Id.* It states:

The State shall have concurrent jurisdiction on all rivers and lakes bordering on this State so far as such rivers or lakes shall form a common boundary to the State and any other State or territory now or hereafter to be formed, when bounded by the same; and the River Mississippi and the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways and forever free, as well to the inhabitants of the State as to the citizens to the United States, without any tax, imposed or duty thereof.

While the original purpose of the public trust doctrine was to ensure that navigable waters would be available to the public for commercial purposes, the trust doctrine has been broadly interpreted by the courts from the time of statehood. “The public trust doctrine...is part of the organic law of the State, and is to be broadly and beneficially construed.” *R.W. Docks and Slips v. State*, 2001 WI 73, ¶ 23, 244 Wis. 2d. 497, 628 N.W. 2d. 781 (citing *Diana Shooting Club v. Hustings*)156 Wis. 261, 271-272, 145 N.W. 816 (1914). The court in *Muench* cited one of the clearest pronouncements of the trust doctrine, by stating;

The United States never had title, in the Northwest Territory out of which this state was carved, to the beds of lakes, ponds, and navigable rivers except in trust for public purpose; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof for the people of this commonwealth. *Muench* at 502.

The public trust doctrine does not create an independent cause of action, but establishes standing to sue for the purpose of vindicating the public trust. *State v. Deetz*, 66 Wis. 2d. 1, 13, 224 N.W. 2d. 407 (1974). It provides citizens the opportunity to challenge the validity of legislative action that is violative of the trust. *Id.* At 11. Efforts by a legislative body to “serve or advance purely private interest to the detriment of the public trust are invalid.” *State v. Village of Lake Delton*, 93 Wis. 2d. 78 (1978).

It is clear the public policy, and the clear law of Wisconsin, entitles citizens the right to seek enforcement of the trust doctrine in the courts of general jurisdiction. As this applies to the case at bar, there is no question that the plaintiffs fulfilled that role as citizens of the State of Wisconsin and Bayfield County. The plaintiffs have standing in this case.

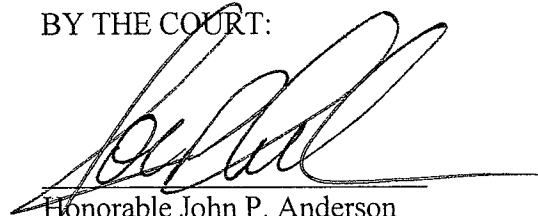
CONCLUSION

Because the county clearly did not apply the appropriate legal standard to the applicant's request to rezone the subject property, the county proceeded on an incorrect theory of law, and therefore, the decision to rezone must be reversed. The matter is remanded in full to the county board with instructions to comply with the rezoning process set forth in Wis. Stat. §59.69(5)(e). Upon remand, it is for the county to decide whether the applicant must restart the process from the beginning under the present application, or to require a new application be submitted. It is not for the court to interfere in that decision. Finally, in an effort to avoid confusion, this court has not specifically determined that the intermittent creek located on the subject property is in fact navigable. This court finds that based upon the record herein, a legal presumption exists that it is navigable.

It is hereby ordered that the decision of the county board to grant the rezone application in this matter is reversed, and the matter is remanded to the Bayfield County Board of Supervisors with directions to conform the county's official district map, in accordance with this judgment, and to proceed with this order.

Dated this 11th day of February, 2010.

BY THE COURT:



Honorable John P. Anderson
Circuit Court Judge
117 E. 5th Street
Washburn, WI 54891
715-373-6118

cc: Attorney Andrew Smith
Attorney Bill O'Connor