

STATE OF WISCONSIN

CIRCUIT COURT

POLK COUNTY

George H. Pfaltzgraff,
Plaintiff,

vs.

City of St. Croix Falls,
Defendant.

MEMORANDUM DECISION

Case No. 03-CV-517

Procedural Posture

Plaintiff, Pfaltzgraff comes now seeking certiorari review of the decision of Defendant, City of St. Croix Falls, denying Plaintiff's application for a conditional use permit for construction of a wind turbine on his property.

Factual Background

Plaintiff owns eighty acres of land located within the City. The land contains his residence. On March 31, 2003, Plaintiff submitted an initial application for a building permit to construct a "wind turbine" on his property. The City responded on April 1, 2003, with a letter from its Administrator, which advised that a ninety-day moratorium on the construction of such structures had been imposed by the City the previous January. (Exhibit 1).

The purpose of the moratorium was to give the city the opportunity "to develop an ordinance regulating such construction in order to protect the health and safety of the community." *Id.*

On July 28, 2003, the City promulgated Ordinance Number 12-03 which created Section 14.30, relating to a building code of ordinances for the regulation of alternative energy systems within the City. The first stated purpose of §14.30 is: "To encourage wind energy systems and other alternative energy uses within the City of St. Croix Falls in accord with State Statute 66.0401."

On September 22, 2003, Plaintiff caused his construction contractor to submit to the City an application for a permit for the construction of a wind turbine as well as a statement of technical information, which accompanied the application. (Exhibits 3 and 4, respectively). Plaintiff also submitted to the City the declarations page of his insurance policy. (Exhibit 7). Exhibits 3, 4 and 7 were submitted for the purpose of attempting to comply with the requirements of Ord. No. 12-03.

The City's Plan Commission is the entity charged with the obligation to determine whether an applicant such as Plaintiff has complied with the requirements of Ord. No. 12-03. See Ord. No. 12-03, §14.32(a). On October 21, 2003, the Plan Commission tabled consideration of Plaintiff's application. The decision to table its consideration of Plaintiff's application was based on a reported comment made during the October 21 meeting by a "Debra Points [who] has worked with several organizations along the River Valley," (Ex. 8, Minutes of the Oct. 21, 2003 meeting of the City Plan Commission), to the effect that "a bill [is] pending in the Wisconsin Senate and the House [sic] [which would allow] certain cities to restrict the installation of solar and wind energy systems." Id.

The City's Plan Commission, based on this representation, decided to table the matter.

On November 19, 2003, Plaintiff filed a Complaint in which he sought this Court's certiorari review of the Plan Commission's October 21, 2003, decision to table consideration of the matter. On January 7, 2004, the City filed a timely Answer in which it affirmatively denied most of Plaintiff's allegations. On March 11, 2004, Plaintiff filed his brief on the matter and sometime after the filing of this brief, the Plan Commission revisited its previous decision to table the matter and, indeed recommended to the City that it approve Plaintiff's application. On April 12, 2004, the City denied Plaintiff's application.

Plaintiff filed his Amended complaint on May 12, 2004, in which he sought this Court's certiorari review of the City's decision on May 19, 2004. The City caused to be filed a timely denial of the material allegations contained within Plaintiff's Amended Complaint.

Issue

The issue presented is whether Defendant's conduct in denying Plaintiff's application was procedurally appropriate?

Pertinent Rules

In this matter of common law certiorari, the Court's review is limited to whether; (1) the City kept within its jurisdiction; (2) the City proceeded on a correct theory of law; (3) the City's action was arbitrary, oppressive or unreasonable; and (4) the evidence was such that it might reasonably have made the determination in question. Town of Hudson v. Bd. of Adjustment, 158 Wis. 2d 263, 275-276 (Ct. App. 1990) (citations omitted).

In applying this standard of review on certiorari, a court must be hesitant to interfere with the City's decision and must not substitute its discretion for that reserved to the City. Additionally, the Court accords the decision of the City a presumption of correctness and validity. Id. at 276 (citations omitted).

First, there is no contention by Plaintiff that the City acted outside of its jurisdiction. Indeed, Section 66.0401(1), Wis. Stats. sets out the circumstances in which a City may place a restriction on the installation of a wind energy system such as the wind turbine at issue in the present case. The City did not act outside of its jurisdiction.

The second prong of the test requires an examination of whether the City proceeded on the correct theory of law. A city may not "place any restriction, either directly or in effect, on

the installation or use ... of a wind energy system ... unless the restriction satisfies one of the following conditions:

- (a) Serves to preserve or protect the public health or safety.
- (b) Does not significantly increase the cost of the system or significantly decrease its efficiency.
- (c) Allows for an alternative system of comparable cost.

§ 66.0401(1), Stats.

There is nothing in either the partial transcript of the April 12, 2004, City Council meeting or the resolution denying Plaintiff's application which reflects a concern about the proposed wind turbine's impact on the public health or safety, nor were any of the remaining statutory conditions expressed in §66.0401(b) and (c), Stats., addressed by the City. The City argues in its Brief filed September 21, 2004, that "[t]he City Council did in effect consider whether or not [Plaintiff's] [a]pplication would affect the public safety," because the phrase "public safety" is mentioned in Ord. No. 12-03. (Brief of Defendant filed September 21, 2004, at p. 3). The phrase "public safety" does indeed appear in Ord. No. 12-03 and it was in fact this Ordinance, which the Plan Commission considered when it recommended approval of Plaintiff's application. However, the Plan Commission recommended approval – something which it could not do unless it was satisfied "the requirements of th[e] ordinance are met." City of St. Croix Falls Ord. No. 12-03 §14.32(a).

The record is simply bereft of anything to indicate a nexus between Plaintiff's proposed wind turbine and a concern over public health or safety.

By its conduct at the April 1, 2004, meeting, the City overturned the findings of the body to which it had delegated the responsibility of ensuring compliance with its own Ordinance;

furthermore, it did so for no reason recognized by law. In State ex rel. Numrich v. City of Mequon Board of Adjustment, 242 Wis. 2d 677 (Ct. App. 2001), the Court held that §66.031 (now §66.0401), Stats., “represents a legislative restriction on the ability of local governments to regulate solar and wind energy systems. Local restrictions are permitted only if they serve the public health or safety, do not significantly increase the cost of decrease the efficiency of the system, or allow for an alternative system of comparable cost and efficiency. Beyond those, no other restrictions are allowed.” Id. at 688.

Furthermore, the City failed to follow its own rules of procedure when it failed to either grant the recommended application or refer the matter back to the Plan Commission for clarification. Ord. No. 12-03 §14.32(4) requires that after the Plan Commission recommends the approval of a conditional use permit for the construction of a wind energy system, “[t]he City Council shall consider the Plan Commission recommendation at its next regularly scheduled meeting. The City Council may grant the recommendation or refer the matter back to the Plan Commission for clarification.” Id.

The City argues that “[i]nterpreting th[is] section of the ordinance to deny the City Council the power to deny an application is simply an absurd reading of the language.” (Brief of the Defendant filed September 21, 2004, at p. 4). On the contrary, such a reading is simply a fair reading of the plain language of the ordinance. Additionally, such a reading is entirely consistent with the purpose of Ord. No. 12-03 which is, “[t]o encourage wind energy systems ... within the City of St. Croix Falls in accord” with §66.0401, Stats.

Furthermore, it has been well-settled in this State since at least 1958 that a City Council is bound by the terms of its own ordinances Corrao v. Mortier, 4 Wis. 2d 492 (1958). Having elected to enact a system for the processing of applications for the construction of wind energy

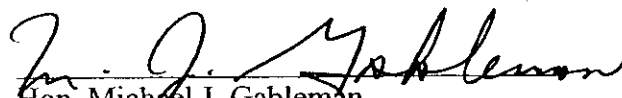
systems such as the one Plaintiff now proposes, the City "has bound itself, until it changes these ordinances, to act in accordance with their provisions." Id. at 496.

Conclusion

In light of the foregoing, it must be found that the City failed to act in accordance with correct procedure when it denied Plaintiff's application and, accordingly, its decision to do so is reversed. Furthermore, the matter is remanded to the City for further proceedings which are not inconsistent with this Decision and which are in conformity with the provisions contained within §66.0401, Stats. and Ord. No. 12-03, and specifically the City is hereby Ordered within 30 days to either approve Plaintiff's application or, in the alternative, refer the matter back to the Plan Commission for clarification. Any such referral must specifically articulate those matters upon which it seeks clarification.

Dated: January 3, 2005

By the Court:


Hon. Michael J. Gableman
Circuit Court Judge

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