FILED
09-03-2020
Door County
Clerk of Courts
2018CV000191

BY THE COURT:

DATE SIGNED: September 3, 2020

Electronically signed by D. Todd Ehlers
Circuit Court Judge

STATE OF WISCONSIN :: CIRCUIT COURT :: DOOR COUNTY
BRANCH 1

WHITE COTTAGE RED DOOR, LLC,
and CHERRY CREEK INVESTMENTS, LLC,

Plaintiffs,

vs.

TOWN OF GIBRALTAR,

Defendant.

DECISION

Case No.: 18 CV 191

The Plaintiffs and the Defendant in this matter have both filed motions for summary judgment. Those motions were both filed on March 18, 2020. Both parties filed briefs and extensive affidavits in support of their respective motions. Additionally, the Plaintiffs filed a pleading entitled Separate Statement of Uncontroverted Material Facts in support of their motion which contained 266 specific allegations of fact.

On April 20, 2020, each of the parties filed briefs, affidavits, and exhibits in opposition to the other party's motion for summary judgment. The Defendant on that same date filed a pleading entitled Defendant's Response to Plaintiffs' Separate Statement of Uncontroverted Material Facts. That Response does dispute and partially dispute a number of the factual allegations made in the Plaintiffs' March 18th Statement, but for the most part, after expanding upon or clarifying a number of those facts, agrees with most of them.

On May 8, 2020, each of the parties filed their reply briefs regarding their respective motions. The Defendant's reply brief was supported by additional affidavits and exhibits. At the parties' request, oral arguments on those motions were heard by me on June 5, 2020. I have now had an opportunity to deliberate regarding these conflicting motions and to review all the above-referenced pleadings and the entire file in this matter. I am now prepared to issue this written Decision in this matter.

I want to first of all apologize to the parties for my tardiness in the issuance of this Decision. I know the parties have been eagerly awaiting this ruling. This case in very short order will have been pending for two years. But unfortunately the press of other matters on my docket over the past several months after the Covid-19 interruption of court proceedings earlier this spring impacted my ability to review this matter. In all frankness, the volume of pleadings in this case is the most I have encountered in one case in my twenty years on the bench. I offer this not as a justification for my delay but simply as an explanation.

As I have already commented on in this Decision in referencing the parties' statements of uncontroverted facts, the material facts of this case are relatively undisputed. I will not reiterate all of those facts at this juncture, but will discuss in this Decision those which are relevant to my deliberation and ultimate determinations in this matter.

It is undisputed between the parties that this case is ripe for summary judgment. The Plaintiffs in this matter are challenging the constitutionality of ordinances passed by the Defendant in 2018 and 2019. The constitutionality of an ordinance or statute presents a question of law for the court to decide, it is not a question of fact for a jury. Questions of law are matters properly decided by the court on a motion or motions for summary judgment.

The Defendant raises two procedural objections to the Plaintiffs' constitutional challenges to its ordinances. The Defendant first raises a mootness objection to the Plaintiffs' challenge to the ordinance enacted by the Defendant on January 10, 2018, entitled Amended and Restated Ordinance No. 1982-05 (hereinafter referred to as "the 2018 Ordinance"). The 2018 Ordinance replaced the Defendant's Ordinance No. 1982-05 which prohibited street hawking and peddling within the Town of Gibraltar. The 2018 Ordinance was ultimately repealed by the Defendant on April 3, 2019, when they enacted Amended and Restated Ordinance No. 1982-05 (hereinafter referred to as "the 2019 Ordinance"). This lawsuit was commenced by the Plaintiffs in October of 2018 challenging the 2018 Ordinance after the Plaintiffs had undertaken their mobile restaurant business in the fall of 2017.

As is obvious by the timeline of this case, the 2018 Ordinance was repealed and replaced by the Defendant during the pendency of this action. As has already been stated, that repeal occurred in April of 2019. The Plaintiffs subsequently amended their pleadings in this matter also challenging the 2019 Ordinance.

The Defendant's mootness argument is that because the 2018 Ordinance has been repealed and replaced by the 2019 Ordinance, the Plaintiffs' constitutional challenge to the 2018 Ordinance is moot and should be dismissed without a debate or discussion of its merits. The Defendant urges me to reject the Plaintiffs' attempt "to conflate the two ordinances in their motion for summary judgment." I find these arguments not convincing for a number of reasons.

First, the Plaintiffs in their challenge to the 2018 Ordinance have made a claim for $1.00 in nominal damages. While the amount of damages sought by the Plaintiffs for an alleged invasion of their constitutional rights is nominal, it is actionable. The Plaintiffs seek redress and

vindication of a violation of their legal rights. In such a circumstance, nominal damages, if such a violation is found, may be appropriate.

Additionally, the 2018 Ordinance was the Defendant's ordinance the Plaintiffs were contesting when this lawsuit was commenced. Indeed, the Defendant mid-suit repealed that ordinance and adopted a new one, but the genesis and enactment of the original ordinance is germane and highly relevant to the Plaintiffs' challenge to both. The 2019 Ordinance flowed from the 2018 Ordinance. One cannot reasonably be considered or evaluated without considering the context of the other. It is not a matter of "conflation" of the two, but one of relationship and apposition of the two.

The Defendant further challenges the Plaintiffs' legal standing to constitutionally challenge the 2019 Ordinance. Caselaw in Wisconsin is clear that a party's standing to proceed is determined by the court on a case-by-case basis and depends on the nature of the claim asserted. Generally, standing is not to be narrowly construed, but rather liberally construed. The court is to consider two factors: has the complaining party suffered some injury as a result of the alleged illegal action and has there been a grant of judicial relief calling for protection from that action.

The Defendant argues that the Plaintiffs have forfeited their legal standing to challenge the 2019 Ordinance for a number of reasons. First, the Plaintiffs' food truck has been sold and they have no offers to buy a new one. Second, the Plaintiffs' licenses and permits through the State of Wisconsin and Door County to operate have apparently expired. Third, the Plaintiffs' business plan to potentially operate periodically at the Edge of Park Rentals premises is only theoretical and nothing is in writing or contractually defined. Finally, the Defendant argues the

Plaintiffs have never applied for a license to operate a food truck from the Defendant under the 2019 Ordinance.

I further reject this legal standing argument of the Defendant and find it to be disingenuous, and quite honestly, galling. The Plaintiffs were operating their mobile food truck business in the Town of Gibraltar during the fall of 2017, in spite of initial warnings from the then Town Chairman and then Town Police Officer challenging their ability to do so. When those tactics did not work, the Defendant engaged their legal counsel to convince Door County to rescind the Plaintiffs' zoning permit to operate. When that effort was unsuccessful, the 2018 Ordinance was enacted. That ordinance included fines of up to $500 per day for violations. Under the threat of citation and significant fines for continued operation of their food truck business, the Plaintiffs have not resumed it since. Claims to the Defendant and initiation of this lawsuit by the Plaintiffs ensued. The 2019 Ordinance, with similar significant financial forfeitures for violations, was enacted by the Defendant in April of 2019.

With that history, the Defendant now argues that these Plaintiffs have no legal standing to challenge the 2019 Ordinance. That argument is ludicrous. The roadblock to the Plaintiffs' pursuit of a food truck business has been the Defendant's ordinances. We are quickly approaching the three year anniversary of the Defendant's shutting down of that business. The Plaintiffs should not be required to spend or incur exorbitant sums and expenses for equipment before challenging these ordinances. New permits and licenses from Door County and the State of Wisconsin can be applied for. The Plaintiffs should not be obligated to have an existing food truck sitting on blocks waiting to operate to seek redress from ordinances that shut down their business. A written contract with the owner of another parcel of property where the Plaintiffs might decide in the future to also vend from is not necessary to provide these Plaintiffs with legal

standing to challenge the 2019 Ordinance. These Plaintiffs have legal standing to challenge the 2019 Ordinance.

The 2018 Ordinance prohibited the sale of any goods from a vehicle, truck, trailer, cart, pushcart or handcart at any place whatsoever in the Town of Gibraltar. The 2019 Ordinance, again enacted after the Plaintiffs' initiation of this lawsuit, repealed the 2018 Ordinance and prohibits mobile food establishments from operating in designated areas within the Town of Gibraltar where at least a dozen (and a significant majority) of the brick-and-mortar restaurants in the Town operate. That designated area would be what most would recognize as the downtown area of unincorporated Fish Creek. The 2019 Ordinance further prohibits mobile restaurants within 500 feet of any town, county or state park. The 2019 Ordinance also includes a number of requirements for mobile restaurants that do not apply to brick-and-mortar restaurants in the Town of Gibraltar. Those include the obligation for mobile restaurants to obtain an approved license from the Defendant prior to operation, limits on the number of hours per day of operation and specific hours of operation, and limits on outdoor seating and the playing of music.

The Plaintiffs argue that both the 2018 Ordinance and the 2019 Ordinance are violative of their Wisconsin Constitution's guarantees of substantive due process and equal protection because they are economically protectionist. The Plaintiffs argue these ordinances violate the Wisconsin Constitution because their primary or sole purpose is to protect one group from competition. In this case that alleged violation is to protect brick-and-mortar restaurants in the Town of Gibraltar from competition from mobile food truck operations, specifically in the downtown Fish Creek area. The Plaintiffs argue this protectionism - the use of public power to

suppress competition for another party or parties' financial benefit - is an illegal government interest under Wisconsin appellate precedent and thus unconstitutional.

The Plaintiffs in support of their unconstitutional arguments rely primarily on *State ex rel. Grand Bazaar v. Milwaukee*, 105 Wis.2d 203, 313 N.W.2d 805 (1982). In that case, the Wisconsin Supreme Court in part provides as follow:

> In examining the merits of these arguments in resolution of the issues before us, we are cognizant of the limited scope of judicial review. It is a basic maxim of statutory construction that ordinances, like statutes, enjoy a presumption of validity. … Consequently, the party challenging an ordinance bears the frequently insurmountable task of demonstrating beyond a reasonable doubt that the ordinance possesses *no rational basis* to any legitimate municipal objective. … Although the rational-basis standard of review of the instant ordinance forbids us from substituting our notions of good public policy for those who adopted the ordinance this does not mean that our evaluation is limited to form and not substance. As the Supreme Court has very recently opined: The rational-basis standard of review is " 'not a toothless one.' " … "When faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes." …
>
> Our review of the record in this case requires us to accept the plaintiff's position. The record supports the conclusion that the ordinance was supported by special interest groups as an anticompetitive measure to keep large retail stores out of the retail liquor business. Only when this controversy entered the judicial arena did the defendant hypothesize the following rational basis to legitimize the legislation, namely, that the ordinance (1) limited the number of premises licensed in the city of Milwaukee, and (2) encouraged adherence to liquor regulations. While this after-the-fact reasoning does not necessarily make it any less worthy of consideration because our review is focused on the reasonable person's perspective of the ordinance regardless of testimony and evidence in the record, we cannot help but conclude in this case that "the Court should receive with some skepticism *post hoc* hypotheses about legislative purpose, unsupported by the legislative history."
>
> Viewing then, somewhat skeptically, the hypothesized purposes of the ordinance – the limitation of liquor licenses and the encouragement of adherence to liquor regulations – we must analyze whether the ordinance's classificatory 50 percent scheme is rationally related to those purposes.
>
> We note, again, that the test is not whether we view the ordinance as unwise; it is an objective determination whether the ordinance is rationally related to the public health, safety, morals, or general welfare.
>
> "[A]n ordinance is not invalid as unreasonable merely because substantially the same result might be accomplished by the enactment of a different type of ordinance, or because a less burdensome course might have been adopted to accomplish the end. Again, it has been said that the reasonableness of an ordinance is dependent upon

> whether it tends to accomplish the objects for which the municipality exists. In other words, to be reasonable, an ordinance must tend in some degree to accomplish the object for which the municipal corporation was created and powers conferred upon it. Or, stated somewhat differently, it is manifest that if there is no substantial connection between the assumed purpose of an ordinance and the end to be accomplished, it is unenforceable." …
>
> This court has restated on frequent occasions the five-fold test for reviewing equal protection challenges to classificatory schemes in *Omernik v. State*, 64 Wis.2d 6, 19, 218 N.W.2d 734 (1974):
>
> "(1) All classification must be based upon substantial distinctions; (2) the classification must be germane to the purpose of the law; (3) the classification must not be based on existing circumstances only; (4) the law must apply equally to each member of the class; and (5) the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of substantially different legislation."
>
> We note that these five points appear to overlap. …
>
> While we have recognized the presumption of constitutionality and the rather easily accommodated rational-basis test, we should not blindly rubber stamp legislation enacted under the guise of the city's police power when careful review has revealed no logical link between the legislation and the objective it was enacted to effect. We are obligated to scrutinize carefully this law because it raises a distinction between classes which are not different under constitutional tests. Having met this obligation, we conclude that the ordinance enacted is this case is arbitrary, unreasonable and discriminatory, and, therefore, we must hold its provisions void as both violative of the city's police power and equal protection guarantees. (105 Wis.2d, pages 208-218.)

The Defendant in support of its argument as to the appropriate standard of my review of the Plaintiffs' constitutional challenges to the ordinances relies on *Porter v. State*, 382 Wis.2d 697, 913 N.W.2d 842 (2018) and its companion case of *Mayo v. Wisconsin Injured Patients & Families Compensation Fund*, 383 Wis.2d 1, 914 N.W.2d 678 (2018). In *Porter*, the Wisconsin Supreme Court provides as follows:

> Noting that "[t]he analysis under both the due process and equal protection clauses is largely the same [,]" the *Mayo* court disposed of an equal protection and due process challenge to Wis. Stat. § 893.55 under the following articulation of the rational basis standard:
>
> > A classification created by legislative enactment will survive rational basis scrutiny upon meeting five criteria:

> (1) All classification(s) 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.
> (3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within a class.]
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
> (5) That 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.
> …
>
> This five-step analysis is the proper standard to apply in the instant case to Porter's constitutional claims. (382 Wis.2d, pages 712-713.)

Porter and *Mayo* did overturn the "rational basis with teeth" standard that had previously been applied by the Wisconsin Supreme Court in *Ferdan ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 284 Wis.2d 573, 701 N.W.2d 440 (2005). My reading of *Porter* and *Mayo*, though, do not lead me to conclude that in either case did the Wisconsin Supreme Court intend to overturn the review standards of *Grand Bazaar*.

After establishing these legal standards of review, I return to a consideration of the facts of this case and the Defendant's Town Board's enactment of the 2018 Ordinance and the 2019 Ordinance and its relationship to the Plaintiffs' allegations of economic protectionism in favor of brick-and-mortar restaurants in the Town of Gibraltar and against mobile food establishments. That consideration in my conclusion invokes the following English proverb: "If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck." My consideration of the facts in this case lead me to the unmistakable conclusion that both the 2018 Ordinance and the 2019 Ordinance were enacted by the Defendant's Town Board in an effort to protect brick-and-mortar restaurants in the downtown Fish Creek area from competition from mobile food trucks or establishments. I conclude that this systematic campaign to basically eliminate mobile

vending within that area and to severly hamper it generally was nothing less than illegal and unconstitutional economic protectionism. It represented the use of public power to suppress competition from one entity for another special interest's financial benefit. Let's consider the facts again.

In early September of 2017 after the Plaintiffs had opened their mobile restaurant, the owner of a brick-and-mortar restaurant in the downtown Fish Creek area lodged a "complaint" about the Plaintiffs' operation with two Town Board members. One of those board members then texted in part to the then Town Chairman to "(P)lease have it shut down." This Town Board member had present and past corporate and management ties to two different brick-and-mortar restaurants in the downtown Fish Creek area. Additionally, the then Town Chairman was the owner of a brick-and-mortar restaurant in downtown Fish Creek.

The then Town Chairman and the above-referenced Town Board member then asked the then Town Police Officer that same day in September "to go and see if they (the Plaintiffs) were operating legally or needed to be shut down." When the then Town Police Officer was satisfied the Plaintiffs had the appropriate permits and licenses, that information was relayed to the previously referenced Town Board member. Within hours of all of this happening, the then Town Chairman also paid a visit to the Plaintiffs' premises where their food truck was operating.

Shortly thereafter the above-referenced Town Board member sent a text to "Gibraltar Restaurant Owners" that lamented "that constable Andrew Crowell "was met with a [p]ermit [i]ssued [b]y [D]oor County" when he "went to shut [Plaintiffs' mobile restaurant] down" and encouraged the restaurant owners to make "a [l]ot of complaint calls or [t]exts" to "Gibraltar Board Members" regarding Plaintiffs' food truck." "The text message to Terry Bolland stated "Hi Gibraltar Restaurant Owners, there is an Illegal Food Truck operating in Gibraltar this

weekend. Local law enforcement went to shut down but was met with a Permit Issued by the County, allowing them to do this in Gibraltar? So food truck is still operating. At "White Cottige [sic] Red Door". Need a Lot of complaint calls or Texts to be made to our other Gibraltar Board Members to get help. Next message will include their numbers. Thanks!" Curiously absent from any of these interactions, communications or complaints was any reference to issues regarding traffic or public safety, preservation of the Town's historic character or protecting the Town's property-tax base.

At the Defendant's Town Board meeting on September 6, 2017, the above referenced Town Board member "successfully moved the Board to "move forward with retaining [Robert] Kufrin's services and [T]own's counsel's services to getting [Plaintiffs' county zoning] permit reversed and protect the community from having this ever happen again." There was again no mention or apparent debate regarding safety, historic preservation or tax base protection. The efforts of the Defendant's attorney with Door County were unsuccessful and the Plaintiffs continued operating for the remainder of that fall season.

The 2018 Ordinance was adopted in January of 2018. Another effort by the Town's attorney in May of 2018 to get the Plaintiffs' Door County zoning permit rescinded failed. The Plaintiffs then filed their Notice of Claim against the Defendant which was denied and this litigation ensued.

Unfortunately the only conclusion I can reach after this recitation of the facts is that the Defendant was intent on shutting the Plaintiffs' mobile food operation down. Up to the point of initiation of this lawsuit, there is nothing in the Town record regarding shutting down the Plaintiffs' operation because of traffic or safety issues, to preserve the historic character of the Town or to protect the Town's property-tax base. What is undisputed is that at least two of the

five Defendant's Town Board members were either brick-and-mortar restaurant owners or affiliates and that other brick-and-mortar restaurant owners in the Town were up in airs. They wanted the Plaintiffs' mobile food operation shut down and presumably operations similar to it prohibited to eliminate competition with their businesses. As such, the mandate of *Grand Bazaar* that "the Court should receive with some skepticism post hoc hypotheses about legislative purpose, unsupported by legislative history."

This litigation then ensued in October of 2018. In April of 2019, the 2019 Ordinance was enacted. It was only then that issues of traffic safety, preservation of historical character, and property-tax basic protection were offered as justification for the 2019 Ordinance. I must decide if these justifications are rational legitimate governmental interests supporting the 2019 Ordinance or whether they are simply hypothesized post hoc rationals in the context of obvious economic protectionism for certain special interests, namely, the brick-and-mortar restaurants in downtown Fish Creek. I conclude they are the later.

Let me put one additional argument of the Defendant to rest before I continue. In its April 20th brief at page 2, the Defendant argues that this lawsuit by the Plaintiffs is an attempt to obtain a broad court order eliminating a municipality's ability to reasonably regulate business on private property. While I cannot speak to the Plaintiffs' motivation, clearly a municipality can reasonably regulate business on private property. Clearly municipalities can reasonably regulate mobile restaurants. But there must be a reasonable relationship and rational basis between the government interest and the means chosen to further that interest. And specifically the government's action may not unreasonably and illegitimately favor one special interest over another.

The Defendant argues that because of the fact that a single state highway is the only road leading through downtown Fish Creek, the location of mobile food establishment or operations must be prohibited in that downtown area because of traffic issues and safety. The Defendant argues the unincorporated village of Fish Creek is unique in Door County to that geography. I disagree. There are no back streets or roads through the unincorporated villages of Jacksonport, Baileys Harbor, Egg Harbor, Ephraim, and Ellison Bay in Door County or the incorporated Village of Sister Bay. All of these municipalities have similar topographies to the Town of Gibraltar of close access to the water and parks. Anyone who has visited Door County on a holiday or summer weekend could attest to the same congestion and traffic issues throughout the county that the Defendant wants to use to justify for banning mobile food trucks in downtown Fish Creek. I fail to see how mobile restaurants impact traffic or congestion any differently than a brick-and-mortar restaurant which seats customers outside or has prospective customers in lines waiting to be seated and served. This geography and traffic justification by the Defendant is hollow.

Similarly, I am not convinced by the Defendant's fact-free speculative justification that mobile restaurants threaten the Defendant's historical character or charm. Fish Creek is a quaint and beautiful town. That fact is undisputed. But the Defendant fails to explain or justify how a downtown Fish Creek restaurant that is outside except for the kitchen comports to the Town's historical character any differently than a mobile food operation.

Additionally, the Defendant's justification for banning mobile food operations in certain areas of the Town to protect its property-tax base is unconvincing. Private property from which mobile food businesses or trucks might operate pay property taxes. The location of a mobile food operation on that private property would not make that property owner exempt from

property taxes or impact the Defendant's overall tax base. This justification for banning mobile food establishments in downtown Fish Creek is especially specious.

In order to survive a rational basis review of a statute or ordinance that is being contested as constitutionally infirm under equal protection and due process challenges, the evidence must show that the law actually, not just conceivably, advances legitimate government interests. With these ordinances' histories, I do not conclude that either the Defendant's 2018 Ordinance or 2019 Ordinance meet that standard. As such, I find them unconstitutional. I can reach no other conclusion than these ordinances look, swim, and quack like efforts to unfairly discriminate against mobile food establishments in favor of brick-and-mortar restaurants in downtown Fish Creek in the Town of Gibraltar. As such, they probably are.

Because of this ruling, I do not need to address the specific requirements that were placed by the Defendant on mobile restaurants that brick-and-mortar restaurants in the Town of Gibraltar are not subject to. I equally question some of the legitimacy of some of those, but do not need to engage in that analysis. Likewise, because of this ruling I do not need to address the Plaintiffs' preemption challenges to the ordinances.

The Plaintiffs' Motion for Summary Judgment that the Defendant's 2018 Ordinance and 2019 Ordinance are unconstitutional as violations of the Plaintiffs' substantive due process and equal protection clause provisions of the Wisconsin Constitution is hereby granted. As such, the Plaintiffs' motion for nominal damages as it relates to the 2018 Ordinance is granted as well as the Plaintiffs' motion for a permanent injunction against the Defendant from enforcing the 2019 Ordinance. Counsel for the Plaintiffs shall submit a judgment to me for signature in conformity with this Decision.