

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2006

Cornelia G. Clark
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 No. 2005AP1772

Cir. Ct. No. 2002CV99

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF MARQUETTE,

PLAINTIFF,

JON BARTHEL AND LEE BARTHEL,

INTERVENING PLAINTIFFS-APPELLANTS,

V.

ROBERT DEWITZ AND JANICE DEWITZ,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Jon and Lee Barthel appeal an order denying a petition to enforce provisions of the Marquette County Zoning Ordinance against Robert and Janice DeWitz. The latter built a wall on their lakefront property that violates the County's setback requirements. For the most part, the wall runs on or near the line dividing the Barthels' lot from the DeWitzes' lot. The circuit court exercised its equitable power to deny the Barthels' request for an order removing the wall. Instead, the court allowed the wall to remain with substantial modification. The Barthels appeal the order insofar as it allows the wall to remain despite its violation of the setback requirements. We affirm.

¶2 The DeWitzes completed a home on their lakefront property in 1998 using a building permit their general contractor obtained. As a result of the construction, their lot ended up several feet lower than the Barthels' adjacent lot. To prevent erosion, they constructed an eight-foot retaining wall on or near the property line. The DeWitzes built the wall without receiving a permit to do so because their contractor mistakenly believed that the wall was exempt from the permit requirement. They also built it without realizing that it violated lake and side lot setback requirements. While the house construction proceeded, but after the wall was completed, a county zoning officer visited the property but made no comment or objection concerning the wall. There was also testimony that Jon Barthel was frequently present as the wall was built, and at one point suggested that the lake end of the wall curve around onto his property. The DeWitzes followed this suggestion, such that the wall extended several feet onto the Barthels' lot at the wall's closest point to the lake.

¶3 The County commenced enforcement proceedings against the DeWitzes in 2002, with the Barthels subsequently joining as intervening plaintiffs. The circuit court found a violation of the setback ordinances, but continued the

matter to allow the DeWitzes to either comply with the setback requirements or obtain a variance. The DeWitzes then applied for a variance, but the County denied it even though the DeWitzes proposed reducing the wall from eight feet to four feet and making other modifications as well.

¶4 The circuit court upheld the County's variance decision on certiorari review. However, the court indicated on the record that it would grant the DeWitzes equitable relief as an alternative to tearing down the wall. Consequently, when the Barthels moved to enforce the ordinance, the court entered an order allowing the wall to stand, but with the modifications that accompanied the variance proposal. On appeal the Barthels contend that the circuit court erroneously exercised its equitable powers by allowing the wall to remain.

¶5 When a party seeks an injunction to enforce a zoning ordinance, the circuit court has discretion whether, and in what form, to grant injunctive relief. *See Forest County v. Goode*, 219 Wis. 2d 654, 670, 579 N.W.2d 715 (1998). The court must use its discretion in such matters in accordance with well-settled equitable principles and in light of all facts and circumstances. *Id.* In applying equitable considerations:

[T]he circuit court should take evidence and weigh any applicable equitable considerations including the substantial interest of the citizens of Wisconsin ... the extent of the violation, the good faith of other parties, any available equitable defenses such as laches, estoppel or unclean hands, the degree of hardship compliance will create, and the role, if any, the government played in contributing to the violation.

Id. at 684.

¶6 In exercising its equitable power in this case, the circuit court had before it evidence that the wall was not a deliberate violation of the ordinance; the DeWitzes relied in good faith on their contractor; the County was aware of the wall early on but made no objection to it until four years after its completion; removal would cause substantial erosion problems for both the Barthels and the DeWitzes; the Barthels acquiesced in the construction, to the point where part of it was built on the Barthels' property; and, removing the wall might cause runoff into the adjacent lake. We affirm discretionary rulings if the circuit court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion using a demonstrably rational process. *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis.2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). Such is the case here. The circuit court used the proper standard regarding its equitable powers and relied on the relevant facts of the case to reach a reasoned and reasonable decision.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

