

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 18, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2811

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

RACINE COUNTY,

PLAINTIFF-RESPONDENT,

v.

MARIO V. LENA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Mario V. Lena appeals from an amended judgment imposing a forfeiture in the amount of \$16,850 and a permanent

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

injunction requiring him to comply with the conditions recited in a conditional use permit previously granted to him by Racine County. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Lena has owned and operated a salvage business in Racine county since 1967. In 1969, the County enacted a comprehensive zoning ordinance. In 1986, Lena applied for a building permit to enlarge the garage on the property. However, given Lena's proposed use of the garage and its location in relation to a highway, the county zoning ordinance required a conditional use permit for the expansion. Lena applied for the conditional use permit and the County granted it subject to various conditions.

¶3 The County commenced this action in April 1999. The citation alleged that Lena had violated the conditional use permit from April 29, 1999, "and continuing thereafter" and sought a forfeiture in the amount of \$332. However, in an amended complaint, the County alleged that Lena had violated the conditional use permit from September 11, 1998, to September 3, 1999, and sought a \$1000 per day forfeiture in the total amount of \$297,000 and an injunction ordering Lena to comply with the conditional use permit.² Essentially, the amended complaint alleged that Lena was illegally storing junked vehicles and other junk material on the property, was illegally parking motor vehicles on the property, and had failed to provide proper landscape screening on the property.

² The commencing date of the violations was based on the County's October 1, 1998 letter to Lena advising that he was in violation of the conditional use permit and giving him ten days to correct the violations. The concluding date of the violations was based on the County's September 2, 1999 inspection of the property. In addition, the County sought a fine of \$1000 per day for each violation after September 3, 1999.

¶4 Lena brought a motion to dismiss contending that the conditions set out in the conditional use permit were invalid. The trial court decided to allow testimony on this question and then considered the motion as one for summary judgment. At the conclusion of the hearing, the court determined that there were material issues of fact and denied Lena's motion.

¶5 Thereafter, the County moved for summary judgment. After examining the summary judgment record, the court granted summary judgment to the County and imposed a forfeiture in the amount of \$200 per day for a total forfeiture of \$67,400.³ The court scheduled the matter for further review on June 2, 2000. At the review hearing, the court determined that Lena had corrected approximately seventy-five percent of the violations and the court reduced the forfeiture to \$16,850. In addition, the court entered a permanent injunction directing Lena to comply with the conditional use permit.

DISCUSSION

1. Summary Judgment

¶6 Lena challenges the trial court's grant of summary judgment to the County.⁴ He bases this argument principally upon the trial court's determination that material issues of fact existed when the court previously denied his motion to dismiss. Lena contends that the court's two rulings are inconsistent. He argues,

³ The trial court found that the violations occurred from September 2, 1998, though August 5, 1999.

⁴ Lena also titles his argument as a challenge to the trial court's denial of his motion to dismiss, and the County separately briefs this issue. However, the substance of Lena's argument is directed at the court's grant of summary judgment to the County, and we limit our discussion to that argument.

“In spite of the trial court’s initial ruling that genuine issues of material fact existed, the trial court granted Racine County’s motion for summary judgment.”

¶7 We see no inconsistency in the trial court’s two rulings. The motions were separately filed, were premised upon different evidentiary records, and were separately litigated. The court’s observation regarding the state of the record at the time of Lena’s motion did not govern the state of the record at the time of the County’s later motion when a further and different record had been developed.

¶8 Lena also contends that the grant of summary judgment to the County was improper because there were material issues of fact on his defenses of legal nonconforming use and whether the County coerced him into applying for the conditional use permit. As to the nonconforming use, Lena points to the trial court’s remark that Lena had certain “grandfather rights” at the time the County adopted its comprehensive zoning ordinance. However, Lena fails to put that remark in its proper context. Although noting that Lena’s use of the property predated the zoning ordinance, the court went on to observe that Lena’s later application for a conditional use permit in 1986, *after the ordinance was in effect*, eliminated any nonconforming use defense and brought Lena under the aegis of the zoning code. We agree.

¶9 As to Lena’s claim that he was coerced into applying for the conditional use permit, we observe that this argument comes some thirteen years after the County granted the permit and imposed the conditions about which Lena now complains. “A party who wants judicial review of an agency decision should carry the burden of initiating a petition for review rather than defying the agency and awaiting an enforcement action.” *County of Sauk v. Trager*, 118 Wis. 2d

204, 213, 346 N.W.2d 756 (1984); *see also Jefferson County v. Timmel*, 261 Wis. 39, 63, 51 N.W.2d 518 (1952). We recognize that this exhaustion doctrine is not unbending and should not be applied in a rigid fashion. *Trager*, 118 Wis. 2d at 214. Here, however, we conclude that the significant passage of time warrants the invocation of the exhaustion doctrine, especially in light of Lena's accompanying claim that he felt the County had "coerced" him into seeking a conditional use permit. If Lena felt aggrieved by the conditions, he should have challenged them at an earlier point in time.

2. The Penalty

¶10 Lena complains that the trial court did not allow for any input from him as to the forfeiture penalty. True, the trial court did not expressly ask for input from the parties after it determined that the County was entitled to summary judgment. Instead, the court proceeded directly to the matter of penalty in its summary judgment ruling.

¶11 Nonetheless, we reject Lena's argument. First, we take note that Lena did not object or complain about the trial court's procedure or the amount of the forfeiture after the court had made its pronouncement. As such, this issue is arguably waived.

¶12 Second, and more importantly, the trial court conducted an extensive review hearing on the matter of the appropriate penalty. At this hearing, the court took further testimony and heard the arguments of counsel. Lena's attorney spoke to Lena's redeeming qualities and the court took these factors into consideration when reducing the amount of the forfeiture to \$16,850, a seventy-five percent reduction in the amount of the original forfeiture. "A trial court has a wide range of discretion in fixing the amounts of forfeitures for ... violations based on the

facts of the individual case.” *State v. Spielvogel & Sons Excavating, Inc.*, 193 Wis. 2d 464, 478, 535 N.W.2d 28 (Ct. App. 1995).

¶13 We see no error in the trial court’s procedure or in the amount of the forfeiture imposed.

CONCLUSION

¶14 We hold that the trial court did not err by granting summary judgment to the County. We also hold that the court did not err when imposing the forfeiture judgment against Lena.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

