COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1898 **Cir. Ct. No. 99-CV-112**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

G-STORE, INC.,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF COMMERCE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Clark County: JOHN V. FINN, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. G-Store, Inc. appeals from an order affirming an administrative decision of the Wisconsin Department of Commerce. The issues concern the Department's order requiring G-Store to remove underground gasoline tanks on its property and to assess the site for environmental contamination. G-Store contends that the Department's order exceeded its

discretion, conflicted with established Departmental policy and is barred by estoppel. We reject these arguments and affirm.

¶2 G-Store's property was used as a filling station until May 1998. State law requires that after twelve months unused gasoline tanks be removed and the site formally assessed for contamination. WIS. STAT. § 101.09(2) and (3) (1999-2000);[1] WIS. ADMIN. CODE §§ COMM 10.73(4) and 10.734. In May 1999, four underground tanks remained on the site. In response to G-Store's inquiries concerning its obligations, a department administrator wrote on May 24, 1999, that in some instances an environmental investigation for mediation purposes might substitute for a site assessment. The letter added, however, that G-Store's inspections and testing of the site to date did not constitute an adequate investigation. It concluded by recommending that G-Store proceed with a thorough site assessment. On June 3, 1999, the Department ordered G-Store to remove the four tanks and to conduct a formal site assessment of "the property" by July 5, 1999.

¶3 G-Store did not meet the July 5 deadline, and instead it requested relief from the site assessment requirement. On August 4, another Department employee wrote to G-Store's attorney, advising him that a site assessment remained necessary, at least for the areas holding three of the four fuel tanks. On August 17, the Department issued an order reiterating the provisions of the June 3 order, but extending the compliance deadline until September 1, 1999. The order also clarified that the site assessment was not limited to the tank excavation zones.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 On August 31, 1999, G-Store commenced this action for review of the Department's compliance orders. The petition alleged: (1) that the Department failed or refused to provide specific data or criteria for deciding when a site assessment is necessary, essentially making its decision arbitrary; (2) that G-Store had performed an environmental investigation for remediation purposes that satisfied the assessment requirements, with no credible evidence to the contrary; (3) that the Department had failed to explain why G-Store's prior site investigations did not satisfy the Department's requirements; and (4) that the Department's orders of June 3 and August 17 were not consistent with the information provided in the Department's August 4 letter to G-Store. Ultimately, the trial court determined that the June 3 order was the only one subject to review, and concluded that it was consistent with the relevant statutes and administrative rules.[2] The court therefore affirmed the Department's order for a site assessment, resulting in this appeal.

¶5 On review of the Department's decision, we may reverse and remand for further proceedings only if the Department has erroneously exercised its discretion; acted inconsistently with a Department rule, policy or practice, if the inconsistency is not satisfactorily explained; or otherwise violated a constitutional or statutory provision. WIS. STAT. § 227.57(8). This court shall not substitute its judgment for that of the Department on an issue of discretion. ***Id***. This court must also accord due weight to the experience, technical competence and specialized knowledge of the Department, as well as the discretionary authority conferred on

[2] The court reached the merits despite its conclusion that only the June 3 order was reviewable, thus making the petition untimely. Our decision makes it unnecessary to decide the issue of timeliness. Nor do we address whether this judicial proceeding is barred by G-Store's failure to pursue its administrative remedies under WIS. STAT. ch. 227.

it. WIS. STAT. § 227.57(10). Findings of fact are reviewed under the substantial evidence standard. WIS. STAT. § 227.57(6). We apply these standards of review independently of the circuit court. *See* ***View Estates Beach Club, Inc. v. DNR***, 223 Wis. 2d 138, 145, 588 N.W.2d 667 (Ct. App. 1998).

¶6 G-Store first argues that under the applicable rules the Department lacked authority to order a site assessment. This argument relies on G-Store's citation to numerous Department of Commerce and DNR administrative code provisions that address the cleanup of contaminated sites. G-Store contends that when read together these provisions exempt site assessments in G-Store's circumstances. G-Store advances this argument for the first time on appeal. It is therefore waived. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

¶7 G-Store next argues that the order of June 3 exceeded Departmental authority because it required a site assessment of "the property," whereas the applicable rules require assessment only of a limited area around the underground tanks. The rule applicable to the scope of the site assessment, WIS. ADMIN. CODE § DOC 10.734, provides that the assessment extends to:

> (1) [W]here contamination is identified or is most likely to be present at the … site.
>
> ….
>
> (3) SAMPLING AND MEASUREMENTS.… [The site assessors] must consider the method of closure, the nature of the stored substance, the type of backfill, the depth to groundwater, and other factors appropriate for identifying the presence of a release. Site assessments shall be performed by persons certified by the department.

One might reasonably construe this provision, as the Department did, to leave the scope of the assessment to the certified site examiner's discretion, thus permitting,

if not requiring, a broad, non-specific description of the assessment area. Because the Department's interpretation is reasonable, we accept it. *See* ***State v. Busch***, 217 Wis. 2d 429, 441, 576 N.W.2d 904 (1998) (an agency's interpretation of its own regulation is controlling unless plainly erroneous or inconsistent with the intent of the regulations.)[3]

¶8 G-Store also argues that the August 17 directive exceeded the Department's authority because it mandated an "environmental investigation" rather than a "site assessment," with no definition of the former term provided by rule or otherwise. The different language used on August 17 is not material because the August 17 order changed nothing other than to extend G-Store's deadline. G-Store cannot reasonably contend that it was misled by the different terminology, such that it misunderstood its duty imposed by the June 3 order. We agree with the Department's characterization of "environmental investigation" as nothing more than an attempt to clarify G-Store's responsibility in layman's terms.

¶9 G-Store further contends that the site assessment requirement was an unexplained inconsistency with past agency policies and practices. G-Store describes the inconsistency as the fact that prior communications from the Department suggested alternatives to a formal site assessment. These letters, however, were an attempt to resolve matters, and were comparable to settlement negotiations. They are not evidence of policies or practices that would bind the Department to a particular course of action, precluding it from enforcing its rules.

[3] G-Store contends that we should not accord such deference in this case because the Department's order was too confusing and inconsistent. However, the Department issued only one order, and its terms were plain. The other "orders" that G-Store refers to included the August 17 deadline extension, and various informal communications from the Department, none of which was binding on G-Store.

¶10 Finally, G-Store argues that the Department should be estopped from enforcing its order because it did not provide timely responses and answers to reasonable inquiries from G-Store. Estoppel may not be invoked against the government when its application interferes with the protection of the public health, safety or general welfare. ***DOR v. Moebius Printing Co.***, 89 Wis. 2d 610, 639, 279 N.W.2d 213 (1979). An exception exists only when the government's conduct works a serious injustice and the public's interest is not unduly harmed by invoking estoppel. ***Id***. at 638. Under these standards, G-Store's estoppel claim provides no basis for the relief it seeks.

By the Court.—Order affirmed.

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