COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP367 **Cir. Ct. No. 2009CV176**

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

ONEIDA COUNTY, A WISCONSIN MUNICIPAL CORPORATION,

PETITIONER-APPELLANT,

V.

DOUGLAS M. MCCOY AND PICS, INC., D/B/A PROFESSIONALS IN CONCRETE STAMPING,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Oneida County: LEON D. STENZ, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Oneida County appeals an order denying its request for an injunction requiring Douglas McCoy and PICS, Inc., to remove a concrete patio that unlawfully encroached within seventy-five feet of the ordinary

high water mark of a lake. The County argues that the circuit court shifted the burden of proof to the County regarding environmental damage, considered irrelevant factors and substituted its lay observations for the opinion of an expert. Because we conclude that the circuit court properly exercised its discretion, we affirm the order.

BACKGROUND

¶2 McCoy concedes that he violated three county ordinances by excavating and constructing the patio without a permit. McCoy's property falls within the county zoning exception that allows for averaging of setbacks in relation to neighboring structures on the lake. Applying setback averaging in this case reduced the setback to sixty-three feet from the ordinary high water mark. The patio encroached twenty-seven feet into the sixty-three-foot setback. Based on that concession, the County presented no witnesses at the trial.

¶3 Before trial, the court viewed the scene. At trial, McCoy testified on his own behalf that he did not know he needed a permit before he started work on the patio. Neither he nor Steve Cooper, appearing for PICS, were aware of any problem until zoning officials stopped the project just as they were finishing pouring the cement. Cooper described the environmental effects of removing the concrete and restoring the area. McCoy also called Pete Wegner, the assistant zoning administrator, who testified regarding the nature of the violations. Wegner identified the purposes of the ordinances and indicated that the County's primary objection was not that the construction caused any damage to the environment, but merely because the construction violated the ordinances. Wegner could identify no deterioration of the habitat, effect on spawning or effect on shoreland vegetation. He testified that, if the court allowed the violation to continue, a

mitigation plan would require planting one tree and three bushes per two hundred square feet.

¶4 The court imposed a ten thousand dollar forfeiture against McCoy and a five thousand dollar forfeiture against PICS, but denied the County's request for an injunction to remove the patio. The court also required McCoy to work with the planning and zoning department to remediate the property as the County deems appropriate and imposed a two-hundred-fifty dollar per day forfeiture against McCoy if the remediation work was not completed by a specified date.

DISCUSSION

¶5 The circuit court has discretionary, equitable power to enjoin violation of a zoning ordinance. ***Forest Cnty. v. Goode***, 219 Wis. 2d 654, 661-77, 579 N.W.2d 715 (1998). In ***Goode***, the court held that the circuit court should grant an injunction once a violation has been established "except, in those rare cases, when it concludes, after examining the totality of the circumstances, there are compelling equitable reasons why the court should deny the request for an injunction." ***Id.*** at 684. The ***Goode*** court identified some factors the circuit court should consider when determining whether to grant an injunction: the extent of the violation, the good faith of the 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.***

¶6 Here, the court considered each of the factors identified in ***Goode*** as well as environmental degradation that would occur from the remediation process. The court specifically noted that ***Goode*** "does suggest that I should not deny the injunctive relief lightly, and it is a rare case where injunctive relief would be denied, and I have to address the interest of the public in obtaining compliance

with the ordinance." The court noted the lack of any evidence that the water quality would be degraded as a result of the patio and the minor mitigation that the County would have required if McCoy would have sought and received permission for building the patio. The court considered the aesthetics of the shoreline and opined, based on its view of the premises, that the patio could not be seen from the shore. Any environmental damage caused by the construction had already been completed, and removing the patio would merely add to any shoreline degradation. The court also considered McCoy's good faith, the absence of equitable defenses, and the government's limited role in creating the problem, consisting of waiting one week after the initial complaint before investigating and stopping the construction.

¶7 Contrary to the County's argument, the court did not switch the burden of proof to the County regarding environmental degradation. The court merely commented that the evidence did not show any environmental degradation.

¶8 The County next argues that the court improperly considered averaging, the government's role in not stopping the violation and the aesthetics of the patio. ***Goode*** specifically indicated that the factors the court listed were not meant to be exhaustive, but only to illustrate the importance of the circuit court's consideration of the substantial public interest in enforcing its shoreland zoning ordinances. ***Goode***, 219 Wis. 2d at 684. In addition, application of averaging was required to determine the degree of encroachment which is necessary to determine the extent of the violation. The court's comment about the County's delay in stopping the project was not a substantial factor in the court's decision to deny injunctive relief. The court called the County's contribution "minimal." The court appropriately considered the aesthetics of the patio, particularly that it could not be seen by a passerby in a boat. Unlike other structures that might be constructed in

the setback area, the only potential problem the patio would create is environmental degradation, and in this case there was none.

¶9 Finally, the County argues that the court improperly ignored expert testimony from Pete Wegner regarding environmental degradation. While Wegner may have been an expert in zoning, the record does not establish his expertise on environmental questions. The court's view of the premises provides an adequate basis for the court to determine that the patio was unlikely to adversely affect any wildlife habitat. In addition, Wegner did not identify any specific deterioration of habitat, effect on the spawning area or vegetation along the shoreline. Wegner indicated that a thirty-five-foot buffer would be an appropriate part of a mitigation plan. The court found that there was thirty-six feet between the patio and the ordinary high water mark. Wegner conceded that a potential remediation of the patio site could be accomplished with "a few extra bushes and shrubs within that 35-foot buffer."

By the Court.—Order affirmed.

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