COURT OF APPEALS
DECISION
DATED AND RELEASED

October 26, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0476

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

DEAN P. LAING
AND TAMARA L. LAING,

Petitioners-Appellants,

v.

ADAMS COUNTY PLANNING AND ZONING
DEPARTMENT AND ADAMS COUNTY
BOARD OF ADJUSTMENT,

Respondents-Respondents.

APPEAL from orders of the circuit court for Adams County: EDWARD F. ZAPPEN, Jr., Judge. *Affirmed*.

Before Eich, C.J., Dykman and Vergeront, JJ.

DYKMAN, J. Dean P. and Tamara L. Laing appeal from orders dismissing their *certiorari* action against the Adams County Planning and Zoning Department and the Adams County Board of Adjustment. The Laings commenced this action against the County after it rejected their application for a

zoning variance for their lakefront gazebo and patio. The Laings argue that: (1) the gazebo and patio are not structures and therefore do not violate the Shoreland Protection Zoning Ordinance; (2) they have been denied their right to equal protection because the County is selectively enforcing its ordinance against them; and (3) the County's decision to deny the variance was arbitrary, oppressive, unreasonable, and was a denial of their right to equal protection. We disagree and, therefore, affirm.

BACKGROUND

The Laings have owned a summer home on Lake Sherwood in Adams County for about six years. In 1992, they decided to build a gazebo and patio by the lake so that Dean's two brothers, one of whom uses a wheelchair and the other, crutches, could have access to the lake and be protected from the sun.[1] According to the Laings, before they began construction, they contacted the Town of Rome and were told that no shoreland protection ordinances existed which might affect their plans as the previous ones were being revised.

The Laings began work on the gazebo and deck in the summer of 1993. The project cost the Laings about $10,000. A gazebo was built within twelve feet of the high water mark and the patio was constructed to the water's edge. The patio is 460 square feet.

On June 29, 1993, the County sent an Order for Correction, informing the Laings that the gazebo and patio violated the Adams County Shoreland Protection Ordinance and therefore must be removed within thirty days. By letter dated July 27, the Laings appealed the Order for Correction and sought a variance from the County. On August 18, the County held a hearing on the matter and denied the Laings' request.

The following month, the Laings commenced this *certiorari* action. The trial court concluded that the gazebo and patio were structures which

[1] Part of the project involved the construction of a concrete seawall for which the Laings received Wisconsin Department of Revenue permits.

violated the ordinance, that the ordinance was not being selectively enforced, and that the County's refusal to grant the variance was not arbitrary, oppressive or unreasonable, and did not deny them equal protection of the law. The Laings appeal.

SHORELAND ORDINANCE

The first issue is whether the ordinance prohibits the Laings from maintaining the gazebo and patio at their present site. Section 3.21 of the Adams County Shoreland Protection Ordinance provides, "All buildings and structures, except stairways, walkways, piers, and patios which may require a lesser setback, shall be set back at least seventy-five (75) feet from the ordinary highwater mark of navigable waters." The ordinance defines "structure" as "[a]nything constructed or erected, the use of which requires a more or less permanent location on or in the ground." Section 3.23 provides that patios shall be set back thirty-five feet and shall not exceed 200 square feet.

Whether the gazebo and patio are "structures" requires us to interpret the ordinance and apply it to undisputed facts. ***County of Adams v. Romeo***, 191 Wis.2d 379, 383, 528 N.W.2d 418, 420 (1995). These are questions of law, which we review *de novo*. ***Id.*** The canons of statutory construction apply to interpretations of ordinances. ***Hambleton v. Friedmann***, 117 Wis.2d 460, 462, 344 N.W.2d 212, 213 (Ct. App. 1984). If an ordinance is unambiguous, we apply its plain meaning.

In WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2267 (1976), structure is defined as "something constructed or built ... something made up of more or less interdependent elements or parts : something having a definite or fixed pattern of organization." This definition indicates to us that the word structure is not ambiguous but includes any object which is constructed or built. The gazebo and patio fall within this definition. To hold otherwise would be contrary to the plain meaning of the word.

But the Laings contend that because their gazebo and patio are not cemented to the ground, they are not *permanent* structures which violate § 3.21 of the ordinance. The Laings' position is enhanced by a Winter 1993 Lake

Arrowhead newsletter indicating that § 3.21 prohibits only permanent structures which are maintained in cement below the ground, but not structures containing cement but located above or on the ground. According to the Laings, the definition of "structure" contained in the ordinance is ambiguous and must be resolved in favor of the property owner. We disagree.

The ordinance provides that a prohibited structure includes those which require a more or less permanent location on or in the ground. The use of the phrase "more or less" before the word "permanent" indicates that the "structure" at issue need not be anchored in concrete.[2] The ordinance also prohibits those "structures" which cannot be moved without considerable effort. The gazebo and patio appear to be attached to the ground or lake bed in such a way that they cannot be removed without being taken apart. For the purposes of the ordinance, we conclude that the gazebo and patio are more or less permanent structures and must be removed.

SELECTIVE ENFORCEMENT

The second issue is whether the County is selectively enforcing the ordinance against the Laings. According to the Laings, there are at least twenty-one other patios and/or gazebos within seventy-five feet of Lake Sherwood alone, and despite having knowledge of these violations, the County has never, during the twenty-four years that the ordinance has been in existence, ordered any of those residents to remove their structures.[3]

The Equal Protection Clause is violated "if an ordinance is administered `with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights.'" ***Village of Menomonee Falls v. Michelson***, 104 Wis.2d 137, 145, 311 N.W.2d 658, 662 (Ct. App. 1981) (quoting ***Yick Wo v. Hopkins***, 118

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[2] Concrete consists of cement, aggregate and water. Cement is not used to anchor structures.

[3] The Laings also contend that there are "hundreds and hundreds" of other prohibited structures within seventy-five feet of the high water mark. This assertion, however, is not supported by any facts of record. Accordingly, we will not consider it.

U.S. 356, 373-74 (1886)). But the fact that the County has enforced an ordinance in one instance and not in others does not alone establish a violation of the Equal Protection Clause. ***Id.*** The plaintiff must demonstrate that the County has engaged in "intentional, systematic and arbitrary discrimination." ***Id.*** Therefore, even if the plaintiff can show that the County enforced the ordinance in only one instance and not in others, that evidence is insufficient to establish an equal protection violation. ***State ex rel. Cities Serv. Oil Co. v. Board of Appeals***, 21 Wis.2d 516, 544, 124 N.W.2d 809, 823 (1963). *See also* ***Town of Richmond v. Murdock***, 70 Wis.2d 642, 647, 235 N.W.2d 497, 500 (1975). We will not presume a discriminatory purpose. ***Cities Serv.***, 21 Wis.2d at 544, 124 N.W.2d at 823.

In the instant case, while the Laings have shown unequal enforcement, they have not shown intentional, systematic and arbitrary discrimination. The Laings have presented photographs showing the existence of gazebos and patios on other lakefront property owners' land which appear to be within seventy-five or thirty-five feet of the high water mark. But they have failed to show that the enforcement of the ordinance against them is the product of intentional, systematic and arbitrary discrimination.[4] Indeed, the Lake Arrowhead newsletter notes that, "Due to a number of ordinance violations recorded within the tri-lakes area, the county has initiated an enforcement program regarding these violations and will be conducting a physical inspection of our three lakes ...." The County is therefore aware of the problem and appears to have decided to address it. In ***Menomonee Falls***, we said:

> [E]ven if the enforcement of a particular law is selective, it does not necessarily follow that it is unconstitutionally discriminatory. Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general

[4] Dean Laing's profession as a Milwaukee lawyer and the fact that he had built an "expensive" gazebo and patio are insufficient to show intentional discrimination.

> compliance will follow and that further prosecutions will be unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found.

Menomonee Falls, 104 Wis.2d at 145-46, 311 N.W.2d at 662-63 (quoted source omitted).

It may be that the Laings are the first and perhaps the only homeowners to date against whom the County has enforced the ordinance. Perhaps further prosecutions await the decision in this case. It also appears that the County has embarked upon a program of enforcement. The Laings have failed to demonstrate that other lakefront landowners will not, in the future, be ordered to remove their offending structures. And, we do not know to what extent the County has prevented or will prevent others from building structures near or on the lake. Absent evidence of intent to discriminate, we cannot conclude that the County deprived the Laings of equal protection of the law.

REFUSAL TO GRANT A VARIANCE

The final issue is whether the County's refusal to grant a variance was arbitrary, oppressive, unreasonable, and a denial of equal protection. The Laings contend that because the County failed to give reasons for its refusal, its decision is arbitrary and must be reversed. They also argue that because three other Adams County residents requested a variance from the same ordinance and only the Laings' request was denied, the refusal was unlawfully discriminatory and a violation of equal protection. We disagree.

Our review of a *certiorari* action is limited to determining: (1) whether the County kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. ***Smart v. Dane County Bd. of Adjustments***, 177 Wis.2d 445, 452, 501 N.W.2d 782, 784 (1993). Since we are hesitant to interfere with administrative determinations, we presume that the County's decision is correct and valid.

Snyder v. Waukesha County Zoning Bd. of Adjustment, 74 Wis.2d 468, 476, 247 N.W.2d 98, 103 (1976). Thus, the County's findings will not be disturbed if any reasonable view of the evidence sustains them. ***Id.***

Parties seeking a variance from an ordinance must prove that they will suffer unnecessary hardship if the variance is not granted. ***Arndorfer v. Sauk County Bd. of Adjustment***, 162 Wis.2d 246, 253, 469 N.W.2d 831, 833 (1991). Three conditions must be present. First, a hardship must be present. ***Id.*** Second, the hardship must be unique to the property and not a condition personal to the landowner. ***Snyder***, 74 Wis.2d at 479, 247 N.W.2d at 104. Third, the variance cannot be contrary to the public interest. ***Arndorfer***, 162 Wis.2d at 256, 469 N.W.2d at 835. Unnecessary hardship can be best described as a situation in which no feasible use can be made of the land unless the variance is granted. ***Snyder***, 74 Wis.2d at 474, 247 N.W.2d at 102.

The County denied the Laings' variance request for the following reasons:

> It was the consensus of the Committee members that a hardship as a result of the land doesn't appear to be present to allow approval of this after the fact variance request because there are other areas where the gazebo and patio could have been constructed that would have been in compliance with the ordinance, and Section 3.23(5) of the Adams County Shoreland Protection Ordinance prohibits canopies and roofs on deck structures.

While the record before the County reveals that the Laings demonstrated that their brothers needed the gazebo and patio to enjoy the lake, there is no evidence demonstrating that there was anything unique about the property itself which would require them to build a gazebo and patio near the lake. Since an unnecessary hardship does not include conditions personal to the landowners, the availability of shading provided by the gazebo is not sufficient to support a variance. Thus, the Laings failed to meet their burden of proving a hardship and the County's decision was not arbitrary, oppressive or unreasonable.

The Laings also argue that because three other requests for variances were granted in which the landowner wanted to build a structure near the lake to make it accessible to a disabled person, but the Laings' request was not, the Laings were denied equal protection. But again, the Laings have not shown any evidence of intentional, systematic and arbitrary discrimination or that they were similarly situated to those landowners. Indeed, the record contains evidence showing that the County has denied other requests for variances. The County need not explain why it denied the Laings' request but granted others when its decision is based upon reasons supported by the record. The fact that the Laings' request was denied, without more, does not prove an equal protection claim.

By the Court.—Orders affirmed.

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