COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 9, 1996

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(1), STATS.

NOTICE

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

No. 95-1762

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JEFFREY L. OSKEY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The State appeals the denial of injunctive relief against Jeffrey Oskey, whom the State contends exceeded the legal limit of 50% of assessed value for structural repairs to nonconforming floodplain buildings. Oskey made alterations totaling over $200,000 to a house assessed at less than $40,000. The State argues that the trial court incorrectly applied the definition of "structural repair" developed in ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 498 N.W.2d 842 (1993). We agree and reverse that part of the judgment. We also affirm the trial court's conclusion that both the state administrative and county

code sections that prohibit structural repairs and alterations in floodplains are not unconstitutionally vague.

Oskey's house is located in a floodplain on Trenton Island. The floodplain zoning laws allow the house to remain in the floodplain because it was built before the enactment of the laws. However, the house is subject to certain restrictions, including WIS. ADMIN. CODE § NR 116.15 and Pierce County, Wis., Ordinance ch. 17.60.190 (Sept. 19, 1978), which prohibit structural repairs to a nonconforming structure in excess of 50% of the building's assessed value.[1]

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[1] WIS. ADMIN. CODE § NR 116.15 provides in part:

(1) Insofar as the standards in this section are not inconsistent with [other provisions], they shall apply to all uses and buildings that do not conform to the provisions contained within a floodplain zoning ordinance. These standards apply to the modification of, or addition to, any building and to the use of any building or premises which was lawful before the passage of the ordinance. The existing lawful use of a building or its accessory use which is not in conformity with the provisions of a floodplain zoning ordinance may be continued subject to the following conditions:

(a) No extension of a nonconforming use, or modification or addition to any building with a nonconforming use or to any nonconforming building, may be permitted unless they are made in conformity with the provisions of this section. For the purposes of this section, the words "modification" and "addition" shall include, but not be limited to, any alteration, addition, modification, outbuilding or replacement of any such existing building, accessory building or accessory use. Ordinary maintenance repairs are not considered structural repairs, modifications or additions; such ordinary maintenance repairs include internal and external painting, decorating, paneling, the replacement of doors, windows and other nonstructural components; and the maintenance, repair or replacement of existing private sewage systems, water supply systems or connections to public utilities;

....

(c) No modification or addition to any nonconforming building or any building with a nonconforming use, which over the life of the building would exceed 50% of its present equalized assessed value, may be allowed unless the entire building is permanently changed to a

Oskey applied for a permit to expand his house. The county granted the permit, but limited the amount of improvements to $18,401 so that the improvements would comply with the floodplain zoning restrictions.[2] Oskey began work on his house, and a state inspector viewed the construction and determined that Oskey had expanded and improved his house beyond the amount allowed in the permit.

(..continued)

conforming building ....

Pierce County, Wis., Ordinance ch. 17.60.190 provides in part:

The existing lawful use of a structure or premises which is not in conformity with the provisions of this chapter may be continued subject to the following conditions:

....

B. No structural alteration, addition, or repair to any nonconforming structure over the life of the structure shall exceed fifty percent of its assessed value at the time of its becoming a nonconforming use unless permanently changed to a conforming use.

[2] The state floodplain regulation, the county ordinance and the county permit each limit Oskey's structural repairs to a different amount. The county ordinance limits repairs to 50% of assessed value at the time the building became a conforming use. The structure became a nonconforming use in 1968. The 1968 assessed value was not in the record; however, the 1966 assessed value was $15,600 and the 1970 assessed value was $15,500, indicating that repairs should not exceed $7,800.

The state regulation limits repairs to 50% of the building's present equalized value. The parties agree that 50% of the equalized assessed value of Oskey's house at the time he sought to expand and remodel it was approximately $19,340.

The amount of the permit is $18,401. The county's permit allowed Oskey to build in an amount in excess of that allowed by the county ordinance. Apparently the county issued the permit in this amount in an attempt to comply with § 87.307, STATS., which mandated floodplain ordinances pertaining to property on Trenton Island to use the present equalized value in calculating the 50% limit on structural modifications to property, instead of using the assessed value at the time the structure became a nonconforming use. However, a Pierce County Circuit Court decision subsequently declared this statutory section unconstitutional.

For purposes of this opinion, we will refer to these three limits collectively as the "50% prohibitions."

The State sought a court order requiring that Oskey limit the improvements to his house to comply with the applicable restrictions and to remove the alterations to his house that exceed the value in the permit. Oskey argued that the Pierce County ordinance was void for vagueness because it did not specify how the structural alterations should be valued for purposes of the 50% prohibitions.

The trial court concluded that the ordinance was not unconstitutionally vague because the only reasonable interpretation of it was to value the improvements at their cost to the property owner. The court tried the case on the merits, deciding the sole factual issue whether Oskey violated the 50% limits when he remodeled and expanded his house. The trial court found the State had not met its burden of proof and, accordingly, dismissed the complaint.

The trial court's decision presents a mixed finding of law and fact. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). In such cases, we review the trial court's conclusion of law independently and apply the clearly erroneous standard to the factual part of the decision. ***Id***. The constitutionality of a statute is a question of law that we review without deference to the trial court. ***Szarzynski v. YMCA***, 184 Wis.2d 875, 883-84, 517 N.W.2d 135, 138 (1994).

The record indicates that Oskey made repairs and alterations to his house in the amount of $210,427.41, well exceeding the 50% prohibitions. The dispute between the parties concerns what portion of these improvements are "structural" and should be applied against the 50% improvement limits.[3]

Our supreme court recently interpreted a similar ordinance in ***Marris***. The ordinance prohibited "structural repairs or alterations" from exceeding "50 percent of the current assessed value of the structure ...." ***Id***. at 31

[3] WIS. ADMIN. CODE § NR 116.15(1)(c) limits "modification[s] or addition[s]," not "structural modifications or additions," and the State argues that subsection limits *any* alteration or addition to a nonconforming structure. However, § NR 116.15(1)(a) distinguishes between structural repairs and ordinary maintenance. *See supra* note 1. We conclude that § NR 116.15(1)(c) limits structural repairs or modifications, not any repairs or modifications.

n.16, 498 N.W.2d at 850 n.16. The court defined "structural repair" using the underlying policy objectives of the floodplain laws. The competing objectives in the restrictions on structural repairs are: first, to avoid imposing undue hardship on owners of nonconforming property by allowing them to make reasonable renovations to prevent deterioration and, second, to ensure that the nonconforming use is gradually eliminated. ***Id.*** at 33-34, 498 N.W.2d at 850. The court balanced these objectives by construing structural repairs

> to include work that would convert an existing building into a new or substantially different building, or work that would affect the structural quality of the building.
>
> ....
>
> However ... an owner is permitted to modernize facilities.

Id. at 38, 498 N.W.2d at 852.

At trial the State introduced evidence showing that, among other things, Red Wing Construction moved the front wall of Oskey's house out four feet to enclose an existing deck, built a new 24 x 18-foot screened porch, and added a half-story to the house, which included a bedroom, rec room, storage area, and closet. Red Wing redesigned the roof of Oskey's house to accommodate the new half-story.[4] Red Wing's estimate of the cost of the new porch was $15,000, moving the outside wall to enclose the existing deck was an additional $15,000, and the cost of the new story plus altering the roof to fit the roof was $62,000.[5]

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[4] By focusing on these three projects, we do not mean to imply that none of the other work was "structural repairs or modifications." We use these three to show that the State has met its burden by proving that Oskey violated the 50% prohibitions.

[5] Red Wing estimated the cost of all its work as follows:

New addition with full basement		$ 52,000.00
New deck:	1,800.00	
New screen porch:	15,000.00	
Front porch encloser:	15,000.00	
Existing house interior remodeling:		40,000.00
Reroof existing house:	10,000.00	

We conclude that adding a new porch, enclosing an existing deck, and adding a half-story to a house creates a "substantially different" building as contemplated by ***Marris***. The trial court concluded that the building was not substantially different because "[t]he Oskey home was a single family residence occupied by Mr. Oskey and his family before the construction began and it was a single family residence occupied by Mr. Oskey and his family after the construction was completed." The trial court construed "substantially different" too narrowly. ***Marris*** created the substantially different test so that "repairs that are *reasonably necessary to prevent deterioration* might not be classed as structural repairs." ***Id.*** at 38, 498 N.W.2d at 852. The three improvements we have discussed were not reasonably necessary to prevent deterioration.

The authority referred to in ***Marris*** supports our conclusion. *See* ***id.*** at 36 n.20, 498 N.W.2d 852 n.20. In 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 6.57 at 618-19 (3d ed. 1986), the author summarizes case law defining "structural alteration" as:

> The construction of a new building, the removal and replacement of a building, [and] the construction of an addition to a building ... seem clearly to be structural alterations of a nonconforming building or structure. Less clear, but probably usable, is the conclusion that alterations which enlarge the nonconforming building, or provide more floor space for a nonconforming use, or tend to render the nonconforming use more permanent, will be regarded as proscribed structural alterations.

The three improvements we have discussed are additions to the Oskey house, thus Anderson's treatise would classify them as "clearly structural."

Oskey argues that the State did not present enough evidence to establish that Oskey performed structural repairs in excess of the 50% prohibition. The trial court agreed with Oskey, holding that the State failed to

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$133,800.00

connect "any cost figure or increase in value to a particular structural alteration or addition."

The State presented an itemized estimate for all work done by Red Wing and evidence that Red Wing performed the work for a total cost that was very close to the total estimated cost.[6] The trial court assumably inferred the itemized costs in the estimate did not reflect an approximation of each item's actual cost. We reject the trial court's inference and conclude that the actual cost of the additions approximated their estimated cost, because total estimated cost of the project approximated its total actual cost and because no evidence was presented to the contrary.[7]

Next, Oskey argues that WIS. ADMIN. CODE § NR 116.15 and Pierce County Ord. ch. 17.60.020 are unconstitutionally vague because neither section defines how the structural additions or repairs should be valued, *i.e.*, at their cost to the homeowner, the fair market value of the services, or the amount by which the services increase the fair market value of the structure.

Unless a statute is so vague and uncertain that it is impossible to execute or to ascertain its legislative intent with reasonable certainty, it is valid. ***Richland School Dist. v. DILHR***, 174 Wis.2d 878, 905, 498 N.W.2d 826, 836 (1993). When we are confronted with a challenge to the constitutionality of a state law or local ordinance, we presume the law or ordinance is constitutional. *See* ***Betthauser v. Medical Protective Co.***, 172 Wis.2d 141, 150, 493 N.W.2d 40, 43 (1992). The party bringing the challenge must show the statute or ordinance is unconstitutional beyond a reasonable doubt. ***State v. McManus***, 152 Wis.2d 113, 129, 447 N.W.2d 654, 660 (1989).

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[6] Red Wing's estimate of the total cost of the projects was $133,800. *See supra* note 6. Oskey's records indicate that he paid Red Wing $134,761.64 after Red Wing finished the projects.

[7] We give no deference to this inference drawn by the trial court because it is based on documentary evidence. ***State ex rel. Sieloff v. Golz***, 80 Wis.2d 225, 241, 258 N.W.2d 700, 705 (1977). The clearly erroneous standard does not apply to factual inferences from documents because findings based on documents do not depend on credibility of witnesses. ***Vogt, Inc. v. International Brotherhood of Teamsters, Local 695***, 270 Wis. 315, 321i-321j, 74 N.W.2d 749, 754-55 (1956).

We conclude that the legislative intent of the ordinance and regulation can be determined with reasonable certainty. As the trial court noted, using the increased fair market value of the building would be unfair to the property owner because the owner would not know the value of the alterations until after the project was complete. Similarly, the fair market value of the services performed would be difficult for the property owner to ascertain. We agree with the rationale of the trial court and conclude that cost to the homeowner is the only reasonable interpretation of "value" in WIS. ADMIN. CODE § NR 116.15 and Pierce County Ord. ch. 17.60.020. Neither are unconstitutionally vague.

Finally, Oskey raises a factual argument regarding precisely which improvements on his house violate the 50% prohibitions. We remand to the trial court for this determination and to impose relief consistent with this opinion applying equitable principles.

By the Court. – Judgment affirmed in part; reversed in part and cause remanded. No costs to either party.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.