

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2000

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.

Nos. 99-2660 and 99-2661

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF BURNETT,

PLAINTIFF-RESPONDENT,

V.

DANIEL F. KAYE,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Burnett County:
JAMES H. TAYLOR, Judge. *Affirmed in part; reversed in part.*

¶1 HOOVER, P.J.¹ Daniel Kaye appeals the judgments determining that he constructed a dwelling without a permit and that he extended or enlarged a private sewage disposal system without a permit.² Kaye contends that the trial

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b)(1997-98).

² The two citations were not consolidated before the trial court, but were treated by the parties and court as though they were consolidated. This court consolidated the cases for appeal.

court erroneously construed the relevant ordinance by concluding that it applied to his garage with a loft was a dwelling. He also claims that he complied with the sanitary ordinance by having a safe and adequate system and, alternatively, that the sanitary ordinance is unconstitutionally vague.

¶2 The definition of dwelling contained in the ordinance does not encompass Kaye's building, and it was therefore inappropriate to find that he had constructed a dwelling without a permit. Accordingly, that judgment is reversed. Kaye, however, violated the sanitary ordinance by connecting the garage's plumbing to an existing septic system without a sanitary permit. The ordinance is not unconstitutionally vague because it gave fair notice of its requirements and provided an objective standard for its enforcement. Accordingly, that judgment is affirmed.

FACTS

¶3 Kaye owns real estate in Burnett County on which a cabin and garage with a loft living area are situated. In March 1992, Kaye applied for and received a building permit to construct the garage and loft. The drawing attached to Kaye's application for the permit did not show that the loft would be made into a living area or that it would have plumbing connected to Kaye's existing septic system. Plumbing was in fact installed in the loft and was connected at some point to Kaye's septic system. Kaye had "people there maybe ten nights a year"

¶4 In May 1998, Kaye was cited with two zoning ordinance violations. One was for constructing a dwelling unit without a permit in violation of BURNETT CTY., WIS., LAND USE ORD. § 9.2.³ The other was for connecting a building to a

³ No. 99-2660.

sanitary system without a permit or approval in violation of BURNETT CTY., WIS., SANITARY ORD. § I.A.⁴ The trial court determined that Kaye violated both ordinances and ordered the plumbing removed from the garage. Kaye appeals the judgments.

DISCUSSION

¶5 The issues on appeal involve statutory interpretation, the application of undisputed facts to the law, and the constitutionality of the sanitary ordinance. These are all questions of law that this court reviews de novo. *See County of Adams v. Romeo*, 191 Wis. 2d 379, 383, 528 N.W.2d 418 (1995); *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993).

1. Construction of Dwelling Unit Without Permit

¶6 Kaye contends that he obtained the permit necessary to construct the garage with loft. He claims that the County erroneously charged him with constructing a dwelling. Even assuming the loft is used as living quarters does not, Kaye asserts, make it a dwelling under the ordinance.

¶7 The County responds that Kaye constructed a dwelling and was required to disclose that he was constructing living quarters in order to obtain the necessary permit. It argues:

To allow a person to obtain a permit for a garage, with or without a loft, and then turn one-half of that structure into living quarters without the necessity of disclosing these living quarters to the Zoning Administrator or obtaining a permit for anything but the accessory structure, clearly leads to an absurd result, and therefore is not a proper

⁴ No. 99-2661.

construction [of the ordinance]. A more reasonable construction under the ordinance is that if a building is designed as the living quarters for one or more families, or is used exclusively as living quarters for one or more families, it is a dwelling under the ordinance.

¶8 An ordinance's construction is governed by the rules of statutory construction. See *Romeo*, 191 Wis. 2d at 387. The goal of statutory construction is to determine the legislature's intent. See *State v. Cardenas-Hernandez*, 219 Wis. 2d 516, 538, 579 N.W.2d 678 (1998). A court first reviews the statute's language. See *id.* "If that language clearly and unambiguously sets forth the legislative intent, it is the court's duty to apply that intent to the case at hand and not look beyond the statute's language to determine its meaning." *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 167, 580 N.W.2d 203 (1998).

¶9 BURNETT CTY., WIS., LAND USE ORD. § 9.2 provides in relevant part: "No structure shall be built, moved, or structurally altered until a building permit has been issued by the county Zoning Administrator." Kaye complied with the plain language of the ordinance. He obtained a permit before building his garage. Construction of a dwelling, however, apparently requires notice in the permit application that a dwelling is going to be constructed.⁵ The zoning code defines a dwelling as "[a] building designed or used exclusively as the living quarters for one or more families." BURNETT CTY., WIS., LAND USE ORD. § 2.1(8).

¶10 The ordinance unambiguously defines a dwelling as only those buildings designed or used exclusively as living quarters. Applying the

⁵ Neither party appended to the record a copy of the entire zoning ordinance. The briefs contain the text of the ordinance provisions the parties deemed relevant.

ordinance's plain language, this court concludes that Kaye's garage is not a dwelling. The building was not designed or used *exclusively* as living quarters. It was designed as a garage and indeed is used for, among other things, garaging motor vehicles. As such, Kaye did not violate the ordinance by failing to obtain a permit to construct a dwelling.

¶11 This result, which the County labels "absurd," flows from the language that it chose to use in the ordinance. Courts presume that the legislature chooses its terms carefully and with precision to express its meaning. *See Johnson v. City of Edgerton*, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996). If the County is unhappy with the result, its recourse is to revise the language of the ordinance to include buildings that contain living quarters. The judiciary may not rewrite the ordinance for the County under the guise of statutory construction. *See Madison Teachers v. Madison Metro. Sch. Dist.*, 197 Wis. 2d 731, 754, 541 N.W.2d 786 (Ct. App. 1995).

2. *Connecting Garage Plumbing to Septic System*

¶12 Kaye contends that BURNETT CTY., WIS., SANITARY ORD. § I.A.5 merely requires that he connect the plumbing from the garage to a "safe and adequate" septic system. He asserts that his septic system was safe and adequate and the County failed to prove otherwise. He also claims that the ordinance is unconstitutionally vague, presumably because it does not define what constitutes a safe and adequate septic system.

¶13 BURNETT CTY., WIS., SANITARY ORD. § I.A.5 provides in relevant part:

No building intended for human use or occupancy shall be erected, structurally altered, or relocated on a lot, unless

provision is made for safe and adequate private sewage facilities in accordance with the applicable requirements of this ordinance

The other applicable requirements, referenced in § I.A.5, include that "[n]o private sewage disposal system shall be installed, extended, enlarged or structurally altered until a sanitary permit has been issued." BURNETT CTY., WIS., SANITARY ORD. § IV.A.1.

¶14 This court concludes that the trial court properly concluded that Kaye violated § I.A.5. To connect the garage plumbing to the existing septic system, Kaye needed a sanitary permit. It is uncontested that, without a sanitary permit, he extended and enlarged the private sewage disposal system on his property by connecting the plumbing from the garage to the existing septic system. Therefore, the trial court's decision that Kaye violated § I.A.5 is affirmed.

¶15 The ordinance is not unconstitutionally vague. An ordinance is unconstitutionally vague only if it fails to give fair notice of the conduct prohibited and fails to provide an objective standard for its enforcement. *See Pittman*, 174 Wis. 2d at 276. Kaye's vagueness challenge ignores the language referring a reader to other provisions that, among other things, required Kaye to obtain a sanitary permit. The ordinance gave fair notice of the conduct prohibited and provided an objective standard for enforcement of the ordinance. It was not unconstitutionally vague.⁶

⁶ Apparently what constitutes a safe and adequate sanitary disposal system is determined in the permitting process. Kaye circumvented that process and cannot complain that the process would have been unconstitutionally vague. *See, e.g., State v. Pittman*, 174 Wis. 2d 255, 277, 496 N.W.2d 74 (1993) ("[W]hen the alleged conduct of a defendant plainly falls in the prohibited zone, the defendant may not base a constitutional vagueness challenge on hypothetical facts.").

¶16 Accordingly, the judgment in No. 99-2660 that Kaye violated BURNETT CTY., WIS., LAND USE ORD. § 9.2 is reversed, and the judgment in No. 99-2661 that Kaye violated BURNETT CTY., WIS. SANITARY ORD. § I.A.5 is affirmed.

By the Court.—Judgment in 99-2660 reversed; judgment in 99-2661 affirmed. No costs on appeal.

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

