COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3076

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

COUNTY OF ADAMS,

PLAINTIFF-APPELLANT,

V.

ROBERT RUFFER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Adams County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed and cause remanded.*

ROGGENSACK, J.[1] Adams County appeals an order dismissing its forfeiture action against Robert Ruffer for a violation of a county shoreline ordinance. The County claims that it should be allowed to assess continuing violation penalties for Ruffer's oversized patio, despite the fact that the ordinance under which it seeks penalties was enacted five years after the patio was built.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS.

Because the County's assertion is completely without legal merit, we affirm the order of the circuit court and also grant the respondent's motion for costs and fees.

BACKGROUND

Robert Ruffer bought property on the shore of Petenwell Lake in Adams County in 1984. In 1985, he built a 230-square-foot patio about 75 feet from the then-existing shoreline. Over the following decade, severe erosion shortened the distance of the patio from the shoreline to about 45 feet. In 1990, § 3.2 of the Adams County Shoreline Protection Ordinance was enacted to limit the size of patios located within 75 feet of the shoreline to 200 square feet. However, § 6.1 of the 1990 ordinance provided:

> The lawful use of a building, structure or property existing at the time this ordinance or ordinance amendment takes effect, which is not in conformity with the provisions of this ordinance, including the routine maintenance of such a building or structure, may be continued subject to [certain] conditions [none of which apply here].

Notwithstanding § 6.1, on April 15, 1997, Adams County issued Ruffer a citation because his patio was thirty square feet larger than the provisions of § 3.2 of the 1990 ordinance. Ruffer challenged the citation, and at the hearing on the matter, the County admitted that it had not known that the patio had been built in 1985 when it issued the citation, and that the patio was of legal size when built. The circuit court dismissed the forfeiture action, but the County appeals on the theory that the oversized patio constitutes a continuing violation of the 1990 ordinance each day of its existence, such that Ruffer should be accountable for daily fines of $200 since the date of the ordinance's enactment.

DISCUSSION

Standard of Review.

An appellate court may determine the proper interpretation of an ordinance without deference to the circuit court. ***County of Adams v. Romeo***, 191 Wis.2d 379, 383, 528 N.W.2d 418, 420 (1995). Similarly, the determination of whether a property owner has a valid nonconforming use "involves the application of the facts to a legal standard and, consequently, presents a question of law which we review *de novo*." *See* ***State ex rel. Brooks v. Hartland Sportsman's Club, Inc.***, 192 Wis.2d 606, 615, 531 N.W.2d 445, 448-49 (Ct. App. 1995).

Shoreline Protection Ordinance § 6.1.

Ordinances, like statutes, are construed in a manner which will give effect to the intent of the body which created them. Therefore, we begin our interpretation with a plain reading of the ordinance which is dispositive in this case. *See* ***State v. Eichman***, 155 Wis.2d 552, 560, 456 N.W.2d 143, 146 (1990). Section 6.1 of the 1990 Adams County Shoreline Protection Ordinance very plainly permits the continued use of nonconforming structures which were lawful when built, notwithstanding other provisions of the ordinance. The County has conceded that the size of Ruffer's patio was lawful when built. Therefore, we conclude that § 6.1 of the 1990 ordinance applies to Ruffer, and allows his continued nonconforming use of the patio. The County's forfeiture action was properly dismissed upon this ground.

In light of our decision, we need not address the County's arguments against estoppel, the applicable statute of limitations, or the circuit court's alternate finding that the violation was *de minimus*.

Motion for Costs and Fees.

Ruffer also moves for costs and fees under § 809.25(3)(a), STATS., on the ground that the County's appeal is frivolous. A frivolous appeal is one without any basis in law or equity and for which no good faith argument for the extension, modification, or reversal of existing law can be supported. Section 809.25(3)(c). The County based its appeal on § 15.0 of the Adams County Shoreline Protection Ordinance, which provides that "every day of violations shall constitute a separate offense." *See* ***Village of Sister Bay v. Hockers***, 106 Wis.2d 474, 317 N.W.2d 505 (Ct. App. 1982) (upholding the continuous violation theory for a water setback ordinance).

However, § 15.0 applies only to "violations." And since a lawful use of property which became a nonconforming use by the passage of the 1990 ordinance is grandfathered as a lawful use under § 6.1, the size of the patio did not constitute an ordinance violation in the first instance. Therefore, the size of the patio cannot form the basis for multiple offenses. Zero plus zero still equals zero. ***State v. Echols***, 152 Wis.2d 725, 745, 449 N.W.2d 320, 327 (Ct. App. 1989) (citation omitted). As the County failed to file any reply brief addressing Ruffer's assertion that the 1990 ordinance has no application to his 1985 patio (a dispositive issue which the County did not even acknowledge in its initial brief), it is reasonable to infer that it has now recognized the legal futility of its position, and has no good faith argument to advance. Accordingly, Ruffer's motion for costs and fees is granted, with the exception of his request to be compensated for his personal time. The statute permits the assessment of reasonable attorney's fees expended in defending against a frivolous appeal, but it does not permit an award to compensate for the time a *pro-se* litigant expends representing himself. *See* ***State ex rel. Young v. Shaw***, 165 Wis.2d 276, 295, 477 N.W.2d 340, 348 (Ct.

App. 1991). The circuit court is directed to determine the amount of Ruffer's reasonable appellate costs and fees upon remand.

Motion for Three Judge Panel.

Because this case was decided based on the application of established precedent, it does not meet the criteria for publication set forth in § 809.23(1), STATS. Therefore, we will not reconsider our previous denial of the motion to convert the case to a three-judge panel.

CONCLUSION

Ruffer's patio was plainly permitted under the grandfathering clause of the 1990 ordinance, and the County's continued pursuit of this action after learning that the patio predated the ordinance was without a reasonable basis in fact or law. The decision of the circuit court is affirmed and the matter is remanded for a determination of the appellant's reasonable costs and fees consistent with the parameters established by statute and this opinion.

By the Court.—Order affirmed and cause remanded.

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