COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1585

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

JAMES MILAM AND HERMINIA MILAM,

PETITIONERS-APPELLANTS,

V.

DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. James and Herminia Milam appeal from a circuit court order affirming an administrative law judge's decision that the Department of Natural Resources (DNR) properly denied the Milams' request for the water

quality certification necessary to fill wetland[1] on their property in order to construct residential housing. We affirm the circuit court.

Wetland is governed by WIS. ADM. CODE ch. NR 103. Wetland has a variety of functional values, including storm and flood water storage, filtration, hydrologic functions, habitat for wildlife and aquatic organisms, recreational and natural aesthetic values and uses. *See* WIS. ADM. CODE § NR 103.03(1)(a)-(g). The DNR reviews proposed activities which may have an affect on wetland. *See* WIS. ADM. CODE § NR 103.08(1). To protect present and future uses of wetland, the DNR considers, inter alia, practicable alternatives to the proposed property use which will not adversely affect wetland or create significant adverse environmental consequences. *See* WIS. ADM. CODE § NR 103.08(3)(b). If these criteria are not satisfied, the DNR must find that the requirements of WIS. ADM. CODE ch. NR 103 have not been satisfied. *See* WIS. ADM. CODE § NR 103.08(4)(a).

The Milams own seventeen platted lots on which they desire to build a subdivision. Three of those lots contain wetland totaling approximately three-quarters of an acre. The proposed fill area consists of large portions of lots 12, 13 and 14.[2] The Milams applied to the DNR for water quality certification in order to fill the wetland. The DNR's wetland/water management specialist denied the Milams' application because there was a practicable alternative to filling the wetland, filling the wetland would result in significant adverse environmental impact, and a substantial net profit on the subdivision development could be

[1] Wetland is "an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions." WIS. ADM. CODE § NR 103.02(5).

[2] It is undisputed that the proposed fill area constitutes wetland under applicable law.

realized without filling the wetland. The Milams then requested a contested case hearing before an administrative law judge (ALJ).[3]

After the contested case hearing, the ALJ found that the Milams had not demonstrated the absence of practicable alternatives to filling the wetland. The ALJ found a practicable alternative to filling the wetland: the Milams could combine the wetland-dominated lots with other lots and build residential housing on the non-wetland or upland portion of the combined lots. Therefore, the ALJ denied the request for water quality certification and dismissed the Milams' petition for review. On judicial review, the circuit court affirmed the ALJ.

The Milams argue on appeal that the DNR's wetland/water management specialist erroneously based her denial of water quality certification upon a consideration of the Milams' lost profit if they could not fill the wetland to build residential housing. This contention requires us to address the focus of our review.

On appeal from a circuit court order affirming an ALJ's decision, we review the ALJ's decision, not that of the circuit court. *See* ***Sea View Estates Beach Club, Inc. v. DNR***, 223 Wis.2d 138, 145, 588 N.W.2d 667, 670 (Ct. App. 1998). Where, as here, an ALJ was assigned to preside over a de novo evidentiary contested case hearing to address the Milams' water quality certification permit request, *see* WIS. ADM. CODE § NR 299.05(5) and (6), and the DNR did not provide for final review by the Secretary or petition for judicial review of the

[3] The ALJ held a contested case hearing on the Milams' application for water quality certification. This procedure is authorized by § 227.46(3)(a), STATS., and WIS. ADM. CODE § NR 2.155(1) which provide that the DNR may direct that the ALJ's decision be the agency's final decision. In this case, the ALJ's order is the DNR's decision on the Milams' application for water quality certification.

ALJ's decision, the ALJ's decision is the DNR's final decision. *See* ***Sea View***, 223 Wis.2d at 147, 588 N.W.2d at 671. Therefore, we review the ALJ's decision, not the DNR's staff analysis which was the basis for the DNR's position at the contested case hearing. *See* ***id.*** at 147-48, 588 N.W.2d at 671. As the circuit court rightly points out in its memorandum decision, the contested case hearing was the forum to dispute the DNR's methodology in addressing the Milams' permit application.

The Milams argue that the specialist's profit analysis is irrevocably linked with the practicable alternatives test. We deem this irrelevant. The ALJ discounted the specialist's profit analysis because the DNR's rules do not allow for such an analysis.

The ALJ determined that there was a practicable alternative to filling the wetland and that filling the wetland would have a detrimental impact on the functional values of the wetland. The Milams argue that the ALJ's decision is not supported by the evidence.

On review of factual questions, we employ the "substantial evidence" standard. *See* ***id.*** at 148, 588 N.W.2d at 671. "Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." ***Id.*** We will not set aside the ALJ's decision unless our examination of the entire record reveals that "the evidence, including the inferences therefrom, is such that a reasonable person could not have reached the decision from the evidence and its inferences." ***Id.***

The Milams ignore the other evidence offered by the DNR which demonstrates that the Milams did not meet their burden to show the absence of a practicable alternative to filling the wetland and that filling the wetland would not

create an adverse environmental impact. *See* ***Sterlingworth Condominium Ass'n v. DNR***, 205 Wis.2d 710, 726, 556 N.W.2d 791, 796 (Ct. App. 1996).

A practicable alternative is defined as "available and capable of being implemented after taking into consideration cost, available technology and logistics in light of overall project purposes." WIS. ADM. CODE § NR 103.07(2). The DNR specialist testified that a practicable alternative would be to combine lots 12 and 13 with lots 14 and 15 to create two larger lots. The specialist referred to the 1993 opinion of the Milams' consultant on an earlier DNR permit application that combining lots 12 and 13, and lots 14 and 15 would permit residential housing and substantial maintenance of the wetland. The Milams' consultant recommended this alternative for developing the property. The ALJ concluded that this approach would permit use of the larger lots to construct residential housing on the upland area without adversely impacting the wetland areas on other portions of the enlarged lots.

The ALJ's determination is supported by evidence which a reasonable mind would accept for such a conclusion. *See* ***Sea View***, 223 Wis.2d at 148, 588 N.W.2d at 671. The ALJ's alternative permits the remaining fifteen lots to be developed as planned and meets the project's overall purpose: residential development. It is correct to view the Milams' seventeen lots property as a whole for purposes of assessing the impact of wetland on the project's purpose, not just the affected portions of the wetland lots. *Cf.* ***Zealy v. City of Waukesha***, 201 Wis.2d 365, 376-78, 548 N.W.2d 528, 532-33 (1996) (property viewed as a whole for purposes of evaluating whether a taking has occurred). The ALJ's practicable alternative permits development of a subdivision on the unaffected lots.

As stated in our prior discussion of DNR wetland regulation, the existence of a practicable alternative precludes filling the wetland regardless of the

degree of adverse environmental impact. *See* WIS. ADM. CODE § NR 103.08(4)(a)2. However, because the ALJ, the circuit court and the parties on appeal have addressed the environmental impact, we will as well.

The Milams argue that the ALJ's determination that filling the wetland would cause a significant adverse environmental impact is not supported by the record. They rely upon an analysis performed by the South Eastern Wisconsin Regional Planning Commission (SEWRPC) which approved filling the wetland. However, the DNR must independently evaluate whether to issue a water quality certification. The DNR's specialist testified that this SEWRPC report did not satisfy the DNR's wetland requirements under WIS. ADM. CODE ch. NR 103. The ALJ was free to accept this testimony.

Turning to the record, we find substantial evidence supporting the ALJ's environmental impact determination. The DNR specialist's unrefuted testimony addressed the functions performed by wetland, including storm and flood water attenuation, wildlife habitat, water quality protection and aesthetic relief. The specialist also addressed the harm to these functions if the wetland were filled and opined that a drainage easement on the property would not perform the function of wetland vis-à-vis water quality and impact on wildlife. The specialist testified that the foregoing factors were very important in her decision to deny the permit. This was the evidence before the ALJ, and the Milams did not counter it.[4]

[4] Herminia Milam, a layperson, testified about a 20-foot wide by 183-foot long drainage easement between lots 13 and 14 and opined that this would be an adequate substitute for the filled wetland. Milam apparently based this testimony upon her consultation with the Army Corp of Engineers. The DNR specialist testified as to why the easement would not function as wetland. It was for the ALJ to evaluate the weight of the testimony on this point. *See* ***Micro-Managers, Inc. v. Gregory***, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988) (the trier of fact is responsible for determining the weight of the evidence and the credibility of the witnesses).

The Milams did not demonstrate the absence of either a practicable alternative or adverse environmental impact from their proposal to fill the wetland. Therefore, the circuit court did not err in affirming the ALJ.

By the Court.—Order affirmed.

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