COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2531

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

REGINALD C. BRUSKEWITZ,

PLAINTIFF-RESPONDENT,

V.

TELLURIAN, INC., D/B/A TELLURIAN UCAN, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

ROGGENSACK, J. Tellurian, Inc. (Tellurian) appeals a judgment of the circuit court enjoining Tellurian from establishing a Community Living Arrangement (CLA) housing federal inmates within 2,500 feet of an existing CLA. We conclude that Tellurian violated the 2,500 foot spacing restriction of § 62.23(7)(i)1., STATS., because Madison had no ordinance establishing a lesser

distance restriction. We also conclude that the circuit court properly considered equitable factors in exercising its discretion to grant the injunction. Accordingly, we affirm.

BACKGROUND

Tellurian purchased a house in a Madison, Wisconsin residential neighborhood. Tellurian then applied to Madison for an occupancy permit to use the house as a CLA for federal inmates on release programs. On May 19, 1998, the Madison Zoning Administrator issued the occupancy permit Tellurian had requested. When the permit was issued, another CLA was already located less than 2,500 feet from Tellurian's proposed site.

On May 22, 1998, Reginald Bruskewitz, who lives forty-five yards from Tellurian's proposed CLA, commenced a lawsuit seeking to enjoin Tellurian from operating the CLA. He alleged that Tellurian had violated § 62.23(7)(i)1., STATS., which prohibits a CLA from being located closer than 2,500 feet to another CLA, unless a city ordinance establishes a lesser spacing distance. In support of the injunction, Bruskewitz also testified that the proximity of the proposed CLA to his house and to the existing CLA would reduce his property value, create a parking problem, and would be unsafe for his family and for him. Tellurian agreed that its proposed CLA is located within 2,500 feet of an existing CLA, but it contended that Madison had established a zero-foot spacing requirement by repealing MADISON GENERAL ORDINANCE § 28.08(2)(b)11.c., which had previously established the same 2,500 foot spacing requirement as § 62.23(7)(i)1.

Tellurian did not present any evidence opposing Bruskewitz's testimony on the effects of the proposed CLA, at either the temporary injunction

hearing or at the permanent injunction hearing. After the circuit court granted the permanent injunction, Tellurian filed a motion for reconsideration, alleging that the circuit court failed to consider equitable factors before granting the injunction, as required by ***Forest County v. Goode***, 219 Wis.2d 654, 684-85, 579 N.W.2d 715, 728-29 (1998). The circuit court denied the motion, concluding that ***Forest County*** was distinguishable from the present case, and that, in any event, the court had considered equitable factors in ruling on Bruskewitz's motion for an injunction. This appeal followed.

DISCUSSION

Standard of Review.

Construction of a statute, or its application to undisputed facts, is a question of law, which we decide independently, without deference to the circuit court's determination. ***Truttschel v. Martin***, 208 Wis.2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997). In contrast, injunctive relief is addressed to the sound discretion of the circuit court. ***Pure Milk Prods. Coop. v. National Farmers Org.***, 90 Wis.2d 781, 800, 280 N.W.2d 691, 700 (1979). When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***State v. Keith***, 216 Wis.2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997).

Statutory Interpretation.

When we are asked to construe a statute whose meaning is in dispute, our efforts are directed at determining legislative intent. ***Truttschel***, 208 Wis.2d at 365, 560 N.W.2d at 317. We begin that task by accepting the plain meaning of the language used in the statute. ***Id.*** If the language of the statute clearly and unambiguously sets forth the legislative intent, our inquiry ends, and this court must apply that language to the facts of the case. ***Id.***

The merit, or the lack thereof, of Tellurian's argument depends upon the construction § 62.23(7)(i)1., STATS., which states in relevant part:

> No community living arrangement may be established after March 28, 1978 within 2,500 feet, or any lesser distance established by an ordinance of the city, of any other such facility. Agents of a facility may apply for an exception to this requirement, and such exceptions may be granted at the discretion of the city.

Section 62.23(7)(i)1., unambiguously states that unless a city has established a lesser distance restriction between CLAs, the 2,500 foot restriction of § 62.23(7)(i)1., applies.[1]

This interpretation of the statute is not contested on appeal. Instead, Tellurian argues that Madison has "established by an ordinance" a zero-foot restriction for CLAs. Its reasoning is as follows: Madison had earlier enacted MADISON GENERAL ORDINANCE § 28.08(2)(b)11.c, which established the same distance restriction as § 62.23(7)(i)1., STATS., *i.e.*, 2,500 feet. Madison repealed

[1] We note that § 62.23(7)(i)1., STATS., also permits agents of a CLA to apply for an exception to the 2,500 foot requirement, and that in certain circumstances two CLAs may operate adjacent to each other, if they comprise essential components of a single program and the city approves. However, those provisions are not before us.

§ 28.08(2)(b)11.c., without enacting any other ordinance dealing with the spacing restriction for CLAs. Therefore, Tellurian argues, the repealing of § 28.08(2)(b)11.c., demonstrates Madison's intent to establish a new spacing restriction of zero feet. While Tellurian's reasoning is creative, we disagree that repealing an ordinance is equivalent to establishing a lesser distance than that set out by the statute.

First, establishing a spacing requirement by repealing an ordinance, rather than by enacting one, is contrary to the plain wording of the statute which permits a city to establish a different requirement "by an ordinance of the city." To interpret the dispositive phrase of the statute as Tellurian requests would establish a rule of law which would require citizens to find all the ordinances that have been repealed in order to know what the law of the municipality requires. This makes no practical sense. One can only guess at the confusion such a rule would create, as ordinances are repealed on a regular basis. Second, zero-foot spacing is contrary to the legislature's intent in enacting the CLA spacing requirement. It was established to enable persons who otherwise would have been institutionalized to live in normal residential settings that did not include numerous CLAs. Apparently, the legislature concluded that a neighborhood with numerous CLAs would lose its established character, which character was thought to be important in hastening the return of the CLA residents to their own homes. *See* ***"K" Care, Inc. v. Town of Lac du Flambeau***, 181 Wis.2d 59, 68-69, 510 N.W.2d 697, 701 (Ct. App. 1993) (citing Laws of 1977, ch. 205, § 1). Third, the drafting papers for the repeal of the ordinance which are in the record show a reason for repealing the ordinance in 1993 was the belief that both the ordinance

and § 62.23(7)(i)1., STATS., probably were unenforceable.[2] There is nothing in the drafting notes that indicates the ordinance was repealed because Madison intended to adopt zero-foot spacing for CLAs. Therefore, we conclude that the statute unambiguously establishes a 2,500 foot distance requirement between CLAs unless a city enacts an ordinance which sets up a different spacing requirement. We further conclude that Madison has no such ordinance and that Tellurian's proposed CLA violates § 62.23(7)(i)1.

Injunction.

Once a zoning violation is established, a neighboring property owner may seek an injunction prohibiting the unlawful property use if he establishes that he would be specially damaged by the violation. Section 62.23(8), STATS;[3] ***Jelinski v. Eggers***, 34 Wis.2d 85, 91-92, 148 N.W.2d 750, 754 (1967). A property owner is specially damaged by a zoning violation when the injury threatened is irreparable and different from that of the general public. ***Jelinski***, 34 Wis.2d at 91, 148 N.W.2d at 754. For example, in ***Jelinski***, the supreme court concluded that a property owner who was denied the full use of light and air and view from his home by reason of the defendant's erection of a garage in violation of a zoning

[2] "[I]t is our opinion that the enforceability of Sec. 62.23(7)(i)1., Stats., and our ordinance is doubtful in light of ***Horizon House [Developmental Servs., Inc. v. Township of Upper Southampton***, 804 F. Supp. 683 (E.D.Pa. 1992)]." Appellant's app., p. 6.

[3] Section 62.23(8), STATS., provides in relevant part:

> In case any building or structure is or is proposed to be erected, constructed or reconstructed, or any land is or is proposed to be used in violation of this section or regulations adopted pursuant thereto, … any adjacent or neighboring property owner who would be specially damaged by such violation, may, in addition to other remedies provided by law, institute injunction … to prevent or enjoin … such unlawful erection, construction or reconstruction.

ordinance was specially damaged and entitled to an injunction pursuant to § 62.23(8). ***Id.*** at 92, 148 N.W.2d at 754. In determining whether the property owner was entitled to an injunction, the supreme court also considered equitable factors. ***Id.*** at 93, 148 N.W.2d at 755.

In ***Forest County***, 219 Wis.2d at 684-85, 579 N.W.2d at 728-29, the supreme court concluded that traditional equitable considerations should be balanced by the circuit court before issuing an injunction, even when a statute[4] specifically authorizes injunctive relief. Once a zoning violation is established, "a circuit court should grant the injunction except, in those rare cases, when it concludes, after examining the totality of the circumstances, there are compelling equitable reasons why the court should deny the request for an injunction." ***Id.*** at 684, 579 N.W.2d at 729.

In the case at bar, Bruskewitz submitted evidence in support of the injunction. He testified that the proximity of the proposed CLA to his house and to the existing CLA would reduce his property value, create a parking problem, and would cause unsafe conditions for him and for his family. Although Bruskewitz's safety concerns are based on the proximity of the CLA to his residence, his concerns about parking and property value reductions relate, at least in part, to the proximity of the proposed CLA to the existing CLA. Because he, unlike the general public, would be forced to endure traffic congestion and reduced property values resulting from the establishment of another CLA in his neighborhood and because such injuries are not adequately compensable in

[4] In ***Forest County v. Goode***, 219 Wis.2d 654, 579 N.W.2d 715 (1998), the supreme court interpreted and applied § 59.69(11), STATS., which provides a procedure for enforcing county zoning ordinances, rather than § 62.23(8), STATS., which applies here.

damages, the circuit court concluded Bruskewitz would be specially damaged by Tellurian's violation of the spacing requirement. We agree with that conclusion.

Furthermore, Bruskewitz's concerns about conditions which affect him and his family through the placement of Tellurian's proposed CLA are consistent with the concerns of the legislature in establishing the spacing requirement set forth in the statutes. That is, clustering of CLAs will change the residential character of a neighborhood. *See* ***"K" Care, Inc.***, 181 Wis.2d at 68-69, 510 N.W.2d at 701. Additionally, Tellurian did not present any evidence opposing Bruskewitz's testimony on the effects of the proposed CLA, nor did it make any equitable argument sufficient to demonstrate a compelling equitable reason why the circuit should have denied the injunction.[5] Therefore, we conclude that the circuit court did not erroneously exercise its discretion in issuing the injunction.

CONCLUSION

Tellurian violated the 2,500 foot spacing restriction of § 62.23(7)(i)1., STATS., because Madison's repeal of an ordinance establishing a 2,500 foot spacing requirement was not equivalent to enacting a city ordinance establishing a lesser distance restriction. In addition, the circuit court properly considered equitable factors in the exercise of its discretion, before it granted an injunction based on the zoning violation. Therefore, we affirm its decisions.

[5] Although Tellurian submitted this evidence in its motion for reconsideration, arguing that it had no basis to challenge Bruskewitz's claims before ***Forest County*** was decided, it waived this argument by failing to submit the evidence at the injunction hearings because ***Jelinski v. Eggers***, 34 Wis.2d 85, 93-94, 148 N.W.2d 750, 754-55 (1967), provided adequate support for its argument that the circuit court must consider equitable factors before issuing an injunction under § 62.23(8), STATS.

By the Court.—Judgment and order affirmed.

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