

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 7, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 01-3104-FT  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CV-410**

**IN COURT OF APPEALS  
DISTRICT IV**

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**VILLAGE OF LAKE DELTON, A WISCONSIN MUNICIPAL  
CORPORATION,**

**PLAINTIFF-APPELLANT,**

**V.**

**JAMES A. ROBERTS,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Sauk County:  
JAMES EVENSON, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. The Village of Lake Delton appeals the dismissal on summary judgment of its action to compel James Roberts to remove a backyard deck which the Village alleged violated a local setback ordinance. We conclude

that the deck complied with the zoning code in effect at the time the deck was built, and therefore affirm.

¶2 Roberts built a house on a lot in Lake Delton which was zoned Waterfront Commercial (WC). The project included the construction of a multi-level wooden deck along the back side of the house, facing the lake. The deck is unenclosed, except for side railings and some vertical and overhead beams, and it extends to within twenty feet of the shoreline.<sup>1</sup>

¶3 After the house and deck were constructed, the Village informed Roberts that the deck violated the local zoning code, which provides that the rear yard setback area for WC property is twenty feet and no structure attached to a principal building may extend into the setback area. When Roberts refused to remove the deck or apply for a variance, the Village filed an action to prevent him from continuing the violation—that is, to compel him to remove the deck. *See generally County of Columbia v. Bylewski*, 94 Wis. 2d 153, 167, 288 N.W.2d 129 (1980) (discussing the circumstances in which the ordered removal of a structure is a proper remedy).

¶4 The trial court determined, and the Village concedes on appeal, that the zoning code provisions the Village initially cited as being in effect at the time the lawsuit was filed were inapplicable because they were enacted after Roberts had already obtained his building permit. The version of the zoning code which

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<sup>1</sup> Although neither party tells us the exact distance of the deck from the shoreline, it is apparent from the photograph included in the record that the deck comes to within a few feet of the lake, and Roberts does not dispute that it falls within the setback area.

actually applied was that enacted by VILLAGE OF LAKE DELTON, ZONING AND PLANNING ORDINANCE #9-91-272 (1991).

¶5 Chapter II, subchapter I, section VI of the 1991 zoning code set forth the following setback requirements for WC district property:

- A. The minimum front yard setback shall be twenty (20) feet.
- B. The minimum rear yard setback shall be twenty (20) feet.
- C. The minimum side yard setback for principal buildings shall be six (6) feet on one side and twenty (20) feet total for both sides.
- D. The minimum side yard setback for accessory buildings shall be four (4) feet on each side.
- E. No building shall be constructed and no existing buildings shall be constructed or altered in such a way that any portion thereof will be closer to the shoreline than twenty (20) feet. The term “shoreline” as used herein shall be interpreted to mean the normal high water line, and all buildings which abut on Lake Delton or any watercourse within the Village of Lake Delton limits shall conform to the above standard.

The code defined “setback” as:

The open space between the property line or public right of way and the nearest part of the building. Unenclosed terraces, slabs or stoops without roofs or walls may project into this open space or setback.

ZONING CODE, VILLAGE OF LAKE DELTON, WISCONSIN, ch. I, art. XVIII (1991).

The code did not define the terms “open space,” “terraces,” “slabs” or “stoops.” Nor did it include, as did its successor, any provision explicitly prohibiting attached structures from extending into setback areas. The 1991 code did define “building” as:

[a]ny structure having a roof supported by columns or walls used or intended to be used for the shelter or enclosure of persons, animals, equipment, machinery or materials[;]

and “deck” as:

[a]n unenclosed exterior structure attached or adjacent to the exterior wall of any building having a floor but no walls or roof.

***Id.***

¶6 The Village contends that the 1991 rear yard setback provision, in conjunction with the setback definition, required twenty feet of open space in a rear yard, plainly prohibiting the existence of anything other than a terrace, slab, or stoop within the setback area. Roberts disputes that the provision had the meaning assigned to it by the Village, and instead contends that when the rear yard setback provision is read in conjunction with the shoreline provision, the only structures which were actually prohibited in WC setback areas were buildings.

¶7 Roberts bears the initial burden of showing that the ordinance’s meaning was ambiguous or plainly contrary to the interpretation given to it by the municipality. ***State ex rel. Beidler v. Williams Bay Zoning Bd.***, 167 Wis. 2d 308, 311, 481 N.W.2d 669 (Ct. App. 1992). We will independently consider the proper construction of the ordinance, using the ordinary rules of statutory construction. ***County of Adams v. Romeo***, 191 Wis. 2d 379, 383, 528 N.W.2d 418 (1995).

¶8 We are not persuaded that the setback definition is plain and unambiguous with respect to decks. In our view, the term “open space” could be reasonably construed in several ways, ranging from nothing but grass, through having land with only mobile objects on it, to having only structures with no enclosing or confining barriers such as walls which would block views. We note

that among the eighteen different definitions given for the adjective “open” by Webster’s Third New International Dictionary are: “so arranged or governed as to permit ingress, egress, or passage,” “completely free from concealment,” “having no roof, lid, or other covering,” and “fit to be traveled over or through.” We are satisfied that a deck could meet several of these definitions, in that it is a structure which, by the ordinance’s own terms, has no walls or roof, and thus would conceal little and could easily be traveled over. In addition, we are satisfied that the references to unenclosed terraces, slabs, or stoops without roofs or walls could reasonably be read as an illustrative list, rather than an exhaustive one. We therefore conclude that Roberts has met his initial burden of showing that the code was ambiguous with respect to decks. Accordingly, our construction of the provisions at issue will take into account their subject matter, object, scope, history and context. *University of Wisconsin v. Dane County Bd. of Adjustment*, 2000 WI App 211, ¶14, 238 Wis. 2d 810, 618 N.W.2d 537.

¶9 The rear yard setback and shoreline provisions were part of a zoning code whose general purpose was “to adopt minimum requirements to promote the health, safety, morals, prosperity, aesthetics, and general welfare of the Village of Lake Delton.” ZONING CODE, VILLAGE OF LAKE DELTON, WISCONSIN, ch. I, art. III (1991). The purpose of the WC district regulations in particular was “to provide an area generally fronting on bodies of water for those residential and commercial activities related to aquatic recreation and enjoyment, or for which location adjacent to a lake or river is a compelling practical consideration.” ZONING CODE, VILLAGE OF LAKE DELTON, WISCONSIN, ch. II. subch. I, art. I (1991). Both of these stated purposes, as well as the general subject matter and scope of the code, support the notion that the setback and shoreline provisions

were intended to maximize the aesthetic enjoyment of those using the lake, but neither gives specific guidance as to the intended treatment of decks.

¶10 The only relevant history of the code with which we have been provided is an excerpt from a subsequently enacted version of the zoning code. The more recent version of the zoning code includes a provision stating that no structure attached to a principal building could extend into a setback area. ZONING CODE, VILLAGE OF LAKE DELTON, WISCONSIN, ch. I, art. XIII, § I (1999). If the setback definition had the meaning which the Village assigns to it, such an additional provision would have been unnecessary. Therefore, the subsequent history of the code supports Roberts' contention that the 1991 version did not prohibit decks in the setback area.

¶11 Furthermore, reviewing the provisions at issue in the context of the code as a whole, we agree with Roberts that the shoreline provision in (E) plainly and unambiguously applied only to buildings. Thus, if we were to accept the Village's construction of the term setback to preclude decks, decks on the front or rear of a house would have needed to be twenty feet away from the shoreline, but decks on the side of the house could have come to within four feet of the shoreline. We view this result as absurd. If, however, the open space of the setback provisions required only the absence of buildings, the shoreline provision could have been understood to require a setback of twenty feet, rather than four feet, when the side of a house faced the lake. We are persuaded that this is the most reasonable construction of the code provisions as a whole. We therefore conclude that the 1991 zoning code did not prohibit decks within setback areas, and the trial court properly dismissed the Village's injunction action.

*By the Court.*—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5  
(1999-2000).

