STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF OGEMAW,

Plaintiff/Cross-Defendant/Appellee,

v

HUGH YOTT and GRACE YOTT,

Defendants/Cross-Plaintiffs/Appellants.

UNPUBLISHED
January 31, 1997

No. 186332
Ogemaw Circuit Court
LC No. 94-437-CZ

Before: Markman, P.J., and O'Connell and D. J. Kelly,* JJ.

PER CURIAM.

Plaintiff Ogemaw County sought an order compelling defendants to remove the wooden deck in their yard that had been constructed without a building permit and in violation of a stop work order. Following a bench trial, the trial court found that a building permit was required under the ordinance and that defendants' deck violated building size and shoreline setback restrictions.[1] It ordered defendants to remove the deck within sixty days. Defendants appeal as of right. We affirm.

Defendants own a lakefront lot in Ogemaw County. In July 1993, defendants began construction on a wooden deck that covered their entire remaining rear yard to the lake. The administrator of the Ogemaw County Building and Zoning Department issued a stop work order on the deck due to defendants' failure to obtain a building permit. Although defendants applied for a building permit, the administrator refused to issue the permit because the deck violated shoreline setback requirements. Defendants filed an appeal and request for a variance with the Zoning Board of Appeals (ZBA). The zoning administrator returned to defendants' property to find that the stop work order had been removed and more construction had been done on the deck. Another stop work order was issued. The ZBA denied defendants' appeal and request for a variance. When the zoning administrator again visited defendants' property, the deck had been completely finished. Plaintiff then filed the complaint in the instant action seeking an order compelling defendants to remove the deck. Defendants filed a cross-complaint in which they alleged that plaintiff had "engaged in a negligent course of conduct . . . of harassment, discrimination and unequal application of the law." The court concluded that the

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* Circuit judge, sitting on the Court of Appeals by assignment.

Ogemaw County zoning ordinance required a building permit to be obtained prior to construction of a deck. Although the court characterized some of the ordinance's language as "evasive," it found nevertheless that the deck as constructed violated the shoreline setback and lot coverage restrictions.

Defendants first argue that that the ordinance was unconstitutionally vague.[2] Zoning ordinances are presumed to be constitutional; the individual challenging the constitutionality of an ordinance has the burden of rebutting that presumption. *City of Lansing v Hartsuff*, 213 Mich App 338, 343-344; 539 NW2d 781 (1995). Moreover, this Court has held that "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *West Bloomfield Twp v Karchon*, 209 Mich App 43, 48-49; 530 NW2d 99 (1995). In this case, defendants claim that the ordinance does not provide fair notice of the fact that a permit is required for a deck because the ordinance does not contain any reference to wooden decks. While it references "accessory structures" it provides that they must be at least ten feet from the principal structure. Defendants claim that since decks are generally attached to the principal structure this provision does not cover decks. However, § 1202 of the Ogemaw County zoning ordinance expressly states that a building permit is a mandatory prerequisite to the excavation or construction of any "structure" or the commencement of any "land use." "Structure" is defined in the ordinance as "[a]nything erected, the use of which requires more or less permanent locations on the ground; or attached to something having a permanent location on the ground." Although arguably not an "accessory structure," defendants have not disputed that a deck comes within the definition of a "structure" as set forth in § 1402 of the ordinance. Therefore, the trial court did not err when it concluded that a building permit was required. See also § 802, Ogemaw County zoning ordinance.[3]

Although we do not disagree that certain parts of the Ogemaw ordinance are confusing, especially § 802 where it is unclear whether the ordinance's drafters intended to bar accessory uses or structures completely in lots bordering waterways or whether such uses and structures would be permitted in the front yard of those lots, the remainder of the ordinance may be enforced where it is clear and where deletion of the invalid portion would not render the overall ordinance unreasonable. MCL 8.5*;* MSA 2.216; *Michigan State AFL-CIO v Michigan Employment Relations Commission*, 212 Mich App 472, 501; 538 NW2d 433 (1995), lv gtd*, Citizens for Logical Alternatives v Clare Co Board of Commissioners*, 211 Mich App 494, 498; 536 NW2d 286 (1995).

Defendants also contend that the building permit requirement and the shoreline setback and lot coverage restrictions regarding wooden decks are arbitrary and have no real or substantial relationship to the public health and welfare. The language of § 304.4(6) demonstrates that the harm the ordinance is designed to remedy is the danger of structural collapse. *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994); *Moss v Shelby Mutual Ins Co*, 105 Mich App 671, 673; 308 NW2d 428 (1981). We will not quickly second-guess the judgment of accountable public bodies. Thus, we are not persuaded by defendants that the permit requirement and setback and size restrictions are unrelated to public health and welfare.

Defendants next claim that the trial court erred when it dismissed the significance of a 1985 newspaper advertisement placed by the county, which stated that "[a]s of September 19, 1985, permits

will be required for all decks." However, this argument has been effectively abandoned on appeal because defendants failed to cite any authority in support of the argument. *Winiemko v Valenti*, 203 Mich App 411, 415; 513 NW2d 181 (1994). Moreover, in view of the language of § 1202 requiring a building permit for all construction, excavation, alteration of, addition to or moving of *any* building or "structure," we find defendants' contention that the advertisement represented an unauthorized attempt to amend the ordinance to be meritless. Rather than constituting an amendment of the ordinance, we view the advertisement as representing either a clarification of the ordinance or a renewed commitment by the county to enforce the provisions of the ordinance in the stated manner. "A reviewing court is to give deference to a municipality's interpretation of its own ordinance." *Macenas v Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989).

Affirmed.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly

[1] Following the submission of plans and an application by defendants, plaintiff had initially issued a building permit. Prior to the commencement of construction, however, and upon the replacement of an acting administrator of Ogemaw County's building and zoning department by a permanent administrator, rescinded its permit and indicated that a variance was needed to proceed with construction.

[2] Plaintiff contends that defendants have failed to preserve their vagueness challenge to the ordinance because the issue was not raised at the trial level. However, defendants raised their constitutional challenge in their trial brief and argued that the ordinance was not understandable at trial. The trial court agreed that the language used in the ordinance was "evasive." Moreover, this Court may disregard the preservation requirements if, as here, the question is one of law and the facts necessary for its resolution have been presented. *Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991). Consequently, defendants' constitutional challenge is properly before this Court.

[3] Section 802 states that "accessory uses and detached accessory structures" are subject to limitations where a lot, such as defendants' "abuts a lake, river, or stream of greater than temporal or seasonal flows." An "accessory use" is defined as a "use of [sic] structure subordinate to the principal use." The language of this provision is consistent with the trial court's conclusion that an "accessory use" may encompass a structure which is *not* detached. Although the height and lot line proximity requirements of § 802 appear to apply only to "accessory structures" as opposed to accessory uses, the prohibition against building over more than thirty percent of the lot runs throughout the ordinance and applies regardless of the label applied to the structure. Therefore, the trial court did not err in concluded that defendants violated the ordinance when they constructed their deck without first obtaining a permit and when they constructed a deck that covered their entire yard.