COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0501

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

CITIZENS FOR THE PRESERVATION OF THE ST. CROIX, INC. AND THE SIERRA CLUB,

PLAINTIFFS-RESPONDENTS,

V.

RIVIERA AIRPORT, INC.,

DEFENDANT-APPELLANT.

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RIVIERA AIRPORT, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Riviera Airport, Inc., appeals a judgment enjoining its operation of a private airstrip pursuant to § 59.97(11), STATS.,[1] because the operation of the airstrip violated local zoning ordinances.[2] Riviera argues the Sierra Club and Citizens for the Preservation of the St. Croix, Inc. (Citizens) lack standing to pursue the zoning claim under § 59.97(11),[3] and the trial court erred when it decided the airstrip was in violation of the county zoning ordinances. Riviera also asserts the airstrip was a grandfathered nonconforming use because it

---

[1] Section 59.97(11), STATS., 1993-94, provides:

> PROCEDURE FOR ENFORCEMENT OF COUNTY ZONING ORDINANCE. The county board shall prescribe such rules and regulations and administrative procedures, and provide such administrative personnel as it may deem necessary for the enforcement of the provisions of this section, and all ordinances enacted in pursuance thereof. Such rules and regulations and the districts, setback building lines and regulations authorized by this section, shall be prescribed by ordinances which shall be declared to be for the purpose of promoting the public health, safety and the general welfare. Such ordinances shall be enforced by appropriate fines and penalties. Compliance with such ordinances may also be enforced by injunctional order at the suit of such county or the owner or owners of real estate within the district affected by such regulation.

Section 59.97(11) was renumbered as § 59.69(11) in 1995. *See* 1995 Wis. Act 201, § 475. For purposes of this opinion, any references to the statutes will be to the 1993-94 version.

[2] The plaintiffs also brought nuisance claims, which were dismissed and are not addressed here because they have not been appealed.

[3] Riviera concedes that the State has standing to pursue the zoning claim under § 59.97(11), STATS. Because the brief filed by the Sierra Club and Citizens for the Preservation of the St. Croix, Inc., raises the same issues and advances the same arguments as does the State in its brief, the standing issue does not impact the outcome of this appeal. Therefore, we do not address it.

was an established use prior to the enactment of the 1972 zoning ordinance, and the use of the airstrip has not changed in a manner that would invalidate its grandfathered status. Riviera also argues that the plaintiffs are estopped from claiming zoning violations because they failed to challenge the county's actions and, as a matter of law, the plaintiffs' suit is barred by the doctrines of equitable estoppel and laches.

We conclude that the airstrip operation violated the applicable zoning ordinance. Even if we assume that its operation was a conditional use pursuant to § 4.2 of the Pierce County Comprehensive Zoning Ordinance, Riviera did not have the required conditional use permit. Because we also conclude that the airstrip was not a grandfathered nonconforming use established prior to the enactment of the ordinance in 1972, we do not address whether the nature and character of that nonconforming use has changed. The plaintiffs are not estopped from claiming zoning violations, nor does laches bar their claim. We therefore affirm the judgment.

Riviera maintains and operates an airstrip in Pierce County. In 1972, the Pierce County Board of Supervisors adopted a comprehensive zoning ordinance, under which the Victor Hagberg farm was zoned agricultural. Riviera's airstrip is located on a subdivided portion of this farm. The airstrip is also located partially in the St. Croix Riverway Zoning District. The State sued Riviera, alleging that its operation of the airstrip violated the Riverway Zoning Ordinance and the Pierce County Comprehensive Zoning Ordinance. Similar violations were alleged against Riviera by Citizens and the Sierra Club. The cases were consolidated and tried to the court.

After a three-day trial, the court granted an injunction against the operation of Riviera's airstrip. The court decided the operation of the airstrip violated Pierce County's Comprehensive Zoning Ordinance. The court also determined that Riviera failed to prove the existence of a valid nonconforming use and, even if a valid nonconforming use had been established, the airstrip lost its nonconforming use status when the character of that use changed. Finally, the trial court decided that collateral estoppel, equitable estoppel and laches did not bar the plaintiffs' claim. Riviera now appeals the judgment.

First, we consider whether the operation of the airstrip violated Pierce County's Comprehensive Zoning Ordinance.[4] The interpretation of a statute or a zoning ordinance presents a question of law we review de novo. ***Welter v. City of Milwaukee***, 198 Wis.2d 636, 643, 543 N.W.2d 815, 817 (Ct. App. 1995). The rules governing the interpretation of statutes and ordinances are the same. ***County of Adams v. Romeo***, 191 Wis.2d 379, 387, 528 N.W.2d 418, 421 (1995). The zoning ordinance at issue is the following:

> 4.2 Public and Semipublic Uses
> The following public and semipublic uses shall be conditional uses and may be permitted as specified:
>
> Airports, airstrips, and landing fields in the A [Agriculture] District, providing that these facilities meet the regulations contained in Chapter 114, Sections 135 and 136 of the Wisconsin Statutes.

[4] As did the trial court, we do not consider whether the operation of the airstrip is a prohibited use under Pierce County's Riverway Zoning Ordinance. "[C]ases should be decided on the narrowest possible ground …." ***State v. Blalock***, 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989).

Pursuant to the general provisions of the ordinance, "Conditional Uses and their accessory uses are considered as special uses requiring review, public hearing, and approval by the County Zoning Committee."

Elsewhere in the ordinance, a chart describing the "A Agriculture" zoning district listed the following as "Principal Permitted Uses: Agriculture, Dairying, Forestry, Greenhouses, Hatcheries, Livestock Raising … *Public and Semi-Public Uses (Sec. 4.2).*" (Emphasis added.) The same chart listed the following as "Conditional Uses: Recreation Uses (Section 4.10)[,] Trailer Parks, and Recreational Camping (Sec. 4.8)[,] *other as allowed in Sec. 4.2* …." (Emphasis added.)

Given the chart's reference to § 4.2, Riviera argues that the airstrip is a permitted use. We recognize the ordinance is ambiguous because "it is capable of being construed in two different ways by reasonably well-informed persons." ***In re J.S.C.***, 135 Wis.2d 280, 287, 400 N.W.2d 48, 52 (Ct. App. 1986). We will consider the entire section of the ordinance and its related sections to interpret the ordinance. ***Id.*** Although the chart's language, read in isolation from the remainder of the ordinance, might suggest that the operation of the airstrip was a permitted use, a reading of the entire ordinance satisfies us that the operation of a public or semipublic airstrip is a conditional use. Assuming Riviera's airstrip was public or semipublic,[5] we agree with the trial court that Riviera did not comply with the ordinance because it did not have the requisite conditional use permit.

[5] The parties dispute whether the airstrip was semipublic or private. For purposes of this opinion, we assume the airstrip was public or semipublic, and therefore subject to the ordinance. Our assumption is not dispositive, however, because the airstrip still lacked the requisite conditional use permit.

Next, we must consider whether the airstrip was a valid nonconforming use. Riviera argues that the airstrip was a valid grandfathered nonconforming use because it was an established use prior to the enactment of the 1972 ordinance.

> Land use qualifies as "nonconforming" if there is an active and actual use of the land … which existed prior to the commencement of the zoning ordinance and which has continued in the same or a related use until the present. The property owner bears the burden to prove by a preponderance of the evidence that the nonconforming use was in existence at the time that the ordinance was passed. This burden also requires the property owner to show that the use was "so active and actual that it can be said he [or she] has acquired a 'vested interest' in its continuance." If the use is characterized as merely casual and occasional or accessory or incidental to the principal use, then the use does not acquire a nonconforming status.

Waukesha County v. Seitz, 140 Wis.2d 111, 115, 409 N.W.2d 403, 405 (Ct. App. 1987) (citations omitted).

The question whether a valid nonconforming use has been established involves the application of the trial court's factual findings to the legal standard of nonconforming use. ***Id.*** at 116, 409 N.W.2d at 405. In a trial to the court, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Section 805.17(2), STATS. Whether the facts constitute nonconforming use is a question of law we review de novo. ***Seitz,*** 140 Wis.2d at 118, 409 N.W.2d at 406.

The parties agree that an airstrip existed prior to the enactment of the ordinance in 1972. Their dispute is whether the use of the airstrip was sufficiently

"active and actual" to constitute a valid nonconforming use. The trial court decided Riviera had not proved by a preponderance of the evidence that the nonconforming use was actively in existence when the ordinance was passed, and that until 1986, the use of the land as an airstrip was incidental to the use of the land as farmland.

The trial court relied on the testimony of Victor Hagberg, Darrel Richer, Edward Thompson, and Eric Sanden, as well as other evidence corroborating their testimony. Hagberg, the owner of the land in question, testified that he plowed one of his fields in 1957, planted corn there until 1960, and then planted alfalfa and used the area as a hayfield. He testified that he cut the hay once or twice annually until the mid-1980s, when the field was used solely as an airstrip. Richer, a park manager for the Kinnickinnic State Park, testified he first noticed planes landing and taking off from the airstrip in 1986-87. Thompson, a pilot, testified he first saw an airplane parked next to the airstrip in 1973. Sanden, plaintiffs' expert, testified that prior to 1984 the airstrip was used less than once per week.

Other testimony revealed that numerous gopher holes on the airstrip made it appropriate only for rear wheel airplanes, as opposed to nose wheel airplanes, until the mid-1980s when the airstrip was repaired so that it was appropriate for both types of aircraft. Power poles and power lines were not removed and placed underground until October 1987.

The trial court stated it found the testimony of three pilots, called as witnesses by Riviera, that they used the airstrip during the 1950s and 1960s, to be incredible. We defer to the trial court's assessment of the credibility of the

witnesses and the weight of their testimony. *See* ***Artis-Wergin v. Artis-Wergin***, 151 Wis.2d 445, 450, 444 N.W.2d 750, 752 (Ct. App. 1989).

We have reviewed the record and conclude the trial court's factual findings regarding the use of the airstrip after 1972 were not clearly erroneous. It relied on the undisputed testimony that the airstrip was first used in the 1980s to infer that the airstrip had not been in actual and active use as an airstrip prior to that time.

> The drawing of an inference on undisputed facts when more than one inference is possible is a finding of fact which is binding upon an appellate court. It is not within the province of … any appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one.

State v. Friday, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). We conclude it was reasonable, based on the undisputed testimony that the airstrip was first used actively in the 1980s, for the trial court to infer that the airstrip was not in actual and active use prior to 1972. Given this factual finding, we also conclude that Riviera failed to prove by a preponderance of the evidence that the airstrip was in active and actual use prior to the enactment of the ordinance in 1972. Because a valid nonconforming use did not exist, we do not address whether the airstrip's character of use subsequently changed.

Next, we reject Riviera's arguments that the plaintiffs are estopped from claiming zoning violations because they failed to successfully appeal the county's land use committee's determination that Riviera was not violating local zoning ordinances. In a memo to the Land Management Committee dated June 24, 1992, Pierce County's corporation counsel opined that the airstrip was a grandfathered nonconforming use. At its June 24, 1992, meeting, the county's

Land Management Committee passed a motion "to accept the memo of the Corporation Counsel and place in the file that Riviera Airport had been grandfathered in." The minutes of the committee's meeting reflect that citizens were permitted to ask questions, but that no testimony was taken, and it was not a contested or formal hearing.

Riviera argues that the plaintiffs' remedy was to appeal the committee's decision to the board of adjustment, and only then would they be entitled to bring this lawsuit. However, when Todd and Mary Stedfeld, members of Citizens and the Sierra Club, attempted to appeal the committee's decision to accept the memo, they were informed that no decision had been made from which an appeal could be taken. In ***Sohns v. Jensen***, 11 Wis.2d 449, 456, 105 N.W.2d 818, 822 (1960), our supreme court decided that the appeal of an administrative agency's decision was not prerequisite to a local landowner's lawsuit for the enforcement of an ordinance under § 59.97(11), STATS. Applying ***Sohns***, and given the fact that plaintiffs attempted to appeal but were informed that no appealable decision had been made by the committee, we conclude that an appeal of the committee's decision was not a prerequisite to their § 59.97(11) lawsuit.

In a related argument, Riviera asserts the plaintiffs' lawsuit was barred by issue preclusion. Issue preclusion bars a claim when the issue has been actually litigated by an administrative body acting in an adjudicative capacity. *See* ***Lindas v. Cady***, 183 Wis.2d 547, 515 N.W.2d 458 (1994). At the trial court, Riviera conceded that the Land Management Committee was not functioning in an adjudicative capacity when it decided to accept the memo. Additionally, this lawsuit is the first time the plaintiffs have litigated their claim. Therefore, we conclude the principles of issue preclusion do not bar the plaintiffs' lawsuit.

Riviera also asserts that the plaintiffs' lawsuit is barred by equitable estoppel and laches. We disagree. Riviera's equitable estoppel argument is that the trial court erred when it decided that equitable estoppel was "not a defense to the enforcement of the zoning ordinances in this case or in any other case." Here, we decide only whether equitable estoppel is a defense in this case. Equitable estoppel "consists of action or nonaction on the part of the one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action or nonaction, to his detriment." ***City of Milwaukee v. Milwaukee County***, 27 Wis.2d 53, 66, 133 N.W.2d 393, 400 (1965). The only action we can discern to form the basis for Riviera's argument is the Land Management Committee's adoption of the memo, explained above. We do not agree that the committee's action, assuming reasonable reliance thereon by Riviera, would preclude the lawsuit filed by Citizens, the Sierra Club and the State, all entities separate from the county. It was the county's action, not the plaintiffs' action, upon which Riviera asserts it relied to its detriment. The plaintiffs are not responsible for the committee's action. We therefore reject Riviera's argument.

Finally, we reject Riviera's argument that the equitable doctrine of laches precludes the plaintiffs' lawsuit. "Unreasonable delay, lapse of time, coupled with injury or prejudice [to the defendant], independently of any statute of limitations, constitute a defense in a court of equity." ***Diehl v. Dunn***, 13 Wis.2d 280, 286, 108 N.W.2d 519, 522 (1961).

> A court of equity applies the rule of laches according to its ideas of right and justice, and the courts have never prescribed any specific period applicable to every case, like the statute of limitations; and what constitutes a reasonable time within which the suit must be brought depends upon the facts and circumstances of each particular case.

Id. (citation omitted). Here, the trial court decided that Riviera failed to demonstrate what prejudice or detriment Riviera suffered between the Land Management Committee's decision on June 24, 1992, and the commencement of the plaintiffs' action on May 17, 1994. It found that only two zoning permits were issued to lot owners after the June 1992 committee meeting and, of those two, only one was issued prior to the commencement of the plaintiffs' lawsuit. We agree with the court that these facts are insufficient to establish the injury or prejudice requirement of the laches defense. Because we interpret ***Diehl*** to require injury or prejudice to the named party defendant for laches to apply, we reject Riviera's argument that the injury or prejudice sustained by the landowners supported the laches defense.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.