

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 15, 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. 01-1641**  
**STATE OF WISCONSIN**

**Cir. Ct. No. 98-CV-01**

**IN COURT OF APPEALS  
DISTRICT III**

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**ERNEST J. KOGER, III,**  
  
**PLAINTIFF-APPELLANT,**  
  
**V.**  
  
**TOWN OF SEYMOUR,**  
  
**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Eau Claire County:  
PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Ernest Koger appeals an order lifting a stay of the raze order issued by the Town of Seymour pursuant to WIS. STAT. § 66.05(1m)(a) (1997-98). The circuit court found that grounds existed for the Town's raze order on an unfinished house owned by Koger. However, rather than ordering the house razed, the court gave Koger an opportunity to complete construction. Koger failed

to complete construction and the court ordered the house razed. Koger argues that by modifying the raze order to allow him to resume construction of the house, the grounds under which the original raze order was brought were no longer applicable. We disagree and affirm the order.

## BACKGROUND

¶2 Koger obtained a building permit and commenced construction of a house in 1982. The exterior of the house was enclosed in 1988. Between 1988 and 1993, Koger performed a variety of tasks. However, after 1993, Koger did nothing until after the Town ordered the structure razed in 1997. The Town stated that the reason for the raze order was that “there has been a cessation of normal construction of said building for a period of more than two years.” WIS. STAT. § 66.05(1m)(a) (1997-98).

¶3 Koger sought a restraining order in circuit court. On August 19, 1998, the court found that grounds existed for the raze order because construction had ceased for more than two years. However, the court noted that “it would come close to waste to tear it down at this particular point” because a significant investment had been made in the partially completed building. To give Koger a chance to complete construction of the house, the court found that the raze order was unreasonable. The court stayed the raze order and modified it, giving Koger until September 1, 1999, to complete construction of the house.

¶4 Koger failed to meet the deadline and the Town moved for an order allowing it to raze the house. In a December 1, 1999, order, the circuit court extended the deadline and ordered that if the house was not completed by May 31, 2000, the raze order would be deemed reasonable and the Town would be authorized to raze the house. However, the court stated that if Koger could find a

buyer for the house before May 31, the court would extend the stay of the raze order.

¶5 Before the May 31, 2000, deadline, Jeff Nelson agreed to purchase the house. Nelson and Koger requested another stay of the raze order. The court again extended the deadline and ordered that construction be completed by April 1, 2001, and the house occupied by May 1, 2001.

¶6 On April 10, 2001, the Town moved to lift the stay of the raze order because no further work had been done on the house. At a hearing on April 25, 2001, Nelson testified that he was unable to get the financing to complete construction. The court then lifted the stay and reinstated the December 1, 1999, order, which provided that the Town's raze order was reasonable and authorized the Town to raze the house. The order was stayed pending appeal.

#### STANDARD OF REVIEW

¶7 The circuit court's duty is to determine the reasonableness of the raze order. *Donley v. Boettcher*, 79 Wis. 2d 393, 406, 255 N.W.2d 574 (1977). Whether a raze order is reasonable is a question of law. *Wassenaar v. Panos*, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983). However, this determination is so intertwined with the court's factual findings that we will give more credence to this legal determination by the circuit court than we do with other legal questions. *Id.*

## DISCUSSION

¶8 WISCONSIN STAT. § 66.05(1m)(a) (1997-98)<sup>1</sup> was recently reorganized by 1999 Wis. Act 150, §§ 134-49. Former WIS. STAT. § 66.05(1m) (1997-98) is now contained in WIS. STAT. § 66.0413(1)(b).<sup>2</sup> Both versions provide two separate grounds for issuance of a raze order by a municipality. The

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<sup>1</sup> WISCONSIN STAT. § 66.05(1m)(a) (1997-98) reads as follows:

The governing body or the inspector of buildings or other designated officer in every municipality may order the owner of premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof and restore the site to a dust-free and erosion-free condition, or if it can be made safe by repairs to repair and make safe and sanitary or to raze, remove and restore the site to a dust-free and erosion-free condition at the owner's option; *or where there has been a cessation of normal construction of any building or structure for a period of more than 2 years, to raze and remove such building or part thereof.* The order shall specify a time in which the owner shall comply therewith and specify repairs, if any. (Emphasis added.)

<sup>2</sup> WISCONSIN STAT. § 66.0413(1)(b) (1999-2000) reads as follows:

*Raze order.* The governing body, building inspector or other designated officer of a municipality may:

1. If a building is old, dilapidated or out of repair and consequently dangerous, unsafe, insanitary or otherwise unfit for human habitation and unreasonable to repair, order the owner of the building to raze the building or, if the building can be made safe by reasonable repairs, order the owner to either make the building safe and sanitary or to raze the building, at the owner's option.

2. If there has been a cessation of normal construction of a building for a period of more than 2 years, order the owner of the building to raze the building.

first basis covers buildings that have become so old, dilapidated or out of repair as to essentially be nuisances. The second basis applies to partially completed structures, specifically where “there has been a cessation of normal construction of a building for a period of more than 2 years ....” WIS. STAT. § 66.0413(1)(b)2.

¶9 When a raze order is challenged, the circuit court's duty is to determine the reasonableness of the order, to dissolve the restraining order if the raze order is found to be reasonable, or to continue the restraining order or "modify it as the circumstances require[]" if it is found to be unreasonable. WIS. STAT. § 66.0413(1)(h).

¶10 Here, it is undisputed that there was a cessation of normal construction for more than two years. However, the court found the raze order unreasonable because of Koger’s investment in the house. The court gave Koger a chance to complete the home by setting a deadline to complete construction. Koger failed to complete construction even after the court extended the deadline several times. Therefore, the court subsequently found the raze order reasonable and ordered the house razed.

¶11 Koger argues that the circuit court’s initial modification of the raze order changed the grounds for razing the house from an unfinished building under WIS. STAT. § 66.0413(1)(b)2 to an old, dilapidated or unsafe building under § 66.0413(1)(b)1. He contends that as a result of the modification, the court exceeded its authority by ordering the house to be fully completed. According to Koger, the court was required to determine whether the house was unsafe for its intended use, in this case human habitation. If the court found that it was unsafe, the court could order the necessary repairs to make the residence fit for habitation,

occupancy, and use. Since the court made no such finding, Koger reasons that it could not order any further work, let alone completion of construction.

¶12 Koger cites *Village of Williams Bay v. Schiessle*, 138 Wis. 2d 83, 405 N.W.2d 695 (Ct. App. 1987), and *Donley* to support his argument that the court could only order repairs to make the house safe for human habitation. In *Schiessle*, we concluded that because the defendants intended to rent certain buildings, the buildings had to be repaired so that they were fit for habitation, occupancy and use. *Schiessle*, 138 Wis. 2d at 87.

¶13 In *Donley*, our supreme court held that repairs ordered by a building inspector went too far. *Donley*, 79 Wis. 2d at 407. The owner of a vacant building had no intention of allowing human habitation in the building. The court concluded that since the public would not be allowed in the building, the repairs necessary were only those required to make the building safe for its intended use. *Id.* Because its intended use was an abandoned building, the building did not need to be fit for human habitation.

¶14 Koger contends that unlike *Schiessle* and *Donley*, the circuit court here ordered Koger to completely finish the house rather than make the repairs necessary for human habitation.<sup>3</sup> However, the raze orders in *Schiessle* and *Donley* were based upon old, dilapidated buildings, not a structure where there had been a cessation of normal construction for more than two years. Koger cites no authority to support his argument that by modifying the raze order, the court

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<sup>3</sup> Koger notes that the circuit court did not even make a finding that the house was unfit for human habitation.

changed the grounds for razing the house from an unfinished building to an old, dilapidated and unsafe building.

¶15 The Town's raze order specifically states: "The grounds for this Order are that construction of said building commenced many years ago, and there has been a cessation of normal construction of said building for a period of more than two years." The circuit court stated that it was basing its order on the grounds that there had been a cessation of normal construction for more than two years, as opposed to basing its order on a "nuisance theory."

¶16 There is nothing in the statute prohibiting the circuit court from modifying a raze order based on an unfinished building. In fact, WIS. STAT. § 66.0413(1)(h) specifically states that if the court determines that the raze order under § 66.0413(1)(b) is unreasonable, the court "shall continue the restraining order or *modify it as circumstances require.*" (Emphasis added.) Section 66.0413(1)(h) applies to both an unfinished building and an old dilapidated one. Therefore, the circuit court's modification of the raze order did not change the grounds for razing the house.

¶17 This case is not about a completed building which has fallen into disrepair. It is about a construction project begun in 1982 and still not finished. We conclude that the court did not err by modifying the order to allow Koger a chance to complete the construction of his house or by its subsequent lifting of the stay of the raze order when Koger failed to comply with the modification.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. Rule 809.23(1)(b)5.

