**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 6, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-1043** **Cir. Ct. No. 01 CV 2088**

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

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**CITY OF MILWAUKEE,**

**PLAINTIFF-RESPONDENT,**

**V.**

**B. DAVIS INVESTMENT, LLC.,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Reversed and cause remanded with directions*.

¶1 SCHUDSON, J.[1] Brian E. Davis, *pro se*, on behalf of his real estate company, B. Davis Investment, LLC, appeals from the circuit court order

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

affirming the City of Milwaukee Municipal Court judgment, following a bench trial, assessing a forfeiture for building code violations. Davis presents several arguments, one of which is clearly correct and dispositive. Accordingly, this court reverses.

¶2 On October 1, 1998, Jack Balzer, a Certificate of Code Compliance Inspector for the City of Milwaukee, inspected the property at 4741 N. 69th St., owned by B. Davis Investment. He did so because the City Department of Neighborhood Services had received an "Application for Certificate of Exterior Code Compliance" for the property, signed by Brian E. Davis. Balzer issued two orders to correct certain conditions and, after deadlines for correction had passed, referred the matter to the City Attorney for prosecution. A municipal court trial followed and the court determined that B. Davis Investment had violated the Milwaukee Code of Ordinances by failing to repair or replace a defective porch guardrail, and by failing to provide approved address numbers for the alley side of the garage. A forfeiture of $420 was assessed and Davis appealed.

¶3 Davis first argues that "[t]he city inspector violated [WIS. STAT. § 66.122 (1997-98)] and the 4th Amendment to the U.S. Constitution when he entered appellant's private property without a warrant." WISCONSIN STAT. § 66.122, however, is inapplicable. It relates to "special inspection warrants," which "shall be issued … only upon showing that consent to entry for inspection purposes has been refused." *See* WIS. STAT. § 66.122(2). In this case, however, the City never maintained that consent had been refused or that the inspector's entry onto Davis' property was under the "special inspection" authority. On appeal, the City specifically disclaims any reliance on the "special inspection" authority of the statute. Thus, even assuming that the City did not comply with § 66.122(2), Davis' first argument is moot given that the City's action was not

under the authority of that statute. *See* ***Milwaukee Police Ass'n v. City of Milwaukee***, 92 Wis. 2d 175, 183, 285 N.W.2d 133 (1979) ("case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy").

¶4 The City does not rely on WIS. STAT. § 66.122, with its prerequisite "that consent has been refused," because, the City asserts, Davis requested or gave permission for the inspection that led to the forfeitures. Davis, however, maintains that he never did so and, further, that the document on which the City and municipal court relied simply cannot be construed to constitute such a request or permission. Davis is correct.

¶5 At the municipal court trial, the City's only witness was Inspector Balzer. Repeatedly, Balzer maintained that his authority to inspect the property was based on Davis' request to do so; that the request was not conveyed in person, but rather, by Davis' "application for *inspection*" or "application for the Certificate of Code Compliance *inspection*." (Emphases added). For example, under Davis' cross-examination, Balzer testified:

> Q: What is your authority for going onto a property and conducting … an inspection?
>
> A: When we receive the application for the Exterior Code Compliance *Inspection*, we consider that as the right to go on the property to do *the inspection*, because *it's made out by the owner requesting the inspection be done*.

(Emphases added.) Balzer said that the application was a "standard form," but admitted that he did not have it with him. Later in the trial, however, the City introduced the form to which Balzer apparently had been referring, and on which the City was relying for its assertion that Davis had requested the inspection.

¶6 The form, however, was not for what Balzer had termed "the Exterior Code Compliance *Inspection*." (Emphasis added.) Instead, it is titled, "Application for Certificate of Exterior Code Compliance." The next line reads, "City of Milwaukee – Dept. of Building Inspection." The form informs purchasers of certain properties that it is their "responsibility to obtain an Exterior Code Compliance Certificate"; informs purchasers of the "City Property Recording Program"; provides sections for the entry of basic information identifying the property, buyer and seller; requires an application fee; and advises of the $75.00 application fee and of the address for sending the application. Except for the line identifying the "City of Milwaukee – Dept. of Building Inspection," however, the form never uses the word, "inspection," or refers to an inspection in any way.

¶7 The municipal court, however, relied on Inspector Balzer's testimony and the application as the bases for its conclusion that Davis had given permission for an inspection of his property. The court commented: "I had some questions … until the Application of Certificate of Exterior Code Compliance was provided…. [W]hen you purchase a property in a code compliance area, … one of the requirements is that you have to undergo a procedure."

¶8 The court then quoted the applicable municipal ordinances—one relating to the Application for Certificate of Exterior Code Compliance, and the distinct ordinance relating to the *Application for Inspection*. Then, declaring its decision and addressing Davis, the court stated:

> When you purchased the property, you had some forms to fill out, they were probably done at closing[. I]ncluded in the forms was the [A]pplication for Certificate of Code Compliance[;] you probably, as part of the closing, provided the $75.00 application fee at the same time. If you didn't read it — and I know, it says right here, it says

> ["]important, please read.["] If you didn't read it, it is very possible you didn't know what you were signing[;] I'll accept that. But the reality is that this was provided and *it deals specifically with the entry of the property because you're correct, they can't just go on property unless they have either an inspection warrant or permission, but this application gives them permission. And so when you apply for the inspection, you're basically asking them,* ["]*come and inspect*["], so we can complete this transaction, that's what it does.
>
> ….
>
> … *So in terms of the entry of the property, there's really no Fourth Amendment issue because they had an application asking them to come on and do the inspection*.

(Emphases added.)

¶9 The trial evidence included Davis' Application for Certificate of Exterior Code Compliance, in apparent satisfaction of MILWAUKEE CODE OF ORDINANCES § 200-55-2. Additionally, however, § 200-55-4 states:

> APPLICATION FOR INSPECTION. When a certificate of exterior code compliance is required for the sale, transfer or conveyance of a one- or 2-family dwelling, an application for inspection shall be filed within 60 days of the sale or transfer of the property with the department on forms provided by the department. The application may be signed by the buyer or seller and it shall state the street address of the dwelling to be inspected. The application for inspection shall be accompanied by the payment in full of the fee required in s. 200-33-7.5.

On appeal, the City quotes this ordinance in full and, apparently, concedes its applicability. Indeed, the City does not dispute the municipal court's comment to Davis, "[Y]ou're correct, they can't just go on property unless they have either an

inspection warrant or permission."[2] The City, however, in neither the municipal court, nor circuit court, nor on appeal, has offered any explanation for the absence of any evidence that the buyer or seller of Davis' property ever applied for an inspection.

¶10 At trial, armed with only the Application for Certificate of Exterior Code Compliance, and apparently unable to explain the absence of an Application for Inspection, the City simply had no answer for Davis' clear and emphatic testimony that he never requested an inspection. As Davis summarized in his closing argument: "[F]irst of all, an application for inspection catches me completely by surprise. When the [assistant city attorney] asked me if I … had signed an application for inspection and I said I had not, that was a truthful statement."

¶11 The City, instead of countering Davis' account in any way, invokes MILWAUKEE CODE OF ORDINANCES § 200-55-4 and seems to suggest that satisfaction of that ordinance's requirement of an Application *for Inspection* can somehow be squeezed into the distinct ordinance for an Application for Certificate of Exterior Code Compliance. The City, however, offers absolutely no legal lubrication allowing this court to force that fit.

¶12 Like the circuit court, this court conducts a limited review of the factual findings and legal conclusions of the municipal court. ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 361, 369 N.W.2d 186 (1985). This court,

[2] Indeed, although the City has offered additional brief arguments questioning whether a Fourth Amendment violation could have occurred under the circumstances of this case, it concedes that its building inspections must comply with the city ordinances. Here, quite obviously, the evidence did not establish such compliance.

however, "owe[s] no deference to the trial court's resolution of issues of law." ***Id.*** at 360. Further, in construing an ordinance, this court "must give effect to the ordinary and accepted meaning" of the language of the ordinance. *See* ***id.***

¶13 Explicitly, the municipal court misread the clear terms of the Application for Certificate of Exterior Code Compliance, incorrectly commenting that Davis, in signing the form, gave permission for "the inspection." And, while quoting MILWAUKEE CODE OF ORDINANCES § 200-55-4, the municipal court inexplicably ignored its separate and distinct requirement for an Application *for Inspection* as a prerequisite to the inspection of the Davis property.

¶14 Thus, although the municipal court correctly referred to the ordinances detailing both the Application for Certificate of Exterior Code Compliance and the Application for Inspection, the court then erred by: (1) failing to recognize the significance of the City's failure to offer any evidence of the latter (or any law establishing that submission of the former automatically triggers the latter); and (2) misreading the Application for Certificate of Exterior Code Compliance to somehow include permission for an inspection.

¶15 This court is not naïve. This court recognizes that, logically, an Application for Certificate of Exterior Code Compliance could trigger a process leading to an exterior inspection. And this court also recognizes that an experienced property purchaser might assume that, too. Still, this court must evaluate an appeal based on the record, not on speculation. Thus, this court must not substitute Inspector Balzer's or the municipal court's mischaracterization of the code for its actual words. And this court must not ignore the clear code provision providing for an "Application for Inspection," separate and distinct from an "Application for Certificate of Exterior Code Compliance."

¶16 Therefore, this court concludes that the evidence does not support the municipal court's conclusion that Davis requested or gave permission for an inspection of the property. Accordingly, accepting the court's undisputed comment that a lawful inspection could not have taken place absent a warrant or permission from Davis, this court reverses the circuit court order affirming the municipal court judgment, and remands the matter to the circuit court with directions to return the matter to the municipal court to vacate the judgment and dismiss the case.

*By the Court.*—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.