COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2614 **Cir. Ct. No. 02-CV-82**

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

THEODORE CRAIG,

PETITIONER-RESPONDENT,

V.

CITY OF BELOIT,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Order modified and, as modified, affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 VERGERONT, P.J. The City of Beloit appeals the circuit court order reversing the decision of the board of appeals that the property of Theodore Craig had lost its nonconforming use status and could no longer be used as a multi-family residence. The City contends the circuit court should have dismissed Craig's petition for certiorari review of the board's decision because the petition

named the City as the respondent instead of the board. We conclude the circuit court properly exercised its discretion in deciding that the City did not raise this objection in a proper or timely manner and therefore was not entitled to dismissal on this ground. The City also contends the circuit court erred in determining that the vote of five of the seven members of the board was sufficient to reverse the decision of the planning department that Craig's property had lost its nonconforming use status. For the reasons we explain below, we agree with the circuit court's conclusion that under the CODE OF GENERAL ORDINANCES OF THE CITY OF BELOIT, Chapter 19, § 2.10.10 (2001), the vote of five members of the board was sufficient to reverse the decision of the planning department. We therefore affirm the circuit court's order reversing the board's decision. However, we also conclude that, in addition to reversing the decision of the board, the circuit court should remand to the board with instructions to enter a written decision based on the vote of the five members to reverse the planning department's decision. We therefore affirm the decision of the circuit court with this modification. For the reasons we explain in the opinion, we do not address the City's contention that, in voting to reverse, the five members applied incorrect law and did not consider the evidence.

BACKGROUND

¶2 When Craig purchased the property in 2001, it was zoned for single-family use. However, the prior owner had been allowed to use it for a multi-family residence as a legal nonconforming use, provided that the multi-family use was not discontinued for twelve continuous months. After purchasing the property, Craig began remodeling with the intention of continuing to use it as a multi-family residence. On September 24, 2001, he received a letter from the City of Beloit Planning Department, stating that the property had been vacated since

October 2000 and the multi-family use would need to be re-established by October 2001 in order to continue the legal nonconforming use.

¶3 The planning department subsequently inspected the property and notified Craig in a letter dated October 10, 2001, that it was "highly unlikely" that anyone had established residence, and therefore the legal nonconforming use status was forfeited. Craig appealed to the City of Beloit Board of Appeals, contending that his tenants had begun to move in on or before October 1, 2001, and a planning department employee had told him that would be sufficient. The board of appeals held a hearing, and five of the seven board members voted in favor of reversing the decision of the planning department. This resulted in a denial of the appeal, based on the view that six votes were required to reverse the planning department's decision.

¶4 Craig appealed the board's decision by filing a petition for writ of certiorari in the circuit court, naming the City as respondent. Craig asserted that the planning department had erred in discontinuing the nonconforming use status and that the City erred in failing to follow the CODE OF GENERAL ORDINANCES OF THE CITY OF BELOIT, Chapter 19 (Zoning Ordinance), § 2.10.10 (2001), under which only four votes of the seven board members were needed to reverse the planning department's decision.[1]

[1] Zoning Ordinance § 2.10 (2001) is entitled "Appeals of Administrative Decisions." Section 2.10.10 provides:

> Vote Required. The concurring vote of 4 members of the Board of Appeals shall be required to reverse wholly or in part, or modify the order, requirement, decision, or determination being appealed.

¶5 In response to the writ, the City filed a certified copy of the proceedings before the planning department and the board. The City also filed a response to the petition, asserting that Zoning Ordinance § 2.10.10 (2001) was void because it conflicted with the CODE OF GENERAL ORDINANCES OF THE CITY OF BELOIT (Ordinance) § 1.32(10) (2001), which requires six votes of the seven board members to reverse a City official's decision. The City contended that § 1.32(10) was enacted in 1997 as a charter ordinance pursuant to WIS. STAT. § 66.0101 (2001-02),[2] and that only a charter ordinance may amend a charter ordinance.[3] Zoning Ordinance § 2.10.10 (2001) was enacted later, but not

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] WISCONSIN STAT. § 66.0101 was numbered WIS. STAT. § 66.01 in 1997, but the substance of the subsections pertinent to this appeal have not changed. We therefore use the current numbering in this opinion, as do the parties. Section 66.0101 (2001-02) provides in part:

> **Home rule; manner of exercise. (1)** Under article XI, section 3, of the constitution, the method of determination of the local affairs and government of cities and villages shall be as prescribed in this section.
>
> **(1m)** In this section, "charter ordinance" means an ordinance that enacts, amends or repeals the charter, or any part of the charter, of a city or village or that makes the election under sub. (4).
>
> **(2)**(a) A city or village may enact a charter ordinance. A charter ordinance shall be designated as a charter ordinance, requires a two-thirds vote of the members-elect of the legislative body of the city or village, and is subject to referendum as provided in this section.
>
> (b) A charter ordinance that amends or repeals a city or village charter shall designate specifically the portion of the charter that is amended or repealed. A charter ordinance that makes the election under sub. (4) shall designate specifically each enactment of the legislature or portion of the enactment that is made inapplicable to the city or village by the election.

(continued)

according to the procedures specified in § 66.0101 for charter ordinances. Therefore, the City asserted, § 2.10.10 could not amend § 1.32(10), and the latter provision continued to determine the requisite number of votes—six out of seven.

¶6 At a status conference, the circuit court established a briefing schedule. Based on the briefs, the court concluded that Zoning Ordinance § 2.10.10 (2001) rather than Ordinance § 1.32(10) (2001) controlled, because § 2.10.10 was the more recently enacted and the more specific, since it dealt with zoning. Section 2.10.10 did not need to be enacted as a charter ordinance, the court ruled, because it was consistent with WIS. STAT. § 62.23(7)(e)9, the statutory provision addressing the number of votes required. In addition, the court rejected the City's argument, raised for the first time in its responsive brief, that the action

---

> **(3)** A charter ordinance shall be published as a class 1 notice, under ch. 985, and shall be recorded by the clerk in a permanent book kept for that purpose, with a statement of the manner of its adoption. A certified copy of the charter ordinance shall be filed by the clerk with the secretary of state….
>
> **(4)** A city or village may elect under this section that any law relating to the local affairs and government of the city or village other than those enactments of the legislature of statewide concern as shall with uniformity affect every city or every village shall not apply to the city or village, and when the election takes effect, the law ceases to be in effect in the city or village.
>
> **(5)** A charter ordinance does not take effect until 60 days after its passage and publication. If within the 60-day period a petition conforming to the requirements of s. 8.40 and signed by a number of electors of the city or village equal to not less than 7% of the votes cast in the city or village for governor at the last general election is filed in the office of the clerk of the city or village demanding that the ordinance be submitted to a vote of the electors, it may not take effect until it is submitted to a referendum and approved by a majority of the electors voting in the referendum. The petition and the proceedings for its submission are governed by s. 9.20 (2) to (6).

should be dismissed because the board of appeals, not the City, was the proper respondent. Accordingly, the court reversed the decision of the board of appeals and ordered that the nonconforming use status be restored.

DISCUSSION

¶7 We address first the City's contention that the circuit court erred in not dismissing the petition because the City, not the board of appeals, was named as the respondent and the service of an authenticated copy of the petition on the clerk of the City did not establish personal jurisdiction over the board. The City asserts that WIS. STAT. § 62.23(7)(e)10 contemplates that the board of appeals is the proper party because it is the decision of the board of appeals that is subject to review.[4]

¶8 The circuit court rejected this contention on a number of grounds, one of which was that the City had not properly or timely raised the objection. The court stated that a responsive pleading was required in a certiorari action, and, therefore, under WIS. STAT. § 802.06(2)(a) the City had to raise either in the responsive pleading or by motion its assertion that the wrong party was named and served, and the City failed to do so. WISCONSIN STAT. § 802.06(2)(a) provides in part:

[4] WISCONSIN STAT. § 62.23(7)(e)10 provides:

> Any person or persons, jointly or severally aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board of appeals, commence an action seeking the remedy available by certiorari.

> **(2)** HOW PRESENTED. (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> ….
>
> 7. Failure to join a party under s. 803.03.

The circuit court also reasoned that the City could have raised this issue earlier, and that the City had, in effect, been representing the interests of the board of appeals.

¶9 The City argues on appeal that a responsive pleading is not required in a certiorari action, and no deadline for filing motions was set at the status conference, only a briefing schedule on the petition. Apparently the City's position is that it was therefore entitled to raise its defense that the board of appeals was the proper party in its brief opposing the petition.

¶10 A resolution of this issue involves statutory construction, as well as review of the circuit court's exercise of its discretion in deciding that it would not consider the issue because it had not been properly or timely raised. The construction of a statute and its application to a particular set of facts is a question of law, which we review de novo. ***Minuteman, Inc. v. Alexander***, 147 Wis. 2d 842, 853, 434 N.W.2d 773 (1987). The exercise of the circuit court's discretion is reviewed with deference: we affirm if the circuit court applied the correct law to the facts of record and reached a reasonable result. ***Rodak v. Rodak***, 150 Wis. 2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989).

¶11 WISCONSIN STAT. § 802.06(2)(a) provides the option of raising certain defenses, including the defense of failure to join a party under WIS. STAT.

§ 803.03, by motion rather than in a required responsive pleading. We agree with the City that, because this action was initiated by a petition for a writ of certiorari, an answer or responsive pleading is not required. *See* ***State ex rel. Casper v. Bd. of Tr.***, 30 Wis. 2d 170, 176, 140 N.W.2d 301 (1966). The court did issue a writ to the clerk of the City, ordering the clerk to file a certified copy of the record of the proceedings before the planning department and the board of appeals with the court within thirty days; but the certified copy of the record of the proceedings is plainly not a "responsive pleading" within the meaning of § 802.06(2)(a). *See* ***Casper***, 30 Wis. 2d at 176. However, § 802.06(2)(a) does not suggest that if a responsive pleading is not required, a party need not raise the listed defenses, or other defenses, by motion. Indeed, precisely because there is not a responsive pleading required in a certiorari action initiated by a petition, the method for raising issues—whether related to the merits, jurisdiction, or procedure—is typically by motion. ***Casper***, 30 Wis. 2d at 176. The critical question, which the circuit court recognized, is: why did the City not raise the defense of improper party either in the responsive pleading or by motion?

¶12 Since the City was requesting an order dismissing the petition based on the failure to name the board of appeals, the proper means to present that request was by motion. *See* WIS. STAT. § 802.01(2) ("An application to the court for an order shall be by motion…."). It is true, as the City contends, that no date was established by which time the City had to file a motion to dismiss the petition. However, the apparent reason for this is that the City never informed the court that it intended to file such a motion. The lack of a court-ordered deadline does not mean that the City may bring such a motion whenever it chooses, or may dispense with a motion altogether. Craig objected in his reply brief to the court's

consideration of the issue of the proper party because the City had filed no motion raising that defense.

¶13 We conclude the circuit court did not erroneously exercise its discretion in deciding that the City's defense of improper party was not properly or timely raised. This defense had not been raised either in the non-required responsive pleading or by motion. True, nothing prevented the court from treating the argument in the City's brief as a motion and considering the merits, after making sure that Craig had a sufficient opportunity to respond. However, it was not required to do so and it acted reasonably in not doing so. The City had acted in all respects as though it were the proper party: it filed a response to the petition that was not required, in which it presented reasons the court should affirm the board's decision; it filed the certified record with the court, signed by "Kenneth J. Quillen, Principal Planner and Secretary of the City of Beloit Board of Zoning Appeals"; it appeared through counsel at the status conference, stipulated to making certain exhibits part of the record, and did not then object to being the named respondent or to briefing the issue of whether the decision of the board should be reversed as Craig requested. In short, the record provides a reasonable basis for the court's decision.

¶14 We next address the issue of the number of votes needed to reverse the decision of the planning department. The parties agree that Zoning Ordinance § 2.10.10 (2001) and Ordinance § 1.32(10) (2001) are in direct conflict, with the former providing that four votes of the seven members of the board are needed to reverse the decision of a city official, and the latter providing that six votes are needed when seven members are voting on the issue. The City acknowledges that the general rule is that when two ordinances conflict, the later enacted ordinance prevails. However, the City contends, as it did in the circuit court, that only a

charter ordinance may amend a charter ordinance, and, because § 2.10.10 was not enacted as a charter ordinance, § 1.32(10) prevails.

¶15 Resolution of this issue requires construction of WIS. STAT. § 66.0101, as well as construction of ordinances, which are questions of law subject to de novo review. ***Town of Grand Chute v. U.S. Paper Converters, Inc.***, 229 Wis. 2d 674, 680, 600 N.W.2d 33 (Ct. App. 1999).

¶16 In WIS. STAT. § 66.0101, the legislature has established the manner in which cities and villages may exercise the home rule powers granted them by article XI, section 3 of the Wisconsin Constitution. ***Save Our Paramedics v. Appleton***, 131 Wis. 2d 366, 373, 389 N.W.2d 43 (Ct. App. 1986). This statute authorizes cities to elect not to be governed by the general charter established by the legislature in WIS. STAT. ch. 62, which would otherwise bind them. ***City of West Allis v. Milwaukee County***, 39 Wis. 2d 356, 365, 367-68, 159 N.W.2d 36 (1968); ***Gramling v. City of Wauwatosa***, 44 Wis. 2d 634, 638, 171 N.W.2d 897 (1969). A city may accomplish this election by enacting a charter ordinance, which requires a two-thirds' vote of the members-elect of the legislative body and is subject to referendum. Section 66.0101(2)(a). A charter ordinance that makes this election "shall designate specifically each enactment of the legislature or portion of the enactment that is made inapplicable to the city or village by the election." Section 66.0101(2)(b).

¶17 The number of members on the board of appeals of a city is addressed in WIS. STAT. § 62.23(7)(e)2,[5] which provides that the board shall

[5] WISCONSIN STAT. § 62.23(7)(e)2 provides:

(continued)

consist of five members and may, in addition, consist of two alternate members. Section 62.23(7)(e)9 addresses the number of required votes, providing:

> The concurring vote of 4 members of the board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance. The grounds of every such determination shall be stated.

¶18 Charter Ordinance No. 8 of the City of Beloit, enacted in 1997, stated that the City elected that WIS. STAT. § 62.23(7)(e)2 not apply to the membership of the board of appeals for the City, and that the board would consist of seven members all with the same rights and privileges. That charter ordinance made various amendments to the provisions in Ordinance § 1.32 for the appointment, term of office, qualifications, quorum, and voting of the board, including the following:

> (10) VOTING. In order to reverse any order, requirement, decision or determination of any enforcement official, or to decide in favor of the applicant on any matter which it is required to pass or to effect any variation in any ordinance, the following concurring votes of the board are necessary:

> 2. The board of appeals shall consist of 5 members appointed by the mayor subject to confirmation of the common council for terms of 3 years, except that of those first appointed one shall serve for one year, 2 for 2 years and 2 for 3 years. The members of the board shall serve at such compensation to be fixed by ordinance, and shall be removable by the mayor for cause upon written charges and after public hearing. The mayor shall designate one of the members as chairperson. The board may employ a secretary and other employees. Vacancies shall be filled for the unexpired terms of members whose terms become vacant. The mayor may appoint, for staggered terms of 3 years, 2 alternate members of such board, in addition to the 5 members above provided for. Annually, the mayor shall designate one of the alternate members as 1st alternate and the other as 2nd alternate.

Members Voting on the Issue	Concurring Votes necessary
4	4
5	4
6	5
7	6

> The grounds of every such determination shall be stated. A majority shall be necessary to adopt any other motion, resolution, or other proposed action, except where a greater number is required by the board's rules of procedure or by-laws.

Although this provision on the number of votes required was a change from § 62.23(7)(e)9, Charter Ordinance No. 8 did not state that the City elected that this subdivision not apply, and, in fact did not refer to this subdivision; it referred only to § 62.23(7)(e)2.

¶19 A necessary premise of the City's argument is that Ordinance § 1.32(10) (2001) was validly enacted by Charter Ordinance No. 8 insofar as it elected not to be bound by WIS. STAT. § 62.23(7)(e)9 and to adopt instead a different number of required votes. However, the failure of the charter ordinance to refer to § 62.23(7)(e)9 raises the question whether the charter ordinance complies with the requirement in WIS. STAT. § 66.0101(2)(b) that the charter ordinance "designate specifically each enactment of the legislature or portion of the enactment that is made inapplicable to the city … by the election." A charter ordinance that does not refer to the section that a city is electing not to be governed by is invalid. ***State ex rel. Coyle v. Richter***, 203 Wis. 595, 601, 234 N.W.2d 909, 911 (1931). The City has apparently overlooked this omission in Charter Ordinance No. 8. It makes no argument that would explain why, in view

of the plain language of the statute and the case law, the charter ordinance is nonetheless a valid election not to be bound by § 62.23(7)(e)9.

¶20 A second deficiency in the City's argument is its assumption that WIS. STAT. § 62.23(7)(e) requires a "super majority" vote, such that if the City elects not to be bound by § 62.23(7)(e)2 and instead to have seven board members, it is also required by statute to adjust the number of votes required to reverse the decision of an official to more than the four votes required by § 62.23(7)(e)9. Because of this assumption, in the City's view the requirement of four votes in Zoning Ordinance § 2.10.10 (2001) is inconsistent with § 62.23(7)(e)(9), and therefore the adoption of the four-vote requirement could be accomplished only by a charter ordinance. However, the City points to no language in WIS. STAT. §§ 66.0101, in § 62.23(7)(e), or anywhere else in WIS. STAT. ch. 62 that supports its assumption. We see no suggestion in the statutes that a city may not elect in a charter ordinance not to be bound by the requirement of five board members in § 62.23(7)(e)2, while remaining bound by the requirement of four votes in § 62.23(7)(e)9. The City simply asserts that a super majority is required by statute, and the circuit court therefore erred in concluding that § 2.10.10 was consistent with § 62.23(7)(e)9, but it presents no developed argument with reference to statutory language or case law to support that assertion.

¶21 In the absence of a developed argument on these two critical points, we are not persuaded that Zoning Ordinance § 2.10.10 (2001) was invalid because it was not enacted as a charter ordinance. Accordingly, we conclude it is proper to

apply the general rule that the later enacted ordinance prevails over an earlier conflicting one, as the circuit court did.[6]

¶22 Finally, we address the City's contention that the five members of the board who voted to reverse the planning department's decision applied an incorrect theory of law and that the evidence supports the planning department's decision.[7] It appears the City is asking that, if we decide that only four votes were needed to reverse the planning department's decision, we treat the discussion of the five members who voted to reverse as the decision of the board and then reverse that decision because it is contrary to law and not supported by the evidence. However, at this time the decision of the board is the one that Craig appealed, consisting of findings of facts that support the determination sustaining the planning department's decision requiring discontinuance of the nonconforming use. The discussion of the five board members who voted to reverse the planning department is not a decision of the board within the meaning of WIS. STAT. § 62.23(7)(e)8 and 9, and is not subject to appeal under subd. 10.[8]

---

[6] The City explains that the provision in Zoning Ordinance § 2.10.10 (2001) requiring only four votes was a mistake because the person charged with drafting it was not aware of Ordinance § 1.32(10). Since becoming aware of that mistake, the City tells us, the charter ordinance and zoning ordinances have both been amended so that now there are five board members as provided in WIS. STAT. § 62.23(7)(e)2, and four votes required to reverse the decision of an administrative official. However, the City does not provide any authority for the proposition that the mistake it refers to or the subsequent amendments render § 2.10.10 invalid.

[7] The City made this argument in its brief in the circuit court, but the circuit court did not address it.

[8] Craig contends the City may not appeal a decision of the board. Under WIS. STAT. § 62.23(7)(e)10, "any officer, department, board or bureau of the municipality" may seek review by certiorari of the board's decision. Therefore, after the board enters a written decision on remand, anyone of these persons or entities may appeal.

¶23 We conclude, as did the circuit court, that under Zoning Ordinance § 2.10.10 (2001) the vote of five members of the board was sufficient to reverse the decision of the planning department. Accordingly, the board erred in entering an order and determination sustaining the decision of the planning department. We therefore affirm the circuit court's order reversing the board's decision. However, we also conclude that, in addition to reversing the decision of the board, the circuit court should remand to the board with instructions to enter a written decision based on the vote of the five members to reverse the planning department's decision. We therefore affirm the decision of the circuit court with this modification.

By the Court.—Order modified and, as modified, affirmed.

Not recommended for publication in the official reports.