COURT OF APPEALS DECISION DATED AND RELEASED	NOTICE
December 27, 1996	
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. 95-3551

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

DUANE and CAROL WAGNER,

Plaintiffs-Appellants,

v.

TOWN OF MENASHA,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Judgment reversed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

NETTESHEIM, J. The Housing Appeals Board of the Town of Menasha denied Duane and Carol Wagner's application for renewal of their mobile home park license. Upon judicial review, the circuit court upheld the Appeals Board's ruling.

On appeal, the Wagners raise various issues. However, we conclude that one issue governs this case. We hold that the Town violated the Wagners' procedural rights, guaranteed under the applicable town ordinance, by failing to give them notice of alleged inspection violations and the corresponding opportunity to correct such violations if they existed.[1]

FACTS

The Wagners own and operate a mobile home park in the Town of Menasha, Winnebago County. The park was built in the 1940's and was purchased by the Wagners in 1964. In 1975, the Wagners replaced the original mobile homes with thirty single mobile home units and then added two duplex units on an additional lot. With the exception of providing plumbing to the duplex units, the Wagners have not altered the original plumbing system. The Wagners' mobile home park has been licensed by the Town of Menasha for over thirty years.

On September 21, 1994, Leonard Moes, the town building inspector, and Rosemary Roy, a Winnebago county health officer, conducted an inspection of the Wagners' mobile home park. The inspection report prepared by Roy identified three pages of specific conditions existing in the Wagners' park which were in need of repair.[2] However, the Wagners were never notified

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[1] The Wagners also claim that: (1) the Appeals Board acted contrary to law when it found the license application was inaccurate and when it determined that the Wagners' water system did not meet state codes; and (2) there was no substantial evidence to support the Appeals Board's findings concerning certain electrical code violations and the overall deterioration of the mobile home units.

[2] The September 1994 inspection report prepared by health inspector Rosemary Roy included the following observations: overgrown vegetation, one leaning power meter,

of the inspection report or of the noncomplying conditions noted therein. As a result of this inspection, Roy recommended to the Town Board that the Wagners' mobile home park license be revoked.

Moes next inspected the Wagners' mobile home park on April 18, 1995. Following this inspection, Moes notified the Town Board that he would not recommend approval of the Wagners' 1995 mobile home park license application. Again, the Wagners were not notified of the results of this inspection.

In June 1995, Moes inspected Unit #21 of the Wagners' mobile home park. Moes performed this inspection in response to the tenant's complaint that the Wagners had failed to repair certain problems in the unit. Moes' inspection of Unit #21 revealed plumbing problems, electrical problems and overall structural problems. Consequently, Unit #21 was designated as a "dangerous dwelling." Moes completed an inspection report and a notice of

(..continued)
buckled and missing skirting, broken windows, missing or ripped screens, inadequately repaired door frames and window casings, inoperable locks on the doors, stained and buckled ceiling tiles in five units, leaking water, sagging flooring, inadequately repaired holes in flooring, poorly flushing toilets and unsecured wiring. In summary, Roy wrote:

> [T]he stained ceiling tiles, wet, soggy, or holey floors, broken or taped windows, lack of a tight fitting door all indicate long-standing, poor maintenance which has created a dilapidated state of housing for the occupants. Further, the poorly fitting windows and doors and questionable maintenance of the gas furnaces lend themselves to a potential safety hazard as our winter begins. The carpeting in the bathrooms is all heavily stained. Tenants related plumbing and sewer problems in the winter months.

It is my recommendation that his mobile park license be revoked.

noncompliance. The Wagners were notified of this report and they were given thirty days in which to remedy the violations.

Soon thereafter, the Wagners received notice from the Town that their water supply system violated certain provisions of the plumbing code. Again, the Wagners were given thirty days in which to present the Town with "an acceptable plan of action to bring the plumbing up to code compliance." The Wagners objected to the Town's directive, contending that their plumbing system predated the enactment of the plumbing code which, by its own terms, did not apply retroactively.

When the Wagners applied for a renewal of their mobile home license in July 1995, the Town Board denied the application. The Wagners appealed the decision to the Town's Housing Appeals Board. At a hearing on July 27, 1995, the Appeals Board heard testimony from numerous witnesses. Based on the evidence, the Appeals Board found that "the mobile home park fails to comply … with the codes of the state as well as the Town of Menasha. … [I]t appears that there is either an ignorance or disregard of the problems that appear to be experienced at the mobile home park and that [the Appeals Board] feel[s] this demonstrates a lack of responsibility of the mobile home park owners being responsive to and maintaining the park." The Appeals Board voted to uphold the Town Board's denial of the Wagners' renewal application.

In August 1995, the Wagners filed this action for judicial review. The circuit court affirmed the Appeals Board's decision. The court concluded

that there was substantial credible evidence before the Appeals Board to support the decision. The Wagners have further appealed to us.

DISCUSSION

We begin by noting that the statute which provides for judicial review of a mobile home park licensing decision does not expressly state that the review is by certiorari.[3] *See* § 66.058, STATS. However, the Town and the Wagners addressed the issue under certiorari standards in the trial court and the court analyzed the issue under those standards. The Town and the Wagners renew this approach on appeal. We will therefore do likewise. *See* ***Nielsen v. Waukesha County Bd. of Supervisors***, 178 Wis.2d 498, 511, 504 N.W.2d 621, 625-26 (Ct. App. 1993).

Although the circuit court affirmed the Appeals Board's decision, we examine the record de novo without deference to the opinion of the circuit court. ***Id.*** at 511, 504 N.W.2d at 626. When reviewing a decision by statutory certiorari, we accord a presumption of correctness and validity to the decision of the board. ***Id***. Therefore, our review is limited to: (1) whether the Appeals Board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence

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[3] Section 66.058(2)(d), STATS., provides: "Any holder of a license that is revoked or suspended by the governing body of any city, village or town may within 20 days of the date of the revocation or suspension appeal therefrom to the circuit court of the county …." Additionally, we note that the licensing statutes for mobile home parks do not contain a provision governing the procedure for nonrenewal. *See* § 66.058. However, both the Town and the Wagners agreed to treat the license nonrenewal under the procedures provided for a license revocation.

was such that it might reasonably make the order or determination in question. ***Arndorfer v. Sauk County Bd. of Adjustment,*** 162 Wis.2d 246, 254, 469 N.W.2d 831, 834 (1991).

Mobile home parks in the Town of Menasha are regulated under Ch. 11 of the Town's ordinances.[4] Section 11.045(3) specifically relates to inspections of mobile home parks and the giving of notice as to any violations. The ordinance provides:

> [I]t shall be the responsibility of the Town Board or the Building Inspector for the Town of Menasha to examine on a regular basis and specifically at the time of licensing, all mobile home parks for the purpose of determining whether the said park is in compliance with the regulations of this ordinance.
>
> In the event that a use that is not in conformity with Chapter 11 is found to be existing, the holder of the mobile home park *shall* be notified in writing by the Town of Menasha or by a specified official of the Town of Menasha that the said mobile home park does not comply with the regulations of the ordinance. That the person making the application shall see that the mobile home park complies in all respects before a license shall be issued. [Emphasis added.]

MENASHA, WIS., ORDINANCES § 11.045(3).

Moes, the town building inspector, and Roy, the Winnebago county health officer, inspected the Wagners' mobile home park in September 1994. Although Roy prepared a report detailing problems in the park and submitted the report to the Town Board, the Wagners were never notified of these concerns. In April 1995, Moes again inspected the park and again reported various problems to the Town and further stated that he would recommend against renewal of the Wagners' license. Again, however, the Wagners were not notified of this report. These failings were in direct conflict with the unambiguous

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[4] With the exception of certain amendments, this regulatory scheme adopts the state licensing standards set forth in § 66.058, Stats. *See* MENASHA, WIS., ORDINANCES § 11.02.

notice requirements of the Town's own ordinance, § 11.045(3). Thus, the Wagners did not have the opportunity under the ordinance to "see that the mobile home park complies in all respects before a license shall be issued." ***Id***.

Interestingly, Moes' April 1995 mobile home inspections covered two days during which four parks, including the Wagners', were inspected. Moes found violations on all the mobile home sites. With the exception of the Wagners, Moes notified the other park owners of the violations. He then reinspected the other parks to ascertain if the conditions had been adequately remedied and then recommended that the other licenses be renewed.

We conclude that the Town's failure to notify the Wagners of the violations cited in the September and April inspections violated the express notice requirements of § 11.045(3) and the commensurate opportunity accorded by the ordinance to remedy any violations. Since this procedure is directly linked to the process by which a mobile home license is issued, we conclude that the Town Board's refusal to renew the Wagners' license was fundamentally flawed.

In an attempt to explain the Town's failure to notify the Wagners of the September inspection, Moes testified that the inspection was performed primarily by the county's health department and therefore that agency, not the Town, should have notified the Wagners. We agree that the county health department was obligated to notify the Wagners under WIS. ADM. CODE § HSS 177.14(2)(a),[5] which provides:

Notification. If upon inspection of a mobile home park the authorized employe or agent of the department finds that the mobile home park is not planned, operated or equipped as required

[5] Chapter HSS 177 as it existed on January 31, 1996, was repealed and a new chapter Adm 65 was created effective February 1, 1996. The section to which we refer is now titled WIS. ADM. CODE § Adm 65.17(2)(a).

> by this chapter, the employe or agent *shall*, [unless there is an immediate danger to health], notify the operator in writing and *shall* specify the changes required to make the mobile home park conform to the standards established in this chapter and the time period within which compliance shall take place. [Emphasis added.]

If the department had discharged its notice obligations under the above rule, the Town's failure to comply with its own notice obligations might be excused as harmless error. However, *under the facts of this case*, we cannot excuse the Town's conduct because the inescapable fact remains that the Wagners never received *any* notice of the alleged defects reported as a result of the September inspection. As we have observed, such notice and the accompanying opportunity to correct the defects are an integral part of the license renewal process under the Town's ordinance.[6]

We recognize that the Wagners did receive notice of the violations related to Unit #21 and the plumbing code resulting from the June 1995 inspection.[7] However, the Appeals Board's nonrenewal decision was based on the entire inspection history regarding the Wagners' mobile home park, not just the June 1995 inspection. We cannot say that the Appeals Board's decision would have been the same had it limited its decision to only the June 1995 inspection. Nonetheless, we make some observations regarding this inspection.

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[6] The Wagners also couch their argument in terms of due process. However, since we base our decision on the notice requirements of the ordinance, we need not address the constitutional argument.

[7] A hearing regarding the possible condemnation of Unit #21 was to be held following the nonrenewal hearing. The parties' briefs do not further inform as to the outcome of this proceeding.

The Unit #21 inspection report provided to the Wagners cited four violations of the plumbing code under WIS. ADM. CODE ch. ILHR 82.[8] The Wagners responded that the code did not apply to their facility because the water system predated the enactment of ch. ILHR 82. In support, they cited the following language from § ILHR 82.03: "The provisions of this chapter are not retroactive, unless specifically stated otherwise in the rule."

The record reflects that the Appeals Board agreed with the Wagners' contention that ch. ILHR 82 did not apply retroactively. The Appeals Board's counsel correctly advised that "you do not have to go back and bring every system into compliance … there's a grandfathering." Counsel also properly advised the Appeals Board that the plumbing cannot be allowed "to deteriorate to the point where it is dangerous or defective or hazardous to human health …." Indeed, § ILHR 82.10(1) provides that "[p]lumbing in all buildings … intended for human occupancy, shall be installed *and maintained* in such a manner so as to protect the health, safety and welfare of the public or occupants." (Emphasis added.)

Although the Appeals Board based its decision in part on the Wagners' failure to bring their existing water system into compliance with the code, the Appeals Board did not make specific findings as to whether the existing system poses a threat to public health and safety. Therefore, even if we limited our consideration to the June 1995

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[8] The specific violations cited in the Unit #21 report relate to the following provisions of WIS. ADM. CODE § ILHR 82.40 Water supply systems: (1) Section ILHR 82.40(4)(c)1.d which governs control valves; (2) Section ILHR 82.40(6) which governs load factors for water supply systems; (3) Section ILHR 82.40(8)(c) which requires that "No private water main or water service may pass through or under a building to serve another building …."

inspection and the plumbing code violations, the Appeals Board's decision falls short. When a decision lacks a rational basis, it can be said to be arbitrary or capricious. ***Olson v. Rothwell***, 28 Wis.2d 233, 239, 137 N.W.2d 86, 89 (1965). An arbitrary action is the result of an unconsidered wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process. ***Id.*** In such instances, the agency action can be said to represent its will and not its judgment. *See* ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis.2d 300, 304, 519 N.W.2d 782, 784 (Ct. App. 1994).

That appears to be the case here. The Appeals Board's decision generally states that the Wagners had violated the state and town codes. However, as to the plumbing violations, those must rise to the level of endangering the health and safety or welfare of the public or the occupants before they can be the basis for nonrenewal. As noted, the Appeals Board did not make that requisite finding.

In addition, the Appeals Board's decision cited to the Wagners' lack of responsibility in maintaining the park and responding to complaints. However, given the lack of notice, this reasoning rings hollow. While the Town had obviously reached a frustration level with the Wagners and with the ongoing problems on this site, such cannot excuse the Town's failure to follow its own rules and procedures governing license renewal.[9]

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

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[9] Because we reverse the Appeals Board's decision on the above issues, we do not reach the additional issues presented by the Wagners on appeal. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (when one issue disposes of an appeal, we need not reach the other issues raised).