

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 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.

NOTICE

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

No. 96-0024

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**TERRANCE MC KILLOP and
DARLENE MC KILLOP,**

Plaintiffs-Respondents,

v.

**COUNTY OF KENOSHA, a domestic
municipal corporation,**

Defendant,

**KENOSHA COUNTY BOARD OF ADJUSTMENTS,
a quasi-judicial body of the Cty of Kenosha,**

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County:
ROBERT V. BAKER, Judge. *Reversed and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. The Kenosha County Board of Adjustments (the Board) appeals from an order permitting Terrance and Darlene McKillop to

finish repairs to a porch, a nonconforming structure within a floodplain. The Board argues that the circuit court exceeded the scope of its authority in a certiorari action by ordering that the repairs could be completed under the original building permit issued to the McKillops. We conclude that under the ordinance the Board may impose floodproofing requirements on the structural repair to the porch. Therefore, we reverse the order of the circuit court and remand to the court with directions to remand the matter to the Board for consideration of the McKillops' application for a zoning permit.

The McKillops own property adjacent to the Fox River in Kenosha County. The property is in the Floodplain Overlay District (FPO) and subject to restrictions under the Kenosha County General Zoning and Shoreland/Floodplain Zoning Ordinance. The McKillops' residence is used as a summer cottage and has been "grandfathered" in as a nonconforming use.

The McKillops sought to replace rotting wood on the porch. The contractor hired to do the repairs obtained a building permit from the Town of Wheatland. Upon inspection of the on-going repairs, the Town of Wheatland building inspector concluded that the repairs were outside the scope of the permit because the porch had been rebuilt with new exterior walls, rafters, headers, windows and patio doors. The McKillops were ordered to stop further repairs and told to obtain a zoning permit from Kenosha County. The zoning permit was denied on the ground that a permit cannot be issued for an addition or expansion of an existing nonconforming structure in the FPO.

KENOSHA COUNTY, WIS., GEN. ZONING CODE § 12.28-10 (1994), provides:

FLOODPLAIN NON-CONFORMING USES

No structural repairs to a structure located in the FPO Floodplain Overlay District, or FWO Camp Lake/Center Lake Floodway Overlay District, or modifications which raise the first floor elevation above the 100 year recurrence interval flood elevation, shall be allowed unless the entire structure is floodproofed by means

other than the use of fill to the flood protection elevation, which is 2 feet above the 100 year recurrence interval flood. ... Structural repairs and modifications which elevate the first floor of a floodprone structure shall not exceed over the life of the structure 50 percent of the structure's equalized assessed value at the time the structure became nonconforming. The term "modification" for this section shall be strictly interpreted to mean only those modifications that deal directly with the floodproofing of the structure. No additions of any type shall be allowed.

On certiorari review, the circuit court determined that the repairs were structural and did not violate nonconforming use zoning as an addition to the property. It held that the Board did not act according to the law in denying the permit because the repair or alteration was less than fifty percent of the assessed value. It concluded that the McKillops would be permitted to finish the project under the building permit issued by the Town of Wheatland.

The Board moved for reconsideration. It argued that even accepting the circuit court's finding that the repairs did not constitute an addition to the nonconforming use, the ordinance still regulates structural repairs. The Board sought to impose a floodproofing requirement on the structure. The circuit court held that the floodproofing requirement did not apply because there was no evidence that the McKillops raised the elevation of the first floor of the structure.

The Board does not take issue with the circuit court's ruling that the repairs were not an addition and constituted only structural repair. It is the circuit court's ruling on the motion for reconsideration which is really at issue in this appeal. The Board claims that the circuit court exceeded its jurisdiction in ordering that the McKillops could complete their project without a zoning permit. It argues that the circuit court should have remanded the McKillops' permit application to the Board to condition the completion of the structural repair on the floodproofing requirement of KENOSHA COUNTY, WIS., GEN. ZONING CODE § 12.8-10 (1994).

The McKillops argue that the Board waived its contention that the floodproofing requirement applies because it did not raise it until after the circuit court's ruling. We disagree. The Board maintained that the repairs were an addition for which no permit could be issued. If it prevailed before the circuit court, no remand was necessary. It was not until the circuit court determined that the porch repairs were structural that the need for a remand arose. Waiver is not a jurisdictional defect, but one of administration. See *Terpstra v. Soiltest, Inc.*, 63 Wis.2d 585, 593, 218 N.W.2d 129, 133 (1974). This was not an instance where a party waited in the weeds only to spring the issue for the first time on appeal. The issue was necessarily raised in the motion for reconsideration and is not waived.

We turn to the application of the ordinance. In doing so, we do not directly address the Board's claim that the circuit court acted in excess of the scope of review on certiorari. In determining that the McKillops could proceed without a zoning permit, the circuit court held that the ordinance did not apply. Interpretation of an ordinance is a question of law within the scope of the circuit court's, and this court's, authority. *Hansman v. Oneida County*, 123 Wis.2d 511, 514, 366 N.W.2d 901, 903 (Ct. App. 1985).

The relevant portion of the ordinance provides: "No structural repairs to a structure ..., or modifications which raise the first floor elevation above the 100 year recurrence interval flood elevation, shall be allowed unless the entire structure is floodproofed" KENOSHA COUNTY, WIS., GEN. ZONING CODE § 12.28-10 (1994) (emphasis added). The McKillops read the ordinance to attach the condition of floodproofing only when structural repairs raise the first floor elevation. The Board asserts that because structural repairs and modifications are stated in the disjunctive, the condition of raising the first floor elevation applies only to modifications. Thus, the Board contends, any structural repair requires floodproofing.

The Board's construction of the ordinance is entitled to some weight but is not controlling. *Hansman*, 123 Wis.2d at 514, 366 N.W.2d at 903. Grammatically, given the structure of the sentence, the placement of the commas and the use of the disjunctive, the Board's construction is correct. Equally important is the principle that "an interpretation and application of the ordinance must accomplish the objective of the ordinance by balancing the

competing interests in a reasonable way." *Marris v. City of Cedarburg*, 176 Wis.2d 14, 34, 498 N.W.2d 842, 851 (1993).

"[T]he spirit of zoning is to restrict a nonconforming use and to eliminate such uses as quickly as possible." *Waukesha County v. Seitz*, 140 Wis.2d 111, 116, 409 N.W.2d 403, 406 (Ct. App. 1987). Although some structural repairs or alterations are permitted to allow owners to continue nonconforming use and make reasonable renovations to prevent deterioration, they are restricted to ensure that the life of the structure is not extended indefinitely. *Marris*, 176 Wis.2d at 34, 498 N.W.2d at 850.

The McKillops' reading of the ordinance would permit a great deal of structural repair to be completed without a zoning permit unless the first floor elevation was raised. If the repairs did not elevate the floor, the life of the nonconforming structure can be extended (provided the fifty percent rule also found in the ordinance is adhered to). The ordinance here seeks to impose stricter requirements than the fifty percent rule and do so in a manner which protects the future integrity of the property against flooding. We conclude that the ordinance imposes the floodproofing requirement on any structural repair, regardless of whether it raises the first floor elevation. This interpretation is consistent with the policy to eventually eliminate a nonconforming use which is dangerous because of the lack of floodproofing.

The McKillops claim that because the cost of the structural repair is well under fifty percent of the assessed value, it is authorized by § 59.97(10), STATS., and regulations of the Department of Natural Resources. They contend that no further limitation can be placed on the repairs. The provision in § 59.97(10) on which the McKillops rely applies only to "buildings and premises used for trade and industry." Moreover, § 87.30(1)(b), STATS., indicates that a county is not prohibited from adopting a floodplain ordinance more restrictive than the regulations adopted by the DNR. Kenosha County has chosen to adopt a more restrictive zoning ordinance with respect to nonconforming uses in a floodplain. The McKillops' property is subject to the more restrictive ordinance.

The circuit court vacated the Board's decision and ordered that the McKillops be allowed to complete repairs without a zoning permit. However,

we conclude that the structural repair undertaken by the McKillops is regulated by the zoning ordinance and subject to the floodproofing requirement. Therefore, the order of the circuit court is reversed. The Board must be given the opportunity to consider the McKillops' zoning application for structural repair and determine what, if any, conditions are necessary to meet the floodproofing requirement of the ordinance. We remand to the circuit court with instructions that the McKillops' zoning permit application be remanded to the Board for further consideration.

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

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.