COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0221 **Cir. Ct. No. 00-CV-367**

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

THOMAS M. CALAWAY, SANDRA K. CALAWAY, AND CATHERINE A. CALAWAY-SCHOUNARD,

PLAINTIFFS-APPELLANTS,

V.

VILLAGE OF ALLOUEZ, A MUNICIPALITY WITHIN THE STATE OF WISCONSIN, AND JOSEPH D. FRASCH,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

DENMARK STATE BANK,

THIRD-PARTY DEFENDANT.

APPEAL from an order of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

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

¶1 CANE, C.J. Thomas Calaway, Sandra Calaway and Catherine Calaway-Schounard (collectively, the Calaways) appeal from a trial court order affirming a Village of Allouez raze order. The Calaways argue that the raze order is unreasonable because (1) the Village did not consider repair cost estimates at the time it issued the raze order; (2) the value of parking spaces adjacent to the building makes it reasonable to repair the building; and (3) the Village and the trial court erroneously considered the cost of repairs necessary to restore the building to its former use as a restaurant, rather than for its intended use. We reject these arguments and affirm.

BACKGROUND

¶2 The Calaways own a building in which they operated a restaurant until 1993. Since then, the Calaways have used the building for personal storage. On February 22, 2000, Joseph Frasch, Village building inspector, reported to the Village board that he believed the building should be razed. According to the meeting minutes, Frasch told the board that he had inspected the building on two occasions and had taken pictures. He showed the board members pictures of the building that illustrated areas in need of repair. Frasch reported that the water, gas and electricity had been turned off in 1993. Frasch also said that the 1999 assessed value of the building was $57,900 and that the cost of repairs would exceed fifty percent of that value.[1] It is undisputed that Frasch did not have

[1] The assessed value of the commercial lot on which the building is situated was listed as $355,000.

written estimates for repairs at the time he recommended razing the building. The board voted to issue an order to raze the building.

¶3 On February 24, the Village issued an order directing the Calaways to raze the building and restore the site to a dust-free and erosion-free condition within thirty days. The order stated: "[T]he Village of Allouez has determined that the above building has become so out-of-repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and that it would be unreasonable to repair the same."

¶4 The Calaways moved for a temporary restraining order, arguing that the raze order was unreasonable. The Village agreed to a temporary restraining order pending a court hearing on the reasonableness of the raze order. The court granted the temporary restraining order.

¶5 The court heard testimony in June and August 2000. Both the Calaways and the Village submitted estimates for repair. The Calaways argued that based on the estimates of its witnesses, the total average cost of repairs was $26,708. In contrast, the Village submitted repair estimates totaling as much as $100,000.

¶6 The court found that based on its assessment of the witnesses' credibility, the cost of repair would well exceed $28,950, one half the cost of the building's assessed value, and therefore the court presumed that repairing the building was unreasonable. *See* WIS. STAT. § 66.05(1m)(b) (1997-98).[2] The court

[2] The legislature renumbered WIS. STAT. § 66.05 (1997-98) to WIS. STAT. § 66.0413 (1999-2000) and amended the statute. Because these amendments did not become effective until January 1, 2001, the 1997-98 statutes are applicable here. Therefore, all statutory references are to the 1997-98 version unless otherwise noted.

also considered several other arguments, such as whether parking spaces adjacent to the building should be considered in valuing the building and whether the Village violated its own building code by employing an inspector who was not certified to inspect commercial buildings. Ultimately, the court determined that the Village's order was reasonable and directed the Calaways to raze the building. Although the court dissolved the temporary restraining order, the court also stayed the raze order pending appeal.

APPLICABLE STATUTES

¶7 The Village ordered the Calaways to raze their building pursuant to WIS. STAT. § 66.05(1m). That statute provides in relevant part:

> (a) 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 ….
>
> (b) Except as provided in sub. (9) [dealing with historic buildings], if a municipal governing body, inspector of buildings or designated officer determines that the cost of such repairs would exceed 50 per cent of the assessed value of such building divided by the ratio of the assessed value to the recommended value as last published by the department of revenue for the municipality within which such building is located, such repairs shall be presumed unreasonable and it shall be presumed for purposes of this section that such building is a public nuisance.

¶8 Pursuant to WIS. STAT. § 66.05(3), the exclusive remedy for a person affected by an order to raze is to apply to the trial court for an order restraining the building inspector or other designated officer from razing and

removing the building. The court's duty is to determine the reasonableness of the order. *See* ***Donley v. Boettcher***, 79 Wis. 2d 393, 406, 255 N.W.2d 517 (1977); WIS. STAT. § 66.05(3). If the court finds the order is reasonable, the court dissolves the restraining order. WIS. STAT. § 66.05(3). However, if the court finds that the order is unreasonable, then the building inspector or other designated officer is prohibited from issuing another § 66.05 order with respect to the same building until the building's condition is "substantially changed." ***Id.***

¶9 Whether a building inspector's or governing body's order is reasonable is a question of law. *See* ***Village of Williams Bay v. Schiessle***, 138 Wis. 2d 83, 88, 405 N.W.2d 695 (Ct. App. 1987). However, the reasonableness finding is so intertwined with the trial court's factual findings that we will give more deference to the trial court's legal determination than we do with other legal questions. *See* ***id.***

DISCUSSION

A. Whether the raze order is unreasonable because the Village's decision to raze was not based on specific repair cost estimates

¶10 The Calaways' first challenge to the raze order is procedural in nature. The Calaways strenuously object to the Village board deciding to order the building razed without securing repair cost estimates. They contend: "It was unreasonable, over reaching and outrageous for [the Village] to issue a raze order based upon WIS. STAT. § 66.05(1m)(b), 1997-98, without ascertaining any costs of repair." They note that it was only after the Calaways challenged the order that the Village sought independent repair cost estimates. They argue that the Village failed to follow the statute and, accordingly, the raze order should be reversed.

¶11 At the trial court, the Village argued that the court should not consider this argument because it was more properly the subject of a writ of certiorari, which the Calaways did not bring. The court stated that although the issue was not properly raised, the court would nonetheless address it. The court concluded:

> [The Calaways'] argument begs the question. The true meaning of § 66.05 lies in the fact that a building determined to be so old, dilapidated, or out of repair as to be unsafe, unsanitary or otherwise unfit for human habitation, occupancy or use, is a public nuisance and may be destroyed. The governing body must make a determination that it would be unreasonable to repair the same in order to issue a raze order. § 66.05(1m)(b), Wis. Stats., establishes a formula that creates a rebuttable presumption as to the reasonableness of repair. It is one method by which the governing body initially, and thereafter the Court, can apply a standard to determine reasonableness. However, although building inspector Frasch testified … that he had not prepared cost estimates prior to the [Village's action], he also testified … that, based on his experience, the building was not fit for occupancy by humans, that it was unhealthy, was unsafe and was beyond repair because of the extent of the damage and disrepair. … [Mr. Frasch] gave an opinion to the Village Board based on his overall experience that the costs of repair would be unreasonable. The Village Board was free to accept that opinion and to make a police power determination consistent therewith.

¶12 We agree that the Village board's failure to consider specific repair cost estimates does not make the raze order per se unreasonable. A governing body can issue a raze order upon determining that a building is, in the governing body's judgment, "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." *See* WIS. STAT. § 66.05(1m)(a). The statute does not prescribe the decision-making process that must take place and does not require the governing body to consider specific

repair cost estimates. Instead, the statute provides that the governing body must use "its judgment."

¶13 The Calaways' procedural argument appears to be based on their concern that governing bodies will issue raze orders based on insufficient information. We are satisfied that WIS. STAT. § 66.05(3) discourages governing bodies from doing so by providing that if the trial court reviewing the order concludes that the raze order is unreasonable, the governing body is prohibited from issuing another § 66.05 order with respect to the same building until the building's condition is "substantially changed." *See* WIS. STAT. § 66.05(3).

¶14 For these reasons, we affirm the trial court's legal conclusion that the Village was not required to obtain specific repair cost estimates before issuing the order. Thus, the Village's raze order was not procedurally defective.

B. Relevance of adjacent parking spaces

¶15 The Calaways contend that the trial court should have taken into account the value of sixteen parking spaces that are adjacent to the building. They explain that because of changes in transportation law, parking spaces are no longer allowed within fifty feet of a state highway. However, existing parking spaces, like the sixteen spaces at issue, are "grandfathered in." Thus, the Calaways argue, the parking spaces increase the value of their building by an additional $64,000. They argue that this raises the level at which repairing the building would be presumptively unreasonable, from $28,950 to $60,950.

¶16 We reject this argument for several reasons. Before issuing a raze order, the governing body must determine that a building is, in the governing body's judgment, "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" that it would be unreasonable to repair the same. *See* WIS. STAT. § 66.05(1m)(a). In the next subsection, § 66.05(1m)(b) provides that if the governing body determines that the cost of "such repairs" (i.e., building repair costs) exceeds "50 per cent of the assessed value *of such building*," the repairs shall be presumed unreasonable and it shall be presumed that the building is a public nuisance. (Emphasis added.) Nothing in these sections suggests that the governing body should consider the value of adjacent land or parking spaces.

¶17 The Calaways argue that parking spaces "run with a building," as opposed to "with the land." They offer no authority for this proposition. We are unconvinced, faced with the unambiguous language of WIS. STAT. § 66.05(1m), that the calculation specified in § 66.05(1m)(b) allows consideration of the value of parking spaces adjacent to a building when deciding whether repairing a building is presumptively unreasonable.

¶18 Next, the Calaways argue that the trial court "failed to take into consideration" the case of ***Posnanski v. City of West Allis***, 61 Wis. 2d 461, 468, 213 N.W.2d 51 (1973), which holds that a trial court may make a finding that reconstruction in excess of the fifty percent limit should be allowed. The Calaways argue that the trial court "unnecessarily restricted itself to the confines of [WIS. STAT. § 66.05(1m)(b)]" and "ignored the [***Posnanski***] case which would allow it to set a higher value for the Calaway building than that assessed." The Calaways misinterpret ***Posnanski***, which stated:

> Only if a property owner can show that the legislature's formula operates arbitrarily in the individual case can a court, after due consideration of the legislature's declared public policy of ridding the state of old and dilapidated buildings, make a finding that a reconstruction in excess of the 50 percent limit be allowed.

> In view of the legislature's declaration of a strong public policy to the contrary, this will be the rare case indeed. Only if it can clearly be said that the operation of the legislative rule is without any rational basis in the individual case may a court find that the presumption is not applicable.

Id. at 468-69.

¶19 Contrary to the Calaways' interpretation, ***Posnanski*** does not allow the trial court to increase the assessed value of a building, and thereby increase the level of repairs required to establish a presumption of unreasonableness. *See* ***Posnanski***, 61 Wis. 2d at 468-69. Rather, ***Posnanski*** allows a party to argue that although the cost of repair exceeds fifty percent of the building's assessed value, the owner should be allowed to make repairs because "the operation of the legislative rule is without any rational basis in the individual case." ***Id.*** at 469. The Calaways have failed to argue that they should be allowed to make repairs even though the cost of repair exceeds fifty percent of the building's assessed value on grounds that "the operation of the legislative rule is without any rational basis" in this case. Therefore, ***Posnanski*** provides no basis to overturn the Village's raze order.

C. Consideration of past, present and future uses

¶20 In the process of determining the reasonableness of the raze order, the trial court was required to consider "the use to which the building is to be put." *See* ***Donley***, 79 Wis. 2d at 407. The Calaways argue that the court erroneously based its reasonableness determination on the cost of restoring the property so that it could be used as a restaurant, rather than for other purposes. We disagree. The court considered that the building would be used for office space, retail sales, a

women's fitness center or personal storage, all of which are consistent with the Calaways' own testimony.

¶21 The court also noted that there is a large sign posted outside the building indicating the property is available for sale or lease, is zoned commercial and that the owner will divide and build to suit. Citing this evidence and the Calaways' testimony about their intent to use the building for office space, retail sales, a women's fitness center or personal storage, the court stated:

> It is clear that [they] intend to lease the building if they receive an inquiry they deem appropriate. In the Court's view, their intent to use a portion of the building for storage is a fall back consistent with its current use. There is nothing in the record which the Court can find which would indicate that they would limit the use of the building in accordance with their testimony in the event that other alternatives became available. Since the use of the building is to rent, … it is not enough to repair the building so that it may be safe and sanitary. It must also be fit for human habitation, occupancy and use.

¶22 Moreover, the court found that "*any use* of the building will necessitate … the costs" that witness Merle Brander said are necessary. (Emphasis added.) Brander, a licensed professional engineer with a degree in civil engineering, testified that water leakage in the building had caused decay and had substantially reduced the structure of the wood. Brander also testified that moisture had generated mold throughout the building and presented a health concern, as well as a strength and safety concern. He said evidence of structural deficiency was clear. Brander estimated total repair costs at $85,000 to $100,000.

¶23 The trial court found that Brander's testimony was persuasive. The court stated in its written decision:

> Although there is considerable disparity in the estimates of the various experts, I find the testimony of Mr. Brander

> to be the most compelling with respect to the costs of repairs to the structure. I find that the testimony of Mr. Brander with respect to the existence of mold and mildew within the structure to be more credible. On that basis, I accept his testimony with respect to the substantial costs of repair necessary to correct that problem not only to make the structure sound, but also to adequately address the health issues existent with the presence of mold and mildew as described by him in his testimony.

¶24 The weight of the evidence and credibility of witnesses are matters resting within the province of the trier of fact. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980). We will not set aside the trial court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (1999-2000). The trial court found, based on its credibility assessments, that (1) the Calaways intend that the building may be used as an office, retail store, exercise facility or personal storage facility; (2) the repairs that Brander suggested are necessary for any use of the building; and (3) the necessary repair costs will well exceed $28,950, one half the cost of the building's assessed value. Based on the trial court's detailed findings and our review of the record, we cannot say that these findings are clearly erroneous.

CONCLUSION

¶25 The trial court's findings of fact are not clearly erroneous. Based on these facts and the court's credibility determinations, we conclude that the trial court correctly determined that repairing the building is presumptively unreasonable pursuant to WIS. STAT. § 66.05(1m)(b). The Calaways have not rebutted that presumption. We affirm the trial court's determination that the Village's raze order is reasonable.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.