

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-2373
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-439

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

OUTAGAMIE COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT,

JOHN A. POVLIICH,

INTERVENING-PARTY-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
MICHAEL W. GAGE, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

¶1 PER CURIAM. The State of Wisconsin appeals from an order vacating a decision by the Outagamie County Board of Adjustment to grant John Povlich’s appeal from an order to remove his nonconforming cabin from the floodway of the Wolf River. The State argues that Povlich’s cabin should be removed because the cabin’s use was discontinued for at least one year. We reject that argument.

¶2 The State also contends that the circuit court erred by vacating, rather than reversing, the board’s decision. Alternatively, the State argues that the circuit court improperly instructed the board on remand. Although we affirm that part of the order vacating the board’s decision and remanding the matter to the board, we conclude that the circuit court improperly instructed the board on remand. Therefore, the matter is to be remanded to the board with directions to apply the proper standard as discussed below.

BACKGROUND

¶3 Povlich’s cabin was built in the 1950’s. Pursuant to the Outagamie County Shoreland-Floodplain-Wetland Ordinance, adopted in 1985, the cabin was no longer a permitted structure within the Wolf River floodway and was therefore characterized as “nonconforming.”¹ As a nonconforming structure, the cabin could remain but was subject to certain conditions set forth by ordinance.

¹ The ordinance forbids habitable structures in the floodway. OUTAGAMIE COUNTY, WIS., SHORELAND-FLOODPLAIN-WETLAND ORD. § 16.31(4)(b)1. Additionally, under state law, counties must forbid any structure in the floodway that is “[d]esigned for human habitation.” WIS. ADMIN. CODE § NR 116.12.

¶4 In 1999, Povlich made various improvements to the cabin. He replaced the windows, the door and the porch and also re-shingled the cabin. Following these improvements, the Outagamie County Zoning Administrator informed Povlich that the restored cabin violated the ordinance. Specifically, the zoning administrator determined that Povlich had re-constructed an existing habitable structure and that the cost of that reconstruction exceeded 50% of its present equalized assessed value. After the zoning administrator ordered Povlich to remove the cabin from the floodway, Povlich appealed to the Outagamie County Board of Adjustment.

¶5 The board found that before its reconstruction, the cabin’s “present equalized assessed value or fair market value” was \$761. The board also found that “[t]he new, post construction, present equalized assessed value of the structure is \$4,262.” Nevertheless, the board ultimately voted to allow the cabin to remain on condition that Povlich remove certain structural enhancements. Specifically, the board ordered removal of a small covered porch on the cabin’s south side, an attached walkway on the north side and several feet of the cantilevered porch over the apparent high-water mark.

¶6 The State filed suit in circuit court seeking certiorari review of the board’s decision. The circuit court vacated the board’s decision and remanded the matter to the board with directions. This appeal followed.

ANALYSIS

¶7 On certiorari review, this court reviews the decision of the Board of Adjustment, not the decision of the circuit court. *Board of Regents v. Dane Cty. Bd. of Adj.*, 2000 WI App 211, ¶10, 238 Wis. 2d 810, 618 N.W.2d 537. Our certiorari review is limited to one or more of the following: (1) whether the board

kept within its jurisdiction; (2) whether the board proceeded on a correct theory of law; (3) whether the board's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the board might make the decision it did. *Id.*

A. Discontinued Use for at Least Twelve Months

¶8 Initially, the State argues that Povlich's cabin should be removed because the cabin's use was discontinued for at least twelve months. It is undisputed that this argument was raised for the first time on appeal before the circuit court. "Ordinarily an appellate court will not consider issues beyond those properly raised before the administrative agency, and a failure to raise an issue generally constitutes a waiver." *State v. Outagamie Cty. Bd. Of Adj.*, 2001 WI 78, ¶55, 251 Wis. 2d 484, 628 N.W.2d 376. Despite the apparent waiver of this issue, we nevertheless reject the argument on its merits.

¶9 Pursuant to OUTAGAMIE COUNTY, WIS., SHORELAND-FLOODPLAIN-WETLAND ORD. §16.28(4), a legal, nonconforming structure that is unused for twelve months or more may not remain in the floodway. The State cites Povlich's circuit court brief as evidence of the cabin's abandonment for more than a year. There, Povlich indicated that the cabin was not used very much during the 1980's. Povlich removed the porch in 1990 because it had deteriorated. In 1991, the cabin was vandalized and in 1999, Povlich began restoration on the cabin. Povlich additionally indicated that a front deck to the cabin was "indispensable for safe access" to the cabin, and that without a deck, "access is severely limited and unsafe." Contrary to the State's assertions, these statements do not prove that the cabin's use was discontinued for twelve months or more. Rather, these statements

merely show that Povlich did not have safe access to the cabin for a number of years.

B. The Board's Findings and Reasoning

¶10 The State contends that because the board's decision failed to include the findings and reasoning required by law, the circuit court erred by failing to reverse the board's decision. We disagree.

¶11 The board allowed Povlich's cabin to remain on condition that Povlich abate certain improvements made to the cabin. Because the board failed to calculate the value of the cabin with its abated improvements, the circuit court vacated the board's decision and remanded the matter. Where, as here, the record is insufficient to establish a rational basis for the board's decision, equitable disposition of the case required its remand to the board. *See Arndorfer v. Sauk Cty. Bd. Of Adj.*, 162 Wis. 2d 246, 259, 469 N.W.2d 831 (1991).

C. Remand

¶12 Alternatively, the State argues that the circuit court erred on remand when it failed to follow the proper standard for determining the extent to which a legal, nonconforming structure may be restored. Although we affirm that part of the circuit court order vacating the board's decision and remanding the matter to the board, we agree that the court erred by directing the board to follow an improper standard.

¶13 In its remand order, the circuit court stated that it was impossible to determine the equalized assessed value of the cabin. Concluding that the equalized assessed value was a rough approximation of the fair market value, the circuit court directed the board to compare the current fair market appraisal of the

improved cabin with an estimated fair market value of the unimproved cabin—but with reasonable repair and maintenance included in the pre-improvement figure. The board was thus ordered to determine whether the cabin has an increased “fair market value” of more than 50% of its pre-improvement “fair market value.”

¶14 The State argues that because the law expressly requires use of “assessed value” as the point of comparison, the circuit court erred by directing the board to make a “fair market value” comparison. We agree.

¶15 Pursuant to WIS. STAT. § 59.69(10)(a):

An ordinance enacted under this section may not prohibit the continuance of the lawful use of any building or premises for any trade or industry for which such building or premises is used at the time that the ordinances take effect, but the alteration of, or addition to, or repair in excess of 50% of its *assessed value* of any existing building or structure ... may be prohibited. (Emphasis added.)

Consistent with § 59.69(10)(a), OUTAGAMIE COUNTY, WIS., SHORELAND-FLOODPLAIN-WETLAND ORD. § 16.34(1)(c) prohibits replacing, reconstructing or rebuilding a nonconforming structure in a floodway if the cost of restoration would exceed 50% of the equalized assessed value of the present structure. That section provides:

If any nonconforming structure is totally destroyed or is so badly damaged that it cannot be practically restored, it cannot be replaced, reconstructed or rebuilt unless permanently changed to a conforming structure with conforming use. For the purposes of this section, restoration is deemed impractical where the total cost of such restoration would exceed 50% of the present equalized *assessed value* of such structure.

OUTAGAMIE COUNTY, WIS., SHORELAND-FLOODPLAIN-WETLAND ORD. § 16.34(1)(c). (Emphasis added). Likewise, Section 16.28(2) of the ordinance

provides that “[n]o structural alteration, addition or repair to any nonconforming structure ... shall exceed 50% of its *assessed value*, adjusted to the most current equalized value for the municipality.” (Emphasis added).²

¶16 Because the law expressly requires a determination whether structural alterations, additions or repairs to the nonconforming cabin exceeded 50% of its assessed value, adjusted to the most current equalized value for the municipality, we conclude that the circuit court erred by directing the board to make a “fair market value” comparison.

CONCLUSION

¶17 Upon the foregoing, we affirm that part of the circuit court’s order vacating the board’s decision and remanding the matter to the board. However, we reverse that part of the order directing the board to compare the fair market value of the cabin before and after the improvements. Rather, the matter is to be remanded to the board with directions to determine whether the improvements exceeded 50% of the cabin’s equalized assessed value.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions. No costs to any party.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

² “Ordinary maintenance repairs are not considered structural repairs, modifications or additions. Such ordinary maintenance repairs include internal and external painting, decorating, paneling and the replacement of doors, windows and other nonstructural components.” OUTAGAMIE COUNTY, WIS., SHORELAND-FLOODPLAIN-WETLAND ORD. § 16.28(3).

