

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 20, 1995

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. 95-0092-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STEVEN FRIENDSHUH,

Petitioner-Respondent,

v.

**SAWYER COUNTY
ZONING COMMITTEE,**

Respondent-Appellant.

APPEAL from an order of the circuit court for Sawyer County:
NORMAN L. YACKEL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Sawyer County appeals an order denying its petition to reverse the circuit court's order granting certiorari relief to Steven Friendshuh.¹ The original order required the County to change the zoning of Friendshuh's island property from a forestry district to a residential district so that he could build two seasonal cottages on his land. That order declared the County zoning committee's decision and the full Sawyer County Board's

¹ This is an expedited appeal under RULE 809.17, STATS.

ratification denial of a zoning change unreasonable and arbitrary. We conclude that the County has waived any challenge to the merits of the original zoning order. The sole issue on appeal is the timeliness of Friendshuh's certiorari petition pursuant to § 59.99(10), STATS.² We conclude that the petition was timely filed and affirm the circuit court's subsequent order denying relief.

WAIVER OF CHALLENGE TO THE MERITS OF THE ORIGINAL ORDER

Because the County did not seek to overturn the court's original order in its petition for relief and expressly stated at the hearing that it was not

² Section 59.99(10), STATS., provides:

Certiorari. Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, 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, commence an action seeking the remedy available by certiorari. The court shall not stay proceedings upon the decision appealed from, but may, on application, on notice to the board and on due cause shown, grant a restraining order. The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof.

If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review.

challenging the merits of the zoning decision, we conclude that the County has waived the right to raise the issue on appeal now.³

The extended procedural background relevant to this appeal is as follows. Friendshuh's request for a zoning change was denied by the Sawyer County Zoning Committee in February 1992. The County has conceded from the outset that the committee's decision was advisory only and required the ratification of the Sawyer County Board of Supervisors. The County zoning administrator's office so notified Friendshuh by letter dated February 24, 1992: "The denial of the change in zone district must be ratified by the Sawyer County Board of Supervisors before it becomes final. This will be scheduled for the County Board Meeting on Thursday, March 19, 1992." The same notice, however, also advised Friendshuh: "Any person or persons jointly aggrieved by this decision of the Zoning Committee may commence an action in the Circuit Court for Writ of Certiorari to review the legality of this decision *within 30 days after the date of this notice.*" (Emphasis added.)

At the scheduled March County board meeting, the board tabled its decision until its April meeting to allow further review. To comply with the directive of the County's notice of February 24, 1992, Friendshuh filed a petition for a writ of certiorari within thirty days of that notice. While Friendshuh's petition for a writ was pending in the circuit court, the County board met on April 21, 1992, and ratified the zoning committee decision. Friendshuh then dismissed his original certiorari action and commenced the present action on

³ In light of our conclusion that the County expressly waived any challenge, we do not address whether the appeal of the original order was timely made under the *Ver Hagen* rule. *Ver Hagen v. Gibbons*, 55 Wis.2d 21, 197 N.W.2d 752 (1972), stands for the proposition that a party may not extend the time for appealing the merits of a final order of the circuit court by the device of seeking a rehearing that raises no new issues, and then appealing the order denying relief:

What the appealing defendant seeks to do in this case is to relitigate matters disposed of by previous judgments and orders of the court. This Court has held from the earliest day that where no appeal was taken from an order (or judgment) within the time limited, mere error in an order cannot be reached by appealing from an order denying a motion to set it aside.

Id. at 26, 197 N.W.2d at 755 (quoting *Kellogg-Citizens Nat'l Bank v. Francois*, 240 Wis. 432, 436, 3 N.W.2d 686, 687 (1942)).

the same date, May 20, 1992. About a year after the circuit court's written certiorari decision favorable to Friendshuh, the County filed a "petition to reverse" the court's order. A year after that, a hearing was held on the County's petition. At the hearing, the County corporation counsel advised the court: "From my standpoint, first of all, your Honor, I want to make it clear obviously I don't think anyone is taking issue with the decision made by the court, except for the fact that maybe the petition was filed incorrectly or the order was filed incorrectly."

The statement by the corporation counsel was consistent with the County's petition to reverse the original order that challenged only the validity of the form of the petition for writ of certiorari and the order granting relief. It was the County's sole contention that Friendshuh in each of his two petitions for certiorari review had erroneously sought review of the zoning committee's advisory decision rather than a review of the County board's ratification. The circuit court denied the petition to reverse and issued a new order dated December 6, 1994, granting Friendshuh the same relief granted in its original written decision of September 18, 1992.

A waiver is the intentional relinquishment of a known right. *Hanz Trucking, Inc. v. Harris Bros.*, 29 Wis.2d 254, 264, 138 N.W.2d 238, 244 (1965). Normally, an appellate court will consider issues raised for the first time on appeal as waived. *Drier v. Drier*, 119 Wis.2d 312, 325 n.12, 351 N.W.2d 745, 752 n.12 (Ct. App. 1984). While the waiver rule is a rule of judicial administration and not jurisdiction, it is certainly appropriate here where the County makes only a perfunctory challenge to the circuit court's decision on the merits and the issue is not adequately briefed.

TIMELINESS OF THE PETITION FOR CERTIORARI

Finally, we reject the County's challenge to the timeliness of Friendshuh's petition for a writ of certiorari. The County contends that Friendshuh had to file his petition for a writ within thirty days of the decision of the zoning committee. The County's position is confusing. In the trial court it argued that the petition was defective because the petition for relief had to be taken from the decision of the County board rather than the zoning committee. It also concedes that the committee's decision was only advisory and not a final decision until ratified by the County board. It cites no authority for its present contention that the appeal is to be taken from the advisory decision of the zoning committee rather than the dispositive decision of the board. Because § 59.99, STATS., contemplates a petition for certiorari only after an appeal to the board of adjustment of adverse administrative decisions, we agree with the circuit court's ruling that Friendshuh's petition for certiorari was within the statutory time limit. We therefore hold that the petition for certiorari filed on May 20, 1992, asking for review of the final decision the County board made on April 21, 1992, was within the thirty-day limit provided by § 59.99(10), STATS. The court's order of December 1994 refusing to reverse its earlier decision in 1992 is therefore affirmed.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.