

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2005

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. 2004AP2345

Cir. Ct. No. 2002CV6

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

YOURCHUCK VIDEO, INC.,

PLAINTIFF-APPELLANT,

v.

**BURNETT COUNTY AND BURNETT COUNTY BOARD OF SUPERVISORS AND
BURNETT COUNTY ZONING ADMINISTRATION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Burnett County:
ROBERT H. RASMUSSEN, Judge. *Reversed.*

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

¶1 PER CURIAM. Yourchuck Video, Inc., appeals an order dismissing its claims against Burnett County.¹ Yourchuck's complaint challenged the constitutionality of the County's sign ordinance.² We conclude the ordinance violates procedural due process and reverse the order.

BACKGROUND

¶2 Beginning in 1986, Yourchuck operated multiple businesses out of a single building on Highway 35/70 in Siren. In 2001, Yourchuck began operating out of a new building located approximately one-half mile north of the old building. Before moving, Yourchuck applied for a permit to construct a new sign at the new location. The proposed new sign was 200 square feet, with a height of 31 feet, a size that was similar to an existing sign at the old building and allegedly necessary to advertise Yourchuck's multiple businesses. Burnett County denied Yourchuck's application because the proposed sign did not comply with the County's sign ordinance, BURNETT COUNTY, WIS., ORDINANCE #2000-01. The ordinance does not include a variance procedure.

¶3 Yourchuck submitted a second application, seeking to move its existing sign to its new location. This application was also denied on the basis of the sign ordinance. The County again informed Yourchuck that the ordinance did not include a variance procedure.

¹ For simplicity, we will refer to the respondents collectively as Burnett County or the County.

² Yourchuck also argues the County did not have statutory authority to pass the ordinance. Because we conclude the ordinance is unconstitutional, we decline to address this argument. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only address dispositive issues).

¶4 Yourchuck then commenced this action. It filed a “Memorandum in Support of Declaratory Relief,” along with supporting affidavits. Yourchuck argued, among other things, that the ordinance violated procedural process by failing to provide a variance or appeal procedure. After a hearing,³ the circuit court concluded that certiorari review under WIS. STAT. § 68.13⁴ provided an adequate remedy and, therefore, the ordinance did not violate procedural due process. The court dismissed Yourchuck’s complaint.

DISCUSSION

¶5 Yourchuck claims the ordinance violates its right to due process under the Fourteenth Amendment of the United States Constitution. That Amendment provides that no state may “deprive any person of life, liberty, or property, without due process of law” This does not mean that states may not deprive persons of life, liberty and property. Rather, it means they may only do so by means of due process of law.

³ The hearing transcript indicates the court heard arguments on Yourchuck’s “motion for declaratory relief.” However, there is no motion in the record. Yourchuck submitted affidavits that were apparently accepted by the court and not contested by the County, so perhaps the court viewed the motion as one for summary judgment. In any event, whether we apply declaratory judgment, judgment on the pleadings or summary judgment methodology, ultimately Yourchuck’s arguments on appeal involve questions of law that we review independently. *See State v. Janssen*, 219 Wis. 2d 362, 370, 580 N.W.2d 260 (1998).

⁴ WISCONSIN STAT. § 68.14 provides, in relevant part:

(1) Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court’s decision.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶6 Generally, due process requires that notice and an opportunity to be heard be provided *before* a person is deprived of life, liberty or property. “The purpose of this requirement obviously is to prevent wrongful deprivations before they occur.” *Irby v. Macht*, 184 Wis.2d 831, 843, 522 N.W.2d 9 (1994), *overruled on other grounds, Sandin v. Conner*, 515 U.S. 472 (1995). In certain circumstances, however, due process is satisfied by providing a remedy to a person *after* the person has been deprived of life, liberty or property. The parlance for this remedy is “adequate post-deprivation remedy.”

¶7 In this case, the County’s only response to Yourchuck’s constitutional argument is that certiorari provides an adequate post-deprivation remedy. This means that the County effectively concedes the two premises of Yourchuck’s argument: (1) it was deprived of a constitutionally protected property interest, and (2) due process of law was not provided *before* the deprivation. We accept the County’s implicit concessions. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (We may accept as conceded propositions that are not refuted by the opposing party.).

¶8 The only question before us, therefore, is whether certiorari review before the circuit court provides Yourchuck an adequate post-deprivation remedy. Yourchuck argues that certiorari review is a meaningless remedy here where the ordinance restricts its land use without the procedural safeguard of a variance procedure. The ordinance’s lack of a variance procedure meant Yourchuck received no hearing in which to present its arguments and evidence that the ordinance’s dimensional sign restrictions are unfair as applied to its multiple businesses. Therefore, Yourchuck argues, there is no record for a court to review on certiorari, making such review meaningless.

¶9 The County responds that the lack of a variance procedure does not necessarily invalidate an ordinance on procedural due process grounds, citing a Texas case, *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1998). However, the ordinance at issue in *Quick* did, in fact, provide a limited variance, *id.* at 118, and therefore the County's reliance on *Quick* is misplaced.

¶10 The County also argues that certiorari review provides Yourchuck an adequate post-deprivation remedy, relying on *Thorp v. Town of Lebanon*, 2000 WI 60, ¶53, 235 Wis. 2d 610, 612 N.W.2d 59. In that case, the Thorps' property was rezoned in an extensive zoning reclassification. The Thorps petitioned the town planning commission to change the rezoning. The petition was denied. The Thorps then appealed to the town board, which granted the change. The county board, however, ultimately denied the change. The Thorps challenged the denial in court arguing, among other things, that they were denied their right to due process. The supreme court held that the Thorps were not denied due process because they had an adequate post-deprivation remedy, namely certiorari. *Id.*, ¶54. Certiorari would have allowed a circuit court to review the proceedings before the planning commission, the town board and the county board to determine if the various bodies acted fairly and reasonably and in accordance with the evidence.

¶11 The problem with the County's argument is that it fails to explain how certiorari review is adequate here. It is not enough that a post-deprivation remedy is available. It must be an adequate remedy. A court's review on certiorari is limited to:

- (1) whether the Board kept within its jurisdiction;
- (2) whether it proceeded on the 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 Board might reasonably make the order or determination in question, based on the evidence.

State v. Waushara County Bd., 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514. Because the ordinance has no variance or exception procedure, there was no hearing to present evidence or arguments. So what would a court review on certiorari? The County states that a court may affirm, reverse or remand for further proceedings, but it never explains what a court would review in order to even consider reversal or remand. Quite simply, there is no relief a certiorari court could even consider. Thus, certiorari can provide no remedy whatsoever, let alone an adequate remedy.

By the Court.—Order reversed.

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

