

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 2, 2010**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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**Appeal No. 2009AP1259**

**Cir. Ct. No. 2005CV1114**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**PLAYERS PIZZA & PUB, LLP,**

**PLAINTIFF-APPELLANT,**

**v.**

**CITY OF OSHKOSH,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Winnebago County:  
SCOTT C. WOLDT, Judge. *Reversed.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 SNYDER, J. Players Pizza & Pub, LLP, (Players) appeals from an order affirming the decision of the board of Zoning Appeals for the City of Oshkosh. In this zoning case, the circuit court upheld the board's determination

that Players' parking lot, which existed as a legal, nonconforming use prior to 2005, was removed and reconstructed such that it now needed to conform to zoning code drainage and setback standards. Players contends that the board acted arbitrarily and unreasonably when it interpreted the code and applied it to the work done on the parking lot. Players asserts that the work performed was not reconstruction, and that Players should be permitted to continue the use of its nonconforming parking lot. We agree and reverse the order of the circuit court.

### **BACKGROUND**

¶2 Players owns a restaurant and adjoining parking lot at 556 W. 5th Avenue in the City of Oshkosh. The lot provides off-street parking for restaurant patrons. The parking lot was constructed prior to the enactment of the relevant zoning code provisions. The lot did not meet certain provisions of the zoning ordinance, but was allowed to continue as a legal, nonconforming structure.

¶3 After years of use, the blacktop surface of the parking lot had sufficiently deteriorated to the point where it needed resurfacing. In March 2005, Players hired Badger Highway Company, Inc., to perform "parking lot renovations" at a cost of \$23,460. The work proposed by Badger included the removal of "visible footing" leftover from a previous structure on the site, pulverizing existing asphalt, excavating where necessary and installing crushed base, installing a "compacted asphalt mat," and resetting existing bumpers. The project manager from Badger explained that "[p]ulverizing allows the contractor to recycle the old surface while eliminating the reflective cracking." He described the work done on the parking lot as "recycling and repaving" as contrasted with "removal and replacement."

¶4 At the Board hearing, Players' owner Carl Sosnoski acknowledged that he had spoken with the zoning administrator, Matthew Tucker, prior to beginning the work on the parking lot. Sosnoski told the board, "I just want to go on record saying that Matt Tucker never mentioned to me anything about any variances." Sosnoski further explained that Tucker asked whether "the footprint of the parking lot was going to be the same. If I was going to add any square footage, I said no we're just going to replace the surface of the lot .... He said I can't see any problems with that."<sup>1</sup>

¶5 Players began work on the parking lot. On June 14, 2005, the City issued a stop work order. Sosnoski then sought a building permit from the City. He brought in a rough site plan and asked to continue with the paving portion of the work on the parking lot. The City issued a conditional permit for specific work, pending approval of the entire project from the Board.

¶6 Players did not seek or obtain a variance. On July 1, 2005, the City issued a correction notice to Players, which advised Players that it was in violation of the zoning code. The notice stated that a "recent inspection of [Players'] property revealed the nonconforming off-street parking area has been altered or reconstructed without prior zoning approval." On July 8, the City issued a final correction notice, wherein it noted that the zoning code establishes the standards for a nonconforming structure, permitting "repairs and improvements of [a] maintenance nature, which [do] not include removal of the asphalt structure and replacement with a new asphalt structure."

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<sup>1</sup> The record contains an email message from Matthew Tucker to the City's acting zoning administrator, Susan Keplinger. In that message, Tucker states that he advised Sosnoski that a variance would "most likely" be required to perform the proposed work on the parking lot.

¶7 In summer 2006, Players applied for an interpretation of the zoning ordinances. Following a hearing on August 23, 2006, the board upheld the City's determination. In support of its decision, the board made the following findings: (1) the City staff determination that the parking lot was completely removed and must therefore be reconstructed in accordance with municipal code regulations was reasonable and supported by the evidence and testimony; (2) the entire parking lot was milled and redone, which constituted a major reconstruction; (3) the cost of the work done significantly exceeded fifty percent of the assessed value of the property and therefore exceeded the limit allowed by the code, and (4) removing a foundation from a parking lot constituted a major reconstruction, as it changed the "the parking lot from what it was previously."

¶8 Players petitioned for certiorari review of the board's determination. The circuit court held a hearing on April 14, 2009, and ultimately determined that the board's decision should stand. The circuit court held that the scope of the improvements to the parking lot exceeded the type of maintenance contemplated by the zoning code. It ordered Players to bring the parking lot into compliance with existing zoning code requirements. Players appeals.

## DISCUSSION

¶9 Our review is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on 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 evidence was such that it might reasonably make the order or determination in question. *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶14, 269 Wis. 2d 549, 676 N.W.2d 401. In order to make such a determination, we review the record before the board, not

the decision of the circuit court. *State ex rel. Harris v. Annuity & Pension Board*, 87 Wis. 2d 646, 651, 275 N.W.2d 668 (1979). While our standard of review is deferential with regard to factual findings, the interpretation of ordinances is a question of law on which the reviewing court owes no deference. *Hillis v. Village of Fox Point Bd. of Appeals*, 2005 WI App 106, ¶6, 281 Wis. 2d 147, 699 N.W.2d 636.

¶10 The parties do not question the board’s jurisdiction, the theory of law upon which it proceeded, or the extensiveness of the evidence taken at the hearing. Where the dispute arises is whether the board’s action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment. The decision of an administrative body is arbitrary or capricious if it is unreasonable or without a rational basis. *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976). Put another way, an arbitrary decision is an unconsidered, willful and irrational choice, “not the result of the ‘winnowing and sifting’ process.” *Donaldson v. Board of Comm’rs*, 2004 WI 67, ¶63, 272 Wis. 2d 146, 680 N.W.2d 762.

¶11 The zoning ordinances here forbid the use and enjoyment of structures that do not conform to the zoning ordinance. Structures that predate the zoning ordinance are permitted but the nature and extent of work that may be done on these structures is limited. *See generally* OSHKOSH, WIS., ZONING ORDINANCE, art. II, § 30-4(B) (2003).<sup>2</sup> The board wrestled with two particular provisions in the

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<sup>2</sup> OSHKOSH, WIS., ZONING ORDINANCE, art. II, § 30-4 (2003), states in relevant part:

(B) Nonconforming Structures

(continued)

code. First, existing structures that are conforming as to use but do not meet the dimensional rules and are proposed to be altered, may continue their nonconforming dimensions, so long as the alterations are repairs and improvements of a maintenance nature. *See* § 30-4(B)(1)(a). Second, where alterations, additions, or expansions change the exterior dimensions of the structure, the alterations are allowed provided that the dimensional nonconformity does not increase, and the work does not exceed fifty percent of the assessed value of the structure for the life time of the structure. *See* § 30-4(B)(1)(c).

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(1) Structures which were constructed prior to the effective date of this Ordinance which are conforming to the Ordinance as to use but do not conform as to dimensional rules (setbacks, height, separations, etc.) and which are proposed to be altered, are subject to the following requirements:

(a) Repairs and improvements of a maintenance nature are allowed.

(b) Alterations, additions and expansions which change the exterior dimension of the structure and which conform to the dimensional rules of the Ordinance are allowed.

(c) Alterations, additions and expansions which change the exterior dimensions of the structure, and which do not conform to this Ordinance but which do not increase the dimensional non-conformity beyond that which existed before the work commenced, are allowed provided they do not exceed fifty (50) percent of the current total assessed value of the structure for the life time of the structure.

(d) No alterations, additions or expansions may occur which will increase the dimensional non-conformity.

All references to the City of Oshkosh Municipal Code are to the 2003 version.

*Improvements in Excess of Fifty Percent of the Assessed Value*

¶12 The board rested its decision in part on OSHKOSH, WIS., ZONING ORDINANCE, art. II, § 30-4(B)(1)(c), which creates a percentage standard to determine whether alterations on a nonconforming structure are allowed. At the hearing, the board found:

[O]rdinance 30-4(B)(1)(c) clearly states that fifty percent of the current total assessed value of the structure, it cannot exceed that. We were provided with an exhibit suggesting that we would allow a \$6116.00 re-work of the parking lot and the documentation submitted by Badger Highways seem[s] to suggest that the cost of this was significantly in excess of that \$6000.00, and therefore, would not be within what was allowed under this.

¶13 However, the board’s finding failed to consider the preliminary language of the ordinance, which applies the fifty percent rule only to “alterations, additions, and expansions *which change the exterior dimensions of the structure.*” See OSHKOSH, WIS., ZONING ORDINANCE, art. II, § 30-4(B)(1)(c) (emphasis added). The evidence before the board, supported by third-party testimony, Sosnoski’s testimony, the building site plan, and undisputed by the city staff report, confirmed that the exterior dimensions of the parking lot did not change. “It is a cardinal rule of construction that no part of a statute should be rendered superfluous by interpretation.” *State v. Ozaukee County Bd. of Adjustment*, 152 Wis. 2d 552, 559, 449 N.W.2d 47 (Ct. App. 1989). Because the exterior dimensions of the parking lot did not change, § 30-4(B)(1)(c) does not apply. Thus, the board’s determination that it did was arbitrary and unreasonable.

*Repairs of a Maintenance Nature or Reconstruction*

¶14 The board also concluded that Players’ parking lot alterations went beyond that of a maintenance nature and therefore were not allowed by OSHKOSH,

WIS., ZONING ORDINANCE, art. II, § 30-4(B)(1)(a). “Ordinances governing the improvement of a structure that has legal nonconforming use status are intended to balance two competing policies: protection of property ownership rights and protection of the community’s interest in the speedy elimination of nonconforming uses.” *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 33, 498 N.W.2d 842 (1993). The City asserts that the purpose of its zoning ordinance is uniformity and the speedy remediation of nonconformities. In weighing the competing interests, the City asserts that allowing the work done on Players’ parking lot will prolong and perpetuate the nonconformity, defeating the purpose of zoning. *See id.* at 38.

¶15 The City compares parking lots to roads, asserting that were the work in question done on a road, it would be considered a reconstruction. It further contends that work of a maintenance nature is more akin to patching, seal coating, and crack filling. The City directs us to the August 23, 2006 staff report, which states in part: “It is staff’s opinion that the work performed was not of a maintenance nature and was a complete removal of the previously existing nonconforming parking lot and construction of a new parking lot.” The staff report continues, “[R]eflective cracking is caused primarily because the base material and binder course are no longer functioning properly and the surface material is not properly supported .... [T]herefore the base had to be removed and reconstructed, in this case partially using the removed pulverized asphalt surface material.”

¶16 Players counters that its existing parking lot surface had fallen into disrepair, and “[o]ver a period of years, despite efforts at patch repairing, the top layer of blacktop became crumbled and cracked.” Players hired Badger to “rectify the situation.” Players emphasizes that it did not seek to expand the lot or add parking stalls.



¶17 At the board hearing, a local architect, Jim Aubrey, whose line of work includes parking lot structures, offered his opinion to assist the board.<sup>3</sup>

Aubrey explained that:

The existing stone base was not removed from the site ... the base, the stone base, that majority of this stayed in place and was not moved. The asphalt was never removed from the site ... it was ground up and compacted into the base so that was not removed from the site .... I just wanted to comment on a couple of [statements in the staff report that] the base was removed and reconstructed are not accurate, they are not true because the base is not removed. Removal implies picking it up, taking it off site and bringing back new material or cleaned up reused material.

¶18 Badger also provided information to place the work in context. It provided a comparison work summary and estimate for “total removal and replacement.” Badger explained that “reconstruction” would require excavating the entire lot, replacing the existing base with fourteen inches of compacted stone base, and only then applying a new asphalt mat. It estimated the cost of removal and replacement to be \$52,490, compared to the repaving cost of \$23,460 that was charged for the work on Players’ lot. Here, Players’ existing stone base remained in place, existing asphalt was pulverized and incorporated into the base, and a new “wearing surface” of asphalt was applied.

¶19 We observe that “it is as much the purpose and intent of the zoning ordinance to protect the owner’s right to a nonconforming use.” *State ex rel. Bollenbeck v. Village of Shorewood Hills*, 237 Wis. 501, 508, 297 N.W. 568 (1941). An ordinary citizen should be able to read an ordinance and understand

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<sup>3</sup> A board member identified Aubrey as “a respected architect in the community” who had appeared before the board on “a number of occasions.”

what is required of them in order to repair and maintain their nonconforming property. As the circuit court here aptly stated, “the City of Oshkosh could draft an ordinance which would make [allowable repairs] clear—hint, hint, hint—never hav[ing] done so ... it’s a matter of interpreting that ordinance.”<sup>4</sup> The city ordinance does not provide definitions for “repair,” “improvement,” or “maintenance.” Consequently, in determining the ordinary meaning of an ordinance, we may look to a recognized dictionary. See *Ozaukee County Bd. of Adjustment*, 152 Wis. 2d at 560. The dictionary defines “maintenance” as “keeping something ... in a state of repair or efficiency,” or “care, upkeep.” See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1362 (1993).<sup>5</sup> Furthermore, “[z]oning ordinances are in derogation of the common law and, hence, are to be construed in favor of the free use of private property.” See *Cohen v. Dane County Bd. of Adjustment*, 74 Wis. 2d 87, 91, 246 N.W.2d 112 (1976). With this guidance in mind, we consider the board’s decision.

¶20 At the board hearing, there was some apparent confusion over the criteria for determining whether certain work was maintenance. One board member observed, “When we are dealing with zoning variances, we have some specific decision criteria that [are] specified for us. Are there any specific decision criteria that apply in this situation?” A city staff member replied, “No, this would

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<sup>4</sup> An attorney witness testified at the hearing before the board and summed up the concern as follows: “These ordinances, and you’re being asked to interpret these, are really designed to tell the people what to expect when they do something. I cannot tell you for certain what these ordinances mean and I’m trained in the area.”

<sup>5</sup> Although Players provides dictionary definitions for both “repair” and “improvement,” these do not speak to the precise issue. The parties agree that the work done on the parking lot was repair and improvement; however, the question is whether the repair and improvement went beyond that of a maintenance nature.

be using your best judgment.” After the board voted in favor of the City, the city attorney asked the board to make findings. A board member responded, “Findings, I sense we have decision criteria, this ought to be interesting ....” The board then found that the parking lot was “completely removed,” the lot was “milled and re-done,” and concluded that “to take and remove foundations that are in parking lots ... is major reconstruction.”<sup>6</sup>

¶21 The board’s findings are contrary to the evidence presented. It is undisputed that the parking lot base was not “completely removed.” The evidence here indicates that Players retained the original external lot dimensions, retained the original base, recycled the original asphalt in place, and added a new surface to address normal wear and tear. Furthermore, the removal of “foundations” that the board considered “major reconstruction” involved the removal of some leftover footings from an unrelated structure that were “coming up a little bit above the surface.” When measured against the record evidence, the definition of maintenance, and the policy considerations underlying zoning law, the board’s acceptance of the staff report characterization of the work as “complete removal” and “reconstruction” was arbitrary and unreasonable.

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<sup>6</sup> The board’s reference to removal of parking lot foundation is a reference to footings that were removed from the site. Sosnoski explained that the footings were “a half of dozen blocks” leftover from a hardware store that no longer existed on the site.

## CONCLUSION

¶22 Players' parking lot was repaired to address extensive cracking on the surface. The work performed was of a maintenance nature and was therefore allowed under OSHKOSH, WIS., ZONING ORDINANCE, art. II, § 30-4(B)(1)(a). Furthermore, the work performed did not alter the exterior dimensions of the parking lot and therefore § 30-4(B)(1)(c) does not apply. We therefore reverse the order of the circuit court and instruct that Players be permitted to continue the use of its legal, nonconforming parking lot.

*By the Court.*—Order reversed.

Not recommended for publication in the official reports.

