# COURT OF APPEALS
# DECISION
# DATED AND RELEASED

March 27, 1996

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

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**No. 95-0489**

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

**UNITED LODGES OF S.N.P.J., a Wisconsin corporation,**

**Plaintiff-Appellant,**

**v.**

**CITY OF BROOKFIELD, a municipal corporation, and its officers, agents and employees,**

**Defendants-Respondents.**

APPEAL from a judgment of the circuit court for Waukesha County: MARK GEMPELER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. United Lodges of S.N.P.J. (United) appeals from a summary judgment in favor of the City of Brookfield. Because the City's order to raze United's dilapidated building was a proper exercise of its police powers, we affirm.

United operated the Arcadian Inn. In June 1992, the City issued an order noting numerous deficiencies in the facility. The order declared the structure a public nuisance and a danger to health and life, and required United to terminate operations, vacate the premises and either rehabilitate or raze the structure within sixty days of service of the order. United sought review of the June 9 order before the City's common council. The City declined to afford such review and suggested that application to the circuit court for a restraining order pursuant to § 66.05, STATS.,[1] was the appropriate remedy. United then filed an action challenging the constitutionality of the ordinances cited in the order, §§ 14.03, 14.04 and 14.05 of the City of Brookfield Municipal Code of Ordinances, and obtained an ex parte order enjoining enforcement of the June 9 order.[2] The parties subsequently stipulated to rescinding the June 9 order, lifting the temporary injunction and dismissing the action to permit the parties an opportunity to settle.

Settlement did not occur and a second raze order was issued on October 25, 1993. United sought a restraining order in the circuit court and damages for the alleged inverse condemnation of the Inn during the period from June 9, 1992, when the first raze order was issued, to October 25, 1993, when the second raze order was issued. United sought damages on the grounds that the June 9 order deprived United of reasonable use of its property resulting in a "temporary taking" without just compensation. The parties subsequently stipulated that the alleged inverse condemnation period would be from June 9 to October 7, 1992.[3] This was the issue submitted to the circuit court for decision.

The City sought summary judgment on the following grounds: (1) the June 9 order was a proper and reasonable exercise of its police powers; (2) United's inverse condemnation claim was barred by the exclusive remedy provisions of § 66.05(3), STATS.; (3) the City was immune from liability pursuant

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[1] All references to § 66.05, STATS., are to the 1991-92 statutes because the original raze order was issued June 9, 1992.

[2] This action was commended in September 1992 as ***United Lodges of S.N.P.J. v. City of Brookfield,*** Waukesha County Circuit Court case no. 92-CV-2219.

[3] The parties also ultimately stipulated to razing the Inn. The structure was razed on or about March 4, 1994, leaving only the damages claim to be litigated.

to § 893.80(4), STATS.; and (4) United failed to allege or establish that the City imposed a legally enforceable restriction on the use of the property.

The circuit court ruled that it was undisputed that the Arcadian Inn was dilapidated and properly the subject of a raze order, and the City reasonably exercised its police powers in issuing the raze order. As a consequence, payment of just compensation was not required. The court further concluded that the order's failure to refer to § 66.05, STATS., did not result in a compensable taking of United's property. The court also granted the City summary judgment on the other grounds cited in its motion. On appeal, United argues that there was a taking of its property because the City failed to comply with § 66.05, STATS., in issuing the June 9 raze or rehabilitate order.

A compensable taking occurs when the government places a restriction on property which "practically or substantially renders the property useless for all reasonable purposes." ***Zinn v. State,*** 112 Wis.2d 417, 424, 334 N.W.2d 67, 70 (1983) (quoted source omitted). However, a compensable taking does not occur when the government exercises its police power and adversely affects a property interest when the property has been deemed harmful to the public welfare. *See* ***Sippel v. City of St. Francis,*** 164 Wis.2d 527, 533, 476 N.W.2d 579, 582 (Ct. App. 1991).

United's claims in the circuit court and its arguments on appeal focus on the fact that the June 9 order did not refer to § 66.05, STATS. Rather, the order referenced §§ 14.03 et seq. of the City's ordinances. United claims these ordinances are unconstitutional, rendering the June 9 order unenforceable.

Section 66.05, STATS., addresses the razing of buildings by a municipality. A municipality may order razed any building which has become so dilapidated as to be dangerous or unsafe. *See* § 66.05(1)(a). Although United complains that the June 9 order was not issued pursuant to § 66.05, United sought a restraining order under § 66.05(3) in its 1992 action challenging the June 9 order. There is no showing that United was deprived of the relief afforded by § 66.05 or that the City proceeded other than under its police powers. United's complaint that it was not allowed to appeal the June 9 raze order to the common council is disingenuous in light of its resort to § 66.05 and the relief it received under that statute.

United contends that during the period from June 9 to October 7, 1992, it was unable to operate the Inn due to restrictions which practically or substantially rendered the property useless. However, United does not flesh out this argument. As the City points out in its brief, the circuit court found that it was undisputed that the building was in a dilapidated condition and was "clearly worthy of a raze order."

United does not direct us to that portion of the record which supports its claim that use of the building was restricted by the June 9 order. Rather, as the City points out, the record indicates that United was aware of the condition of the building prior to the issuance of the June 9 order. United's president, Edward Starich, agreed in his deposition that the building was unsafe. This testimony permits an inference that the building was unusable due to its condition, not as a result of the June 9 order. United's argument that the June 9 raze order prohibited all reasonable use of the property is not sufficiently developed.

Other than the absence of a reference to § 66.05, STATS., United has not persuaded us that the City did not otherwise comply with the provisions of § 66.05 in issuing the June 9 raze order. We therefore decline to address United's arguments regarding the constitutionality of §§ 14.03, 14.04 and 14.05 of the City of Brookfield Municipal Code of Ordinances. *See* ***State v. Waste Management of Wis., Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1977) (this court is not required to address every argument raised on appeal), *cert. denied,* 439 U.S. 865 (1978).

In its reply brief, United addresses for the first time the other grounds relied upon by the circuit court in granting summary judgment to the City. We normally do not consider arguments raised for the first time in a reply brief. ***Swartwout v. Bilsie,*** 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981). Furthermore, we note that these arguments are premised upon United's contention that the June 9 order was not issued in compliance with § 66.05, STATS. We have already addressed this issue.

*By the Court.*—Judgment affirmed.

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