COURT OF APPEALS
DECISION
DATED AND RELEASED

April 2, 1997

No. 96-1728

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

KATHY LASKA,

Plaintiff-Appellant,

v.

TOWN OF WAUKESHA ZONING BOARD OF APPEALS, TOWN OF WAUKESHA PLAN COMMISSION and TOWN OF WAUKESHA TOWN BOARD,

Defendants-Respondents.

APPEAL from an order of the circuit court for Waukesha County: ROGER MURPHY, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

BROWN, J. The Town of Waukesha Zoning Board of Appeals granted a "special exception" from certain ordinances relating to drainage systems. The ruling permitted the developer to set basements closer to the water table. Kathy Laska, a neighboring landowner, filed a petition for

certiorari review of this ruling. She alleged that the Zoning Board of Appeals did not provide proper notice of the public hearing on this matter. Laska later filed an amended petition which added a claim that the town of Waukesha's other planning agencies had improperly applied other zoning ordinances during their review of this development.

After the circuit court dismissed her petition and her amended petition, Laska brought this appeal and now realleges her original claim that the notice was defective. Laska also continues to assert that the planning agencies have misapplied certain zoning ordinances.

We join in the circuit court's conclusion that Laska was not harmed by the defective notice and that the special exception is valid. We further conclude that Laska's zoning-related challenge is not properly before us because she abandoned this argument in the proceedings before the circuit court. Moreover, Laska never raised it before the planning agencies. We affirm the order dismissing Laska's petition and her amended petition.

The record reveals the following undisputed facts. Paul and Judith Scholovich wish to develop "Trillium Woods," a residential subdivision consisting of eleven homesites on a twenty-one acre,[1] wooded, hilltop site. The Scholoviches began the approval process by filing an application with the Town of Waukesha Plan Commission which granted "conceptual approval" on July

[1] We took this number from the circuit court's memorandum decision. We note, however, that other documents identify the parcel to be about thirty acres. This discrepancy is not relevant to the issues before us.

27, 1995. The Plan Commission, however, informed the Scholoviches that they needed a special exception from local drainage ordinances before they could proceed further in the approval process. Accordingly, the Scholoviches filed an application with the Zoning Board of Appeals on September 25, 1995.

The drainage ordinances relevant to the inquiry before the Zoning Board of Appeals mandated that the lowest (basement) floor of the proposed homes be at least three feet above the highest "seasonal ground water level." *See* TOWN OF WAUKESHA, WIS., ZONING ORDINANCES §§ 11.08(a) and 11.12(d). Because site testing showed that the water level sometimes approached within two feet of the ground surface, the Scholoviches proposed that they would install a special drainage system which would keep the basements dry and safely carry away any ground water runoff.

The Zoning Board of Appeals scheduled a public hearing and published a notice in the WAUKESHA FREEMAN, Oct. 9, 1995 and Oct. 16, 1995; the notice provided in pertinent part:

> BOARD OF APPEAL
>
> NOTICE
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> NOTICE IS HEREBY GIVEN that the Town of Waukesha Board of Appeals will meet on Wednesday, October 25, 1995 ... to consider the request of Paul J. and Judith Scholovich ....
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> ....
>
> FOR THE FOLLOWING SPECIAL EXCEPTION: If approved, this would allow the lowest floor elevation above the highest "natural" anticipated seasonal ground water level by lowering the drain tile system.

Prior to the hearing, the Zoning Board of Appeals also received written reports and comments from the town's Building and Zoning Department and from neighboring landowners.

During the public hearing, the Zoning Board of Appeals heard testimony regarding the specific details of the drainage system from the Scholoviches' attorney and from their engineer. Moreover, several neighbors from an adjoining subdivision, including Laska, testified in opposition. They all explained how their homes were located downhill of the proposed development and how they already had drainage problems. They expressed fear that any construction on the hilltop land above them would substantially aggravate their situation.

The Zoning Board of Appeals nonetheless granted the Scholoviches a special exception. Laska then filed a petition for a writ of certiorari with the circuit court on November 22, 1995. In it she explained that she was "aggrieved" by this drainage ruling because it meant that the development "has now cleared its final significant approval hurdle." Laska's specific complaint was that the notice for the October 25 public hearing was defective.

In addition, two months later, Laska filed an amended petition and added claims that the Plan Commission and the Town of Waukesha Town Board had misapplied the applicable zoning ordinances when they reviewed this development. Laska explains that her new claims were based on what was

then the just released decision in ***City of Waukesha v. Town Bd. of Waukesha***, 198 Wis.2d 592, 543 N.W.2d 515 (Ct. App. 1995),[2] which declared void the town's "Planned Urban Development" ordinance—the same ordinance which the Scholoviches were seemingly relying on to secure approval for their development.

The following standards of review govern our analysis of Laska's appeal. We owe no deference to the circuit court's decision to dismiss the petition and the amended petition. *See* ***State ex rel. Smith v. Oak Creek***, 131 Wis.2d 451, 455, 389 N.W.2d 366, 367 (Ct. App. 1986), *aff'd*, 139 Wis.2d 788, 407 N.W.2d 901 (1987). Nonetheless, our analysis is confined to the following four issues: (1) whether the planning agencies stayed within their jurisdiction, (2) whether they acted according to law, (3) whether their decisions were arbitrary or oppressive and (4) whether their decisions were reasonably supported by the evidence. *See* ***id.*** Laska's notice claim relates to the first of these prongs and her zoning claim relates to the second. We now will address them in that order.

Laska first claims that the notice was facially defective because it stated that the proposed special exception was related to the "natural" water level. She argues that this was misleading because the Scholoviches were really seeking to impose an "artificially lowered" water level by installing a drainage system. Laska further argues that the defects in the notice left her without a "meaningful opportunity to prepare an objection."

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[2] The decision was released on December 6, 1995. Laska filed her amended petition on January 24, 1996.

The Town (on behalf of all of the zoning agencies) responds that we should follow the reasoning of the circuit court. The court found that Laska was not in a position to challenge the notice since she appeared at the hearing and was able to state her objections. The Town argues that ***Cities Service Oil Co. v. Board of Appeals***, 21 Wis.2d 516, 124 N.W.2d 809 (1963), supports this conclusion.

In ***Cities Service***, the zoning board withdrew a building permit and the landowner argued that its decision should be overturned because of flaws in the notice. *See* ***id***. at 534, 124 N.W.2d at 818. The supreme court observed, however, that the landowner had participated in the hearings and reasoned that the "defect" was not "prejudicial" to the landowner. *See* ***id***. at 535, 124 N.W.2d at 819.

Laska replies, however, that the analysis within ***Cities Service*** is not applicable here. She notes that the neighboring landowners in that case successfully persuaded the zoning board to revoke the landowner's unauthorized building permit, hence the supreme court was simply making the common sense observation that better notice would have only informed *more* opposition to come to the hearing and would have been of no benefit to the landowner. *Cf.* ***id***. ("[the landowner] is not entitled to raise this lack of adequate notice to others than itself.").

We disagree that the analysis within ***Cities Service*** does not apply. We acknowledge that the decision provides some support for Laska as the supreme court emphasized how in variance cases, similar to special exception

cases, "adequate public notice is most essential in order to give affected property owners a chance to protest against the proposed variance." *See* ***id.*** at 534-35, 124 N.W.2d at 819. However, the court added to this cautionary language that a party challenging the notice must also show how he or she was negatively affected; it explained:If the variance is granted and the published notice is defective, nearby property owners adversely affected, *who have been seriously prejudiced thereby*, ought to be entitled to assert that the board's action in granting the variance is illegal and void.

Id. at 535, 124 N.W.2d at 819 (emphasis added). Based on these statements, we reject Laska's argument that ***Cities Service*** is not applicable.

Assuming that the notice was defective, Laska has not demonstrated how an accurate notice would have changed her position before the Zoning Board of Appeals. We have reviewed the record and see that Laska's argument, and that of the other neighbors, was that no development whatsoever should take place on the Scholoviches' hilltop land.[3] Laska's objection was not based on the specifics of the drainage system or on what an appropriate "natural" or "artificial" water level should be. Nor has she

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[3] Laska summarized her position to the Zoning Board of Appeals as follows:

> We are all very sorry that the [Scholoviches] might lose out financially if they do not develop the woods. However, they would be able to develop the entire rest of their property and that will not at all affect the people in the lower areas. If they develop anything west of that woods, all the drainage would go towards Big Bend Road, would not at all affect us on the lower part. I believe what we're developing here is a white elephant.

demonstrated to this court that she would have made such an argument if she had only been properly advised through a better public notice. Thus, we conclude that the notice's technical defect did not affect her ability to prepare for the hearing. We reject Laska's challenge to the notice.

We next turn to the claim that Laska raised in her amended petition concerning whether the Plan Commission and the Town Board misapplied the Town's zoning ordinances. Because Laska abandoned the issue before the circuit court, we deem it waived on appeal.

This is what occurred before the circuit court. Soon after Laska filed her original petition, the court set a briefing schedule which required Laska to file her brief-in-chief by January 19, 1996. She did so. Then, afterward and before the reply brief was due, Laska filed her amended petition. She never sought permission to file a supplemental brief on the issue raised in her amended petition.

As a result, once it came time for the court to make a ruling, it only had before it a complete analysis of Laska's notice claim and simple allegations relating to her zoning claim. So the circuit court ruled on Laska's notice issue and merely noted that Laska had also raised a zoning issue. Because Laska failed to pursue this latter issue before the circuit court, she is precluded from asserting it on appeal. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981).

There is a further reason why Laska's zoning claim is not properly before this court. Laska never raised it during the hearings where the zoning of this development was addressed; she failed to exhaust her administrative remedies. *See* ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis.2d 416, 424, 254 N.W.2d 310, 315 (1977).

Since Laska's original briefs to this court did not clarify why she needed to raise this claim by filing an amended petition, instead of pursuing the generally required path of making this objection during the administrative process, we asked the parties to prepare supplemental briefs.

In this brief, Laska concedes that the Plan Commission and the Town Board considered whether they should grant the Scholoviches a "conditional use permit," the final step in the approval process, *after* the Scholoviches received their special exception from the Zoning Board of Appeals. Thus, it is clear that Laska had the opportunity to present her concerns about whether the Scholoviches could properly develop their property in light of the ***City of Waukesha*** decision.

For some reason, however, Laska chose not to appear at these hearings and elected to simply "attach" this issue to the petition for certiorari review that she had already filed to challenge the ruling made by the Zoning Board of Appeals. That ruling to grant the Scholoviches the special exception to the drainage ordinances, however, was not at all related to the matter of how the property should be zoned and whether the Scholoviches were entitled to a conditional use permit. Although Laska alleged that the drainage matter was

the last "hurdle" that the Scholoviches faced, the supplemental briefs establish that this was not the case.

Although our decision to affirm the order dismissing Laska's petition and her amended petition may leave her without any remedy, she has failed to pursue the administrative remedies that were available to her. We therefore hold Laska to the rule that issues not raised before the appropriate administrative agency will not be considered on appeal. *See* ***Goranson v. DILHR***, 94 Wis.2d 537, 545, 289 N.W.2d 270, 274 (1980).

By the Court. – Order affirmed.

Not recommended for publication in the official reports.